# **LLM Dissertation**

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### **List of Abbreviations**

CA 2006 The Companies Act 2006 (UK)

CIC Community Interest Company (UK)

CJEU Court of Justice of the European Union

ECCJ European Coalition for Corporate Justice

ECHR The European Convention on Human Rights

EU the European Union

FCA The Financial Conduct Authority in the UK

HRDD Human rights due diligence

ICA The International Cooperative Alliance

ICCPR The UN International Covenant on Civil and Political Rights

ILO The International Labour Organisation

SCE The Societas Cooperativa Europaea, the European Cooperative Society

SCE-R The Council Regulation (EC) No 1435/2002 establishing the SCE, the Societas Cooperativa Europaea, dated 22 July 2003

UK United Kingdom

**UN** United Nations

UNGPs The United Nations Guiding Principles on Business and Human Rights

USA, the US United States

It is possible that, on occasion, the complete word of phrase may be mentioned in the text rather than the abbreviation.

The words company, firm, corporation are used interchangeably.

#### **Abstract**

The present debate on human rights due diligence (HRDD) in company law, culminating in the European Commission's February 2022 Proposal for a Corporate Sustainability Directive, centres on whether it is possible to expect companies to enforce human rights and on the nature of the liability this will impose, especially on directors. The dissertation examines the debate and seeks to contribute to it by arguing that cooperatives, historically and contemporarily based on human rights principles and linked to business law and the market as they are, may have some unique guidance to offer in relation to the complexities of the application of HRDD. At the same time, there are questions that will perhaps be best addressed by the Commission, in the process leading up to the passing of the Directive.

In examining the argument contained therein, the dissertation uses original nineteenth-century British sources on cooperatives, current legislation, European/International law/ United Nations instruments and a variety of scholarly writing on cooperatives, companies and on human rights.

### Chapter 1

# **Introduction to the Dissertation**

### 1.1 Statement and explanation of the argument

This dissertation examines the close relationship between cooperatives and human rights to determine how it can contribute to the debate about the enforcement of human rights due diligence (HRDD) in European company law.

The legislative enforcement of human rights is currently expressed in the proposal of the Commission for a Directive on Corporate Due Diligence dated 23 February 2022. Sustainability encompasses human rights and environmental protection. The proposal has been met with criticism, revealing the complexity of HRDD and concerns about incompatibility between human rights and the purpose of companies.

Thus, this dissertation investigates ways to answer the possible disassociation between rights (of the community and of individuals) and the operation of for-profit entities like the limited liability company. It argues that cooperatives, which as for-profit business entities have been adjusting rights into their operation for over a century, may assist in applying HRDD. This is particularly so in three ways.

First, by suggesting that every community is different in terms of rights and needs. HRDD should arguably remain sensitive on this point, to counter the criticism that it is asking from companies an almost limitless protection of rights. The experience of cooperation seems to suggest that it is better to correspond to specific needs, though certainly core human rights such as right to life, decent working conditions and rules against modern slavery should be invariably upheld. The minimum protection of human rights is not new, neither to the philosophy of law nor to human rights law – H.L.A. Hart, for example, puts this notion forward in the classic *The Concept of Law* (1961).

Second, by providing a locus for a redefinition of terms, such as profit and investment, to include investment in human capital, and for profit to encompass success in HRDD.

The third way in which cooperation may aid in HRDD is related to the first, and has to do with the possible adoption of guiding principles for the application of HRDD. Rather

than ask companies to comply with lists of human rights, as this proposal does by including such lists in an annex, a set of operative principles may be formulated instead.

# 1.2 Research Questions

To explore this argument, the dissertation places the following three questions:

- 1. In what ways are cooperatives, historically and contemporarily, connected to human rights, acting as a point of reference for other business formations such as companies?
- 2. What are the main obstacles in company law enforcement of human rights, or, what are the parameters of the debate on HRDD in company law?
- 3. Can cooperatives contribute to this debate and what questions are left unanswered?

### 1.3 Definitions of Terms

Although core terms will be explained in the relevant chapters, basic definitions will be mentioned before the dissertation proceeds to answer the research questions.

Sustainability has been defined by the United Nations as "meeting the needs of the present without compromising the ability of future generations to meet their own needs". Sustainability is a three-pillar concept comprising, (a) social, (b) environmental, and, (c) economic sustainability. The first pillar would include human rights, the third questions of profit and growth. For the UCLA project "Sustainability at UCLA", the UN definition is summed up as "the balance between the environment, equity and economy". The proposal

<sup>&</sup>lt;sup>1</sup> "Sustainability" (*Academic Impact, United Nations*) <un.org/en/academic-impact/sustainability> accessed 1 November 2022.

<sup>&</sup>lt;sup>2</sup> G. Miribung, 'Thinking beyond the principle – from an attempt to legally substantiate the principle of sustainability using the example of agricultural cooperatives' in W. Tadjudje and I. Douvitsa (eds), *Perspectives on Cooperative Law* (Springer Nature Singapore Pte Ltd. 2022), 231-232.

<sup>&</sup>lt;sup>3</sup> 'What is sustainability?' (*UCLA Sustainability*) < <a href="https://www.sustain.ucla.edu/what-is-sustainability/">https://www.sustain.ucla.edu/what-is-sustainability/</a>> accessed 1 November 2022.

for a Directive on corporate sustainability acknowledges its relationship to the 2015 UN Sustainable Development Goals.<sup>4</sup>

Concerning HRDD, Robert McCorquodale and others argue that "there is no international consensus on a definition". Nevertheless, the Office of the High Commissioner for Human Rights (OHCHR) sets the term as "an ongoing management process that a reasonable and prudent enterprise needs to undertake in light of its circumstances ... to meet its responsibility to respect human rights".

Furthermore, the UN Working Group on Business and Human Rights has specified HRDD as "a way for enterprises to proactively manage ... adverse human rights impacts with which they are involved". There are four components: identify, take action, track effectiveness and communicate on how impacts are being addressed.<sup>7</sup>

In Article 4, the proposal for a Directive contains a definition that is not dissimilar to the above, adding prevention and mitigation (1(c)). The limbs of the definition are explained in detail in Articles 5-8.

Cooperatives lack a "precise definition". Yet, put simply,

a cooperative is a firm owned ... and controlled by the persons who transact with it. These persons are in principle not investors. ... Instead, the relationship is based on supplying the cooperative, working for it, or purchasing its products.

[Correspondingly], a cooperative is owned by its suppliers, workers, or consumers.

Thus, the cooperative is a "people-centred" business.8

<sup>&</sup>lt;sup>4</sup> Commission, 'Proposal for a Directive of the European Parliament and of the Council on Corporate Sustainability Due Diligence and amending Directive (EU) 2019/1937' COM (2022) 71 final. Recital 7, p. 29.

<sup>&</sup>lt;sup>5</sup> Robert McCorquodale and others, 'Human rights due diligence in law and practice: good practices and challenges for business enterprises' (2017) 2 Business and Human Rights 195, 198.

<sup>&</sup>lt;sup>6</sup> UNCHR, 'The corporate responsibility to respect human rights: an interpretive guide' (2012) HR/PUB/12/02, 6.

<sup>&</sup>lt;sup>7</sup> UNCHR, Summary of the report of the Working Group on business and human rights to the General Assembly October 2018, 'Corporate human rights due diligence: emerging practices, challenges, and ways forward' (October 2018) A/73/163, 1.

<sup>&</sup>lt;sup>8</sup> G. Miribung, *The Agricultural cooperative in the framework of the European Cooperative Society* (Springer Nature Switzerland AG 2020), 85-86.

For Hagen Henry and David Hiez, cooperatives are a distinct form of enterprise<sup>9</sup> in at least three respects. First, specific purpose (the needs of members). Second, "structural duality"; they are "associations of persons cum enterprises". Third, the convergence of the cooperative and members; the members help themselves through the cooperative (self-help).<sup>10</sup>

In an examination of Greek agricultural cooperatives, Demosthenes N. Kassavetes has elaborated on the dual nature (association/enterprise) of cooperation. Noting that a cooperative is independent of for-profit commercial corporations, he also pointed out that a cooperative operates in the market. Market action must be efficient and promote the cooperative's financial aims. Societal and cultural aims must be carried out in a financially viable manner. Nevertheless, the cooperation combines any financial profit with the personal and collective advancement of the members.<sup>11</sup>

The dissertation examines cooperatives mainly from Europe, hence the term European in the title. These are cooperatives from the UK and, more briefly, Italy, Spain and Germany. Additionally, the SCE, the European Cooperative Society, the most current form of a European cooperative. The SCE is "a European Union … legal form of business organisation provided for by Council Regulation n. 1435/2003 of 22 July 2003. …". Despite limited success <sup>13</sup> the symbolic value of the SCE cannot be denied. <sup>14</sup>

Final in the list of definitions is the limited liability company, a term considered notoriously easy to define. For example, a UK company is a corporate body "brought into being by the registration procedures laid down by the Companies Act 2006 ... and its predecessors". The liability of the members (shareholders/owners) is limited to the amount of their shares, while the "big idea of company law is the separate personality of the company

<sup>&</sup>lt;sup>9</sup> Hagen Henry and David Hiez, 'Foreword/ Editorial; Note by the Editors/ Publishers' (2018) 1 Ius Cooperativum – International Journal of Cooperative Law IJCL, 11.

<sup>&</sup>lt;sup>10</sup> Hagen Henry and David Hiez (n 9) 7-9.

<sup>&</sup>lt;sup>11</sup> Demosthenes N. Kassavetes, *Agricultural Cooperatives*. [Αγροτικοί Συνεταιρισμοί]. (Sakkoulas Publishing 2020) 18.

<sup>&</sup>lt;sup>12</sup> Antonio Fici, 'The SCE Regulation' in D. Cracogna and others (eds), *International Handbook of cooperative Law* (Springer – Verlag Berlin Heidelberg 2013), 116.

<sup>&</sup>lt;sup>13</sup> Fici Regulation (n 12) 148.

<sup>&</sup>lt;sup>14</sup> Fici Regulation (n 12) 122. For details on the SCE, see Chapter 3 of the dissertation.

 $<sup>^{\</sup>rm 15}$  Sarah Worthington, Sealy & Worthington's Text, Cases, & Materials in Company Law (11 edn, Oxford University Press 2016) 1.

as an artificial person. [...] The basic company model is that a company has *members* [the shareholders] who, in effect, own it and it has *directors* who control what the company does". Companies can be public or private; the public company (plc) is allowed to invite the general public to subscribe for shares, in contrast to the private company.<sup>16</sup>

However, in terms of theory of company law/ the firm the definition of a company is less easy to pin down.<sup>17</sup> Eva Micheler has summarised theory of company law usefully as follows: "[t]here are three main theories of the company. The [contractarian theory] explains the company as a contract".<sup>18</sup> Conceptually, the company does not have an existence separate from the interests of its human members, that is the shareholders.<sup>19</sup> The second theory holds that the company is a concession of the state.<sup>20</sup> On this definition, the corporate form and limited liability "are favours granted by governments to entrepreneurs".<sup>21</sup> The third theory assumes that the company is a "real entity", autonomous, a "social phenomenon" that may operate independently of its members' interests.<sup>22</sup> The entity paradigm acknowledges the social responsibilities of the firm.<sup>23</sup> The firm is a real person who is interested to "survive and grow, as well as to serve the common good of [its] shareholders and society".<sup>24</sup>

<sup>&</sup>lt;sup>16</sup> Derek French, *Mayson, French & Ryan on Company Law* (3rd edn, Oxford University Press 2017) 3-4, italics original.

<sup>&</sup>lt;sup>17</sup> It would appear not to be a contradiction to speak of a dearth of discussion for companies in jurisprudence/ philosophy of law writing, while writing on theory of the firm abounds. The latter is concerned with the nature of the company, the former with the nature of law. The philosophy of law studies issues like the purpose of law and law in terms of morality, the community and the rights of people. Therefore, it seems to be safe to say that the two fields are not the same.

<sup>&</sup>lt;sup>18</sup> Eva Micheler, Company Law: a real entity theory (Oxford University Press 2021) 1.

<sup>&</sup>lt;sup>19</sup> Marc Moore and Martin Petrin, *Corporate Governance: Law, Regulation and Theory* (Palgrave Corporate & Financial Law, Palgrave 2017) 23.

<sup>&</sup>lt;sup>20</sup> Micheler (n 18) 1.

<sup>&</sup>lt;sup>21</sup> Paul G. Mahoney, 'Contract or Concession: an essay on the history of corporate law' (2000) 34 Georgia Law Review 873, 876. Mahoney demonstrates that, historically, concession theory holds true only for the separate personality: by contrast, "limited liability was never a favour to entrepreneurs" (893).

<sup>&</sup>lt;sup>22</sup> Micheler (n 18) 1.

<sup>&</sup>lt;sup>23</sup> Moore and Petrin (n 19) 24.

<sup>&</sup>lt;sup>24</sup> Emiliano Di Carlo, 'The real entity theory and the primary interest of the firm: Equilibrium theory, stakeholder theory and common good' in Sandro Brunelli and Emiliano Di Carlo (eds), *Accountability, Ethics and Sustainability of Organizations* (Accounting, Finance, Sustainability, Governance & Fraud: Theory and Application, Springer Nature Switzerland AG 2020) 3-4.

According to real entity theory, the company practices good citizenship in exchange of the benefits of limited liability and incorporation. It can legitimately seek to maximise forms of value that go beyond profit and finance; it can seek to capitalise on social and environmental value. As Lynn Buckley has written, the real entity approach is the theoretical foundation that more suitably "lends itself to sustainable business conduct", 25 that is the type of conduct under discussion in this dissertation. 26

# 1.4 Background to the Dissertation

The Commission's proposal for a Directive builds on existing "international voluntary standards on responsible business conduct", namely the 2011 United Nations' Guiding Principles on Business and Human Rights (UNGPs) and the 2018 OECD Due Diligence Guidance for Responsible Business Conduct.<sup>27</sup>

HRDD in general, and the proposal for a Directive in particular, face several objections, to be further elaborated in Chapter 4. Lorraine Talbot is not entirely unjustified when she argues that, presently, company law cannot solve the adverse impacts against human rights.<sup>28</sup> Profit making is the best way to deliver shareholder value:<sup>29</sup> the law *as it stands* is unable to mitigate the impact of this principle. The duty to act in the interests of the company is not a "duty to be more socially responsible or more inclusive".<sup>30</sup> Capitalism is not done by being socially responsible. Only radical reform can achieve results.<sup>31</sup> The reforms

<sup>&</sup>lt;sup>25</sup> Lynn Buckley, 'The foundations of governance: implications of entity theory for directors' duties and corporate sustainability' (2022) 26 Journal of Management and Governance 29, 47-48

<sup>&</sup>lt;sup>26</sup> However, a study of the theory of the firm is not the subject of this dissertation; see Limitations of the Research below.

<sup>&</sup>lt;sup>27</sup> Proposal for a Directive (n 4) 2. For a good overview of the aims of identifying, preventing, mitigating and accounting for potential adverse impacts in areas such as HR and the environment, see OECD Guidance p. 15, and UNGDPs p. 1. OECD, 'OECD Due Diligence Guidance for Responsible Business Conduct' (OECD 2018); UNCHR, Guiding Principles on Business and Human Rights: Implementing the United Nations "Protect, Respect and Remedy" Framework (2011) UNDoc/HR/PUB/11/04.

<sup>&</sup>lt;sup>28</sup> Lorraine Talbot, 'Trying to save the world with company law? Some problems' (2016) 36 Legal Studies 513, 514.

<sup>&</sup>lt;sup>29</sup> Talbot Trying (n 28) 518.

<sup>&</sup>lt;sup>30</sup> Talbot Trying (n 28) 533.

<sup>&</sup>lt;sup>31</sup> Talbot Trying (n 28) 514, 534.

Talbot proposes include to implement corporate personality fully by removing control from shareholders,<sup>32</sup> reduce shareholders' decision-making powers,<sup>33</sup> and prohibit bonus pay for the board.<sup>34</sup> Only this way capitalism would be actually "forced" to become more responsible.<sup>35</sup>

Also concerned about current models, Beate Sjafjell emphasises the need for a redefinition of certain capitalistic aims. These are the purpose of the corporation, the duties of the board<sup>36</sup> and, ultimately, of the corporation itself.<sup>37</sup> We need a "thoughtful set of rules" to move away from business as usual,<sup>39</sup> integrate ethics and human rights into the role of the board,<sup>40</sup> recognising that shareholder primacy (profit-making for the benefit of shareholders) is detrimental.<sup>41</sup>

Indeed, the word "thoughtful" may be key for HRDD. As Walter Robert Goedecke has argued, there is little jurisprudential thought on corporations; "a remarkable absence of discussion" on the subject<sup>42</sup> in terms of the philosophy of law. However, corporations "demand conceptual recognition"; the "definition and function of corporations is not clear", while the rights-based approach needed in a "free society" requires not only definitions but also *redefinitions*.<sup>43</sup>

Needless to say, there is a corpus of knowledge on the theory of company law and the nature of the company: see, for example, the aforementioned description of the company as a "nexus of contracts" and Paddy Ireland's discussion of the debate between stakeholder

<sup>&</sup>lt;sup>32</sup> Lorraine Talbot, 'Why is modern capitalism irresponsible and what would make it more responsible? A company law perspective' (Repository copy of article appearing in the King's Law Journal 29(1) pp. 111-141, The University of Sheffield 2018) 23.

<sup>&</sup>lt;sup>33</sup> Talbot More responsible (n 32) 24-26.

<sup>&</sup>lt;sup>34</sup> Talbot More responsible (n 32) 27.

<sup>&</sup>lt;sup>35</sup> Talbot More responsible (n 32) 35.

<sup>&</sup>lt;sup>36</sup> Beate Sjafjell, 'Redefining the corporation for a sustainable new economy' (2018) 45 Journal of Law and Society 29, 41-42.

<sup>&</sup>lt;sup>37</sup> Sjafjell Redefining (n 36) 37.

<sup>&</sup>lt;sup>38</sup> Sjafjell Redefining (n 36) 43.

<sup>&</sup>lt;sup>39</sup> Sjafjell Redefining (n 36) 42.

<sup>&</sup>lt;sup>40</sup> Sjafjell Redefining (n 36) 43.

<sup>&</sup>lt;sup>41</sup> Sjafjell Redefining (n 36) 45.

<sup>&</sup>lt;sup>42</sup> Walter Robert Goedecke, 'Corporations and the philosophy of law' (1976) 10 The Journal of Value Inquiry 81, 81.

<sup>&</sup>lt;sup>43</sup> Goedecke (n 42) 90, italics mine.

<sup>&</sup>lt;sup>44</sup> Also propounded in Brian R. Cheffins, *Company Law: Theory, Structure and Operation* (Reprinted edition, Oxford University Press 2000) 32.

(social responsibility, rights) and shareholder (profit) primacy not precluding the shareholders' commitment to good governance.<sup>45</sup> Ireland suggests that the concept of separate legal personality undermines the idea of shareholder property and ownership rights<sup>46</sup> and that the idea of shareholders' risk-taking is a myth;<sup>47</sup> therefore, it is erroneous to identify the company with shareholders (56).<sup>48</sup> However, as Sjafjell's recent work indicates, there is still need for writing on core company law definitions.

Even the so-called cosmopolitan multinational corporations have been created by some country's legal system. <sup>49</sup> Incorporation grants great power, which must go with human rights responsibilities. <sup>50</sup> Nevertheless, such responsibilities must be prevented from becoming so broad as to make HRDD infeasible, something for which Andrew Keay was worried about as early as 2010. <sup>51</sup>

There seems to be, then, a three-fold need: to establish a practical framework for HRDD; to address the lack of philosophical thought on corporations; and, also, a need for basic re-definitions. This dissertation inserts itself into this background, building upon the work of Sjafjell and deploying cooperative history and principles, suggesting ways to aid the function of HRDD.

Importantly, the dissertation does not claim that cooperative principles can address all issues raised by the prospect of mandatory HRDD. Chapter 6 sets out areas where intervention by company law is the most appropriate approach. Responses to the proposal for a Directive and early critical writing indicate that some redrafting might be needed from the legislator (Commission).

However, cooperative thought may cover gaps, because of its strong human rights tradition (discussed in Chapter 1) and because cooperatives have been able to accommodate human rights while also being profitable enterprises. As Henry Hansmann has noted,

<sup>&</sup>lt;sup>45</sup> Paddy Ireland, 'Company Law and the myth of shareholder ownership' (1999) 62 Modern Law Review 32, 32.

<sup>&</sup>lt;sup>46</sup> Ireland (n 45) 48.

<sup>&</sup>lt;sup>47</sup> Ireland (n 45) 54.

<sup>&</sup>lt;sup>48</sup> Ireland (n 45) 56.

<sup>&</sup>lt;sup>49</sup> Goedecke (n 45) 86.

<sup>&</sup>lt;sup>50</sup> Goedecke (n 45) 88-89.

<sup>&</sup>lt;sup>51</sup> When discussing the shareholder (profit)/ stakeholder (human and social rights) dichotomy, p. 290. Andrew Keay, 'Stakeholder theory in corporate law: has it got what it takes' (2010) 9 Richmond Journal of Global Law and Business 249.

cooperatives "are big business of a distinctly modern type. They represent a substantial share of the economy in most developed market economies". In the US, they "dominate important industries" such as supplies, electricity, and agriculture. "And, more striking still, the market share of cooperatives in economic activity has grown throughout the 20<sup>th</sup> century". 52

There are, suggestively, links between cooperatives and corporations that make it possible to discuss them under the same denominator concerning human rights. This is so in terms of their past, present, and future. There will be a detailed discussion on this in Chapter 5. Here, two points will suffice. First, in relation to HRDD the discussion of a possible reform of company law seems to echo terminology from cooperative law. Second, there are differences but also similarities between the two ways of doing business. As Joseph Heath has remarked, there is nothing to stop a corporation "from adopting a charter that specifies something other than profit as the central objective". <sup>53</sup> Considering company and cooperative law as aspects of organizational law, Hansmann, writing with Reiner Kraakman, is able to say, "[i]n principle, only a single form of [business entity] is needed, or perhaps two: one with limited liability as the default rule, the other without". <sup>54</sup>

### 1.5 Methodology

To an extent, the dissertation employs a doctrinal approach, for it looks at specific legislative instruments, such as Commission Regulations and proposals. Nevertheless, the methodology used is, essentially, the socio-legal methodology.<sup>55</sup> This is because the dissertation examines the role of law in society and company law in relation to socio-ethical matters. Moreover, it

https://www.researchgate.net/publication/313640633\_Socio-

<u>Legal Methodology Conceptual Underpinnings Justifications and Practical Pitfalls</u>> accessed 1 July 2022.

<sup>&</sup>lt;sup>52</sup> Henry Hansmann, 'Cooperative firms in theory and practice' (1999) 4 LTA 387, 387.

<sup>&</sup>lt;sup>53</sup> Joseph Heath, 'Business ethics and the 'end of history' in corporate law' (2011) 102, Journal of Business Ethics 5, 8.

<sup>&</sup>lt;sup>54</sup> Henry Hansmann and Reinier Kraakman, 'Organizational law as asset partitioning' (2000) 44 European Economic Review 807, 816.

<sup>&</sup>lt;sup>55</sup> For details of the doctrinal and socio-legal ("law in context") approaches, you might look at Mike McConville and Wing Hong Chui (eds), *Research Methods for Law* (2<sup>nd</sup> ed, Oxford University Press 2017) and Darren Donovan, 'Socio-legal methodology: conceptual underpinnings, justifications and practical pitfalls' (*Research Gate*, 2016) <

investigates the history of business formations. The legal rules we have now are the result not only of legal, political and financial policies and decisions, but also of historical and social processes. The requirement for sustainability, to protect the planet and its inhabitants, like all events, are a moment in history.

### 1.6 Limitations of the Research

Having established the argument parameters, research questions, basic terms, and methodology, it would be appropriate to explain the limitations of the research. That is, issues the dissertation does not inquire into. These fall in four areas.

First, the dissertation will not discuss the duty for environmental due diligence; it is only about the human rights limb of sustainability. This is mostly done for reasons of time and space (word limit). It might, however, be acknowledged that human rights and the environment are closely linked, as becomes obvious in Chapter 3, where the ways cooperatives protect communities and the environment are discussed.

Second, the influence of cooperative thought on company law is, for the purposes of this dissertation, an influence *only in the area of HRDD*. In other words, the dissertation does not seek to establish any general similarity between the two entities. Because of the interaction of cooperatives with the rights of the people and the public good (present from the start) and because of some shared ground between cooperatives and companies (such as the need to make and distribute profit) it is possible for cooperation to offer conceptual tools for companies to apply mandatory HRDD successfully. The dissertation does not suggest that cooperation may or should otherwise interfere with the working and machinations of company law.

Third, the dissertation refers to human rights rules as these appear in existing documents and does not discuss the philosophical foundations of human rights or address the question whether human rights are relative or universal. The historical interrelationship between business and human rights is a subject of the dissertation; the history of human rights is not.

The dissertation is, however, aware of the universality/relativity debate and of the history of human rights, which goes back at least as Ancient Greece. As Josiah Ober explains, the ancient Greeks did not have a set of rules called "human rights". They did, however, have notions of justice, fairness and fair distribution, as well as a set of civil liberties. <sup>56</sup> Human rights have been present in some form or other in all periods, culminating in the UN Declaration of Human Rights (discussed in Chapter 3) which followed the atrocities of the Second World War. <sup>57</sup>

A pivotal question for human rights law is whether existing human rights are universal or relative to Western thought. Alison Dundes Renteln sums up the position, saying that Western philosophers seem to be particularly "prone to projecting their moral categories on others. As a consequence, the presumption of universality is deeply ingrained in Western philosophy".<sup>58</sup> The social life envisaged by human rights codes "is unrepresentative of the entire world".<sup>59</sup> Though rights exist in most moral systems, "we cannot presume that all moral codes contain the same … values".<sup>60</sup>

Conversely, the Global Citizenship Commission has argued that to create a *Universal* Declaration of Human Rights is not to impose Western values on others. Human rights thinking allows for debate; there are contextual variations and rights are formulated abstractly, to allow for interpretation. Maria Kaspersson correctly points out that cultural variations exist and cultural practices should be respected provided that they are non-oppressive to groups such as women, and respect core human values like life and freedom of choice. That is, core human rights must be unequivocally upheld. There are basic rights with which people are born and are entitled to, simply by reason of being human.

<sup>&</sup>lt;sup>56</sup> Josiah Ober, *The Rise and Fall of Classical Greece* (μετάφραση Μιχάλης Λαλιώτης, The Princeton History of the Ancient World series, Εκδόσεις Δώμα 2020) 23, 67.

<sup>&</sup>lt;sup>57</sup> An excellent book on the modern history of human rights is Mark W. Janis and others, *European Human Rights Law: Text and Materials* (3<sup>rd</sup> reprinted edition, Oxford University Press, 2010). For a solid discussion on the meaning of "rights" (legal, moral, freedoms, entitlements) see R.W.M. Dias, *Jurisprudence* (4<sup>th</sup> ed, Butterworths) and Denise Meyerson, *Understanding Jurisprudence* (Cavendish – Routledge 2007).

<sup>&</sup>lt;sup>58</sup> Alison Dundes Renteln, 'The concept of human rights' (1988) 83 Anthropos 343, 349.

<sup>&</sup>lt;sup>59</sup> Renteln (n 58) 350.

<sup>&</sup>lt;sup>60</sup> Renteln (n 58) 360.

<sup>&</sup>lt;sup>61</sup> Global Citizenship Commission, *The Universal Declaration of Human Rights in the 21<sup>st</sup> century: a living document in a changing world* (Open Book Publishers 2016) 37.

<sup>&</sup>lt;sup>62</sup> Maria Kaspersson, 'Honour Killings' (Hate Crimes Conference, Nottingham, 21-22 February 2003) 15.

Though this is a position that would seem the most appropriate, the dissertation does not address itself to the universality/ relativity debate. It refers to human rights as these are actually embodied in existing documents.

Finally, four, it is beyond the scope of the dissertation to position itself in relation to theory of the firm. Buckley has correctly identified its value for sustainable business conduct. 63 Yet, material used in this dissertation, for example in considering the company's place in organization law, refers to the other two approaches as well. The applicability of those approaches is neither questioned nor examined, for they do not seem to be inherently incompatible with human rights or HRDD. Suggestively, if a company is a concession from government, the government or the EU may use this as a lever to impose human rights obligations. If a company is a nexus of contracts, a hub around which officials and microagents like members, directors, creditors and customers contract with one another 64 (interestingly, Mahoney has argued that an entity similar to a company could have evolved solely out of contract law 65), there is, arguably, nothing to prevent governments or the EU from requiring human rights guarantees for valid contract formation, similar to the existing modern slavery statement found in business websites. 66 In short, the argument of this dissertation would suggestively remain valid, irrespective of which theoretical approach is followed.

### 1.7 Chapter Outline

The dissertation is divided into several chapters, as follows. Chapters 2 and 3 refer to the first half of the dissertation topic, and the first research question, by studying the way human rights have been historically engrained into cooperatives and how contemporary cooperatives embody human rights and sustainability. Chapter 4 is appropriately poised in the middle of

 $\underline{https://www.struttandparker.com/application/themes/rawnet/app/pdfs/modern-slavery-and-humantrafficking-statement-april-2022.pdf, \ and \ \\$ 

https://www.dexters.co.uk/images/Dexters\_Modern\_Slavery\_and\_Human\_Trafficking\_Statement\_20 22.pdf.

<sup>&</sup>lt;sup>63</sup> Buckley (n 25) 29, 48-49; see also in Definitions above.

<sup>&</sup>lt;sup>64</sup> As Moore and Petrin have described (n 19) 31.

<sup>&</sup>lt;sup>65</sup> Mahoney (n 21) 877, 879

<sup>&</sup>lt;sup>66</sup> See, for example, business websites like

the dissertation, to outline the parameters of the debate on HRDD and explain the current regulatory framework, reaching to and including the 2022 Directive Proposal. Chapter 4 seeks to answer the second research question.

The third research question is addressed by chapters 5 and 6. Chapter 5 examines the links between companies and cooperatives, suggesting ways cooperatives aid in conceptual re-definitions and practical matters such as which human rights should be protected in given situations. Chapter 6 studies the proposal for a Directive, suggests that some concerns might be ameliorated by adopting a set of principles rather than a list of human rights documents, and outlines problems that should be addressed by legislation and not by the cooperative approach or jurisprudential thought. The Conclusion is titled Chapter 7 and draws the various strands together.

# 1.8 Closing Remarks

As the new regime for mandatory HRDD proposed by the EU indicates, company law has reached a stage of its development where, arguably, certain core elements will require a redefinition or, at least, a reconsideration. In relation to HRDD, company law policy documents have started to employ the language and terminology of cooperatives. It might be fruitful to examine what the one type of business enterprise might have to teach the other.

### Chapter 2

# **Cooperatives and Human Rights: Origins**

#### 2.1 Introduction

The purpose of this chapter is twofold. First, to give an outline of the history and context of cooperatives and the cooperative movement, from 18<sup>th</sup> century France and 1844 Rochdale, to events on cooperatives and youth in 2020 under the auspices of the UN. Second, to consider how notions that are characteristic of the cooperative movement, such as self-development, education and self-improvement, find their way in current human rights law. The chapter does not argue that present human rights legislation mirrors the 19<sup>th</sup> century notions, or that 19<sup>th</sup> century human rights thinking was essentially the same as today. It does, however, trace a continuity, whereby core 19<sup>th</sup> century cooperative values have, in our era, achieved recognition on an institutional human rights level.

# 2.2 Political framework of the cooperative movement

Cooperatives as we understand them today developed in 19<sup>th</sup> century Britain, within the context of belief in industrious effort and self-government, and within the movements of Chartism, Owenism and Christian Socialism. The original members of the cooperative movement in Rochdale, writes Edith Simcox in *Fraser's Magazine*, had been Chartists.<sup>67</sup> Owenism was the philosophy that took its name from reformer Robert Owen. For some, Owen was the father of the cooperative movement.<sup>68</sup> Owenism was connected to socialism, trade-unionism, reform and cooperation<sup>69</sup> but was not revolutionary.<sup>70</sup>

<sup>&</sup>lt;sup>67</sup> Edith Simcox, 'A turning point in the history of cooperation' *Fraser's Magazine* (London, August 1882) 223.

<sup>&</sup>lt;sup>68</sup> Robin Gilmour, *The Victorian period: The intellectual and cultural context of English Literature 1830-1890* (Longman 1993) 177.

<sup>&</sup>lt;sup>69</sup> Brett Fairbairn, 'The meaning of Rochdale: the Rochdale pioneers and the cooperative principles' (1994) University of Saskatchewan, Centre for the Study of Cooperatives Working or Discussion Paper, <a href="https://ageconsearch.umn.edu/record/31778/?ln=en">https://ageconsearch.umn.edu/record/31778/?ln=en</a>, accessed 10 June 2022.

<sup>&</sup>lt;sup>70</sup> Gilmour (n 68) 177.

Chartism, the movement calling for a code of liberty<sup>71</sup> was, interestingly, close to what we might today consider a human rights movement. The so-called *People's Charter* originated with a society called The London Working Men's Association and called for equality of political rights and manhood suffrage.<sup>72</sup> The People's Charter had been drafted by Owenite activist William Lovett and a veteran radical, Francis Place. In the 19<sup>th</sup> century, the vote could be exercised only by men having a certain amount of property; the Charter conversely demanded abolition of the property qualification.<sup>73</sup> Chartism collapsed in 1848, after unrest in London in April;<sup>74</sup> the cooperative movement became one of the ideological currents that replaced it.<sup>75</sup>

Thus, the cooperative movement was associated with trade unions, the demand for rights, and the non-revolutionary version of Socialism that was particularly British.<sup>76</sup> Indeed, an aspect of British socialist thought was Christian Socialism -- the ideal of a democracy of equality.<sup>77</sup> This is, broadly, the political framework within which cooperation begun. The chapter will now turn to a brief historical account of cooperatives.

# 2.3 From French cheese manufacturing to the Rochdale pioneers

Although Rochdale had been a centre of cooperative activity for years, <sup>78</sup> the first serious attempt at cooperation happened in 1844, with a group of working men who had been nearly ruined because of a strike. These men discussed industrial organization, "eventually forming the Rochdale Equitable Pioneers' Co-operative Society". <sup>79</sup>

<sup>&</sup>lt;sup>71</sup> 'Chartism' *Fraser's magazine* (London, May 1848) 579.

<sup>&</sup>lt;sup>72</sup> 'Chartism' Reynolds's Miscellany (London, 27 May 1848) 461.

<sup>&</sup>lt;sup>73</sup> Robert Tombs, *The English and their history* (Penguin Books 2014) 442-443.

<sup>&</sup>lt;sup>74</sup> Tombs (n 73) 450-451.

<sup>&</sup>lt;sup>75</sup> Thomas Hughes Q.C., 'Cooperation in England first paper' *Good Words* (London, December 1885) 63, 65; 'Cooperative Societies' *Saturday Review* (London, 3 October 1863) 461, 462.

<sup>&</sup>lt;sup>76</sup> Gilmour (n 68) 177.

<sup>&</sup>lt;sup>77</sup> John Ludlow, 'A dialogue on cooperation' *The Economic Review* (London, April 1892) 223.

<sup>&</sup>lt;sup>78</sup> Fairbairn (n 69) 3.

<sup>&</sup>lt;sup>79</sup> John Plummer, 'Cooperative associations in England' *Once a Week* (London, 8 November 1862) 554, 554-555.

Such associations were not new; actors had created companies in the Elizabethan era. <sup>80</sup> *The Reader* on August 12, 1865, reviews a French monograph, whereby the first friendly societies are traced to a society founded in London in 1703 by French refugees. <sup>81</sup> For Ahmad Bello Dogarawa, the first recorded cooperative goes back to 1750 France; <sup>82</sup> Georg Miribung concurs on the 1750 French date, where a cooperative was created by cheese producers. <sup>83</sup> Within a decade, cooperatives had developed in countries as diverse as the United Kingdom, the United States, and Greece. <sup>84</sup>

However, the first contemporary type of cooperative was the one set up in 1844 Rochdale, by the twenty-eight unemployed community members, who pooled their resources for the common good. <sup>85</sup> Miribung notes that Rochdale was "the first modern cooperative, whose influence is still visible today". <sup>86</sup> The first cooperative principles were developed in Rochdale with the Equitable Pioneers Society. The thirty-eight original members had been poor flannel weavers, mistreated by the harsh business environment of 19<sup>th</sup> century Britain. On December 21, 1844, they opened a shop in Toad Lane, a Rochdale backstreet, selling products like butter, sugar and candles. By the end of the first year, the turnover was at the rate of 6,000 pounds sterling, <sup>88</sup> a large amount for the 19<sup>th</sup> century.

The Rochdale cooperators worked hard for success. The principles according to which the cooperative worked were straightforward:

[a]ll transactions are for cash, no credit being allowed; and a simple ... system is adopted for the purpose of ... registering the amount of purchases made by each customer. The profits are divided quarterly, five per cent per annum being allowed on all paid-up shares, and the remainder equally distributed amongst the numbers in proportion to the amount of purchases individually made by them.<sup>89</sup>

<sup>&</sup>lt;sup>80</sup> Plummer (n 79) 555.

<sup>81 &#</sup>x27;English Friendly Societies' *The Reader* (London, 12 August 1865) 168, 168.

<sup>82</sup> Ahmad Bello Dogarawa 'The role of cooperative societies in economic development' (SSRN, 2010)

<sup>&</sup>lt; https://www.ssrn.com/index.cfm/en/> accessed 10 June 2022.

<sup>83</sup> Miribung Agricultural (n 8) 50.

<sup>&</sup>lt;sup>84</sup> Dogarawa (n 82) 3.

<sup>85</sup> Dogarawa (n 82) 3.

<sup>&</sup>lt;sup>86</sup> Miribung Agricultural (n 8) 50.

<sup>&</sup>lt;sup>87</sup> Dogarawa (n 82) 3.

<sup>&</sup>lt;sup>88</sup> Mary E. Murphy, 'Centenary of the British Cooperative Movement' (1946) 10 *Journal of Marketing* 270, 270.

<sup>&</sup>lt;sup>89</sup> Plummer (n 79) 555.

Thus, the aim was a more equitable system of retail dealing.<sup>90</sup> There was never a wholesale rejection of the business world, or the world of profit, but basically the desire to infuse this world with morality. Trade had become too corrupt; it had to include values.<sup>91</sup> Moreover, provident societies, which existed as early as 1845, aimed at a moral use of investment schemes by setting a system of pension and/ or insurance for those in need.<sup>92</sup> The theme of brotherhood pervades cooperation: open membership and one person one vote. Justice is also promoted, by just and fair prices.<sup>93</sup>

### 2.4 Cooperatives and education, intellectual progress and reform

Because of links to Owenism, the cooperative movement was also concerned with education and social reform. Reform was a keyword in 19<sup>th</sup> century Britain and comprised a number of proposed actions – from a reconciliation between employers and workers to a gradual extension of the franchise and a change in priorities and ideology. As Charles Dickens argued on 30 December 1853, during a speech at the Birmingham Mechanics' Institute, supported by cooperators, the welfare of society exists,

in the fusion of different classes ... in the bringing together of employers and employed; in the creating of a better common understanding among those whose interests are [essentially] identical, who depend upon each other, who are vitally essential to each other.<sup>97</sup>

<sup>&</sup>lt;sup>90</sup> 'A manual of the law relating to industrial and provident societies' *The Athenaeum* (London, 12 June 1869) 794, 794.

<sup>91</sup> Hughes First paper (n 75) 66.

<sup>&</sup>lt;sup>92</sup> 'Provident societies' Sharpe's London Magazine (London, 29 November 1849) 65.

<sup>&</sup>lt;sup>93</sup> E.R. Bowen, 'Social implications of the cooperative movement' (1941) 2 The American Catholic Sociological Review 195, 202.

<sup>&</sup>lt;sup>94</sup> Some of the original pioneers, such as William Cooper, Charles Howarth and James Daly were Owenites (Fairbairn 3-4). Their ethic was not only work and the improvement of the business world. It was also education, knowledge and self-development.

<sup>95</sup> As, for example, in Elizabeth Gaskell's North and South, 1854.

<sup>&</sup>lt;sup>96</sup> Charles Dickens in, for example, *Hard Times* (1854) and *Bleak House* (1853).

<sup>&</sup>lt;sup>97</sup> Charles Dickens, *Speeches: literary and social* (reprint of older book, Kessinger Publishing) 40.

Educational improvement was not a keyword for Owenism<sup>98</sup> alone. Faith in the potential of education was general in 19<sup>th</sup> century Britain. It was possible for individuals to improve themselves and their surroundings by education; hence the popularity of manuals, books on manners and books on general knowledge. Self-improvement through industry and manners pointed to the Victorian pervasive self-help ideal. As Samuel Smiles, the chief proponent of self-help, had pointed out, work and active industry is the healthiest training and the best educator, leading to progress.<sup>99</sup>

Similarly, the Rochdale and other members of the cooperative movement established reading rooms, libraries, lecture halls and a fund for the relief of their poorer members. <sup>100</sup>

Intellectual change was one of the objectives of cooperatives. Intelligence was seen as the counter to ignorance. The cooperative unions wished to circulate knowledge. Libraries, lectures and reading rooms were one part of the story. The other would be that, through establishing their own stores and trading houses, workmen would learn statistics, finance, political economy and the basics of legislation.<sup>101</sup>

The hope was that a number of concerns promoted by cooperatives would, ultimately, prepare the people for political power. The advantages of the cooperative organization included, on the one hand, the quality and cheapness of articles that were essential for survival; on the other, a positive influence exerted on the members. The writer in the October 3, 1863, *Saturday Review*, describes a cooperative association in Leeds, where alongside the flour-mill and stores, they had started to build "a spacious reading room". As for the hardworking Rochdale Pioneers, the effect of their endeavour was to raise "the character of the British workman very highly in the estimation of the world". 103

<sup>&</sup>lt;sup>98</sup> Fairbairn (n 69) 3.

<sup>&</sup>lt;sup>99</sup>Samuel Smiles, *Self Help* (1859), found at: <a href="https://oll.libertyfund.org/title/smiles-self-help-with-illustrations-of-character-and-conduct">https://oll.libertyfund.org/title/smiles-self-help-with-illustrations-of-character-and-conduct</a>.

<sup>&</sup>lt;sup>100</sup> Plummer (n 79) 555.

<sup>&</sup>lt;sup>101</sup> 'Cooperative union the only effectual remedy for national distress' *The London Cooperative Magazine* (London, March 1830) 33, 35.

<sup>&</sup>lt;sup>102</sup> Plummer (n 79) 556.

<sup>&</sup>lt;sup>103</sup> 'Co-operative societies' *The Saturday Review* (London, October 3 1864) 461, 461.

### 2.5 A cooperative timeline

The cooperative movement expanded. In 1849, the Society for Promoting Working Men's Associations, "WMA", was founded in London, to infuse the principles of cooperation to trade and industry. <sup>104</sup> The WMA later developed into the Wholesale Society, which numbered 663 societies in 1883. The Wholesale Society was administered by a congress and a board divided into regional sections. <sup>105</sup>

As a result, the inauguration of an International Cooperative Alliance was highly anticipated by *The Economic Review* in July 1894, as a most positive outcome of the first International Cooperative Congress convening in London. Such an alliance would secure to cooperators the benefits of mutual support and the exchange of ideas. A central aim would be to raise the position of workers and promote their economic independence.<sup>106</sup>

Eventually, the International Cooperative Alliance was formed in 1895, as a non-governmental, "umbrella organization to promote friendly and economic relations between cooperative organizations of all types". The strengthening and development of autonomous cooperative organizations throughout the world continues to be the principal aim of the ICA.<sup>107</sup>

An excellent timeline of the cooperative movement is that found in the website of the ICA. <sup>108</sup> These include the first ICA Congress in 1895, the attainment of "consultative status" in relation to the UN in 1946; also, the support given to cooperatives by the UN (2001, guidelines for a supportive environment) and the ILO (2002, Promotion of Coops Recommendation, R193). The Recommendation No. 193 is important because it is "the first and only instrument of universal applicability on cooperative policy and law adopted by an international organization". Since 2002, it has helped close to 100 countries formulate policies or laws relating to cooperatives. <sup>109</sup> The year 2012 was the UN International Year of

<sup>&</sup>lt;sup>104</sup> Hughes First paper (n 75) 65.

<sup>&</sup>lt;sup>105</sup> Thomas Hughes Q.C. 'Cooperation in England second paper' *Good Words* (London, December 1885) 161, 163-164.

<sup>&</sup>lt;sup>106</sup> Henry W. Wolff, 'Cooperative credit' *The Economic Review* (London, July 1894) 366, 369 <sup>107</sup> Dogorawa (n 82) 4.

<sup>&</sup>lt;sup>108</sup> 'Our history' (*International Cooperative Alliance*) <a href="https://www.ica.coop/en/cooperatives/history-cooperative-movement">https://www.ica.coop/en/cooperatives/history-cooperative-movement</a> accessed 30 June 2022.

<sup>&</sup>lt;sup>109</sup> Stirling Smith, *Promoting cooperatives: an information guide to ILO Recommendation No.193* (International Labour Office – Geneva: ILO 2014) 25-26.

Cooperatives. The last event mentioned in the timeline is in 2020; this is the holding of the first Global Youth Forum on Cooperative Entrepreneurship in Sarawak, Malaysia.

The legislation which granted legal status to cooperatives in Britain was "the first Industrial and Provident Societies Act, which was passed in 1852". The societies responded eagerly to the passing of the Act and started to organize better. This legislation was updated and finally consolidated in the Co-operative and Community Benefit Societies Act 2014, which requires the cooperative or community benefit societies to be registered with the Financial Conduct Authority. In European Union law, there is no specific legislation to govern the field directly. However, Regulation 1435/2003, setting up the Societas Cooperativa Europaea has influenced national law, and has established a "pan-European structure" for cooperatives. 111

The cooperatives uphold a regime that is not the same as that of commercial and capital-based companies: the seven cooperative principles, which are a part of the identity of a cooperative. These principles were put forward by the Rochdale Pioneers and they are adopted by the ICA today. They are, in summary, open membership, democratic organization (one member one vote), members participate financially, cooperatives are autonomous and self-help organizations, they aim to educate, inform and train their members, and they work for "the sustainable development of their communities". The principles are also reiterated in the ILO Recommendation, Part I(3)(b). Today, it is estimated that "12% of the world's population is a member of a cooperative".

<sup>&</sup>lt;sup>110</sup> Hughes Second paper (n 105) 163.

<sup>111</sup> Ian Snaith, 'Cooperative and community benefit societies' (*Ian Snaith's website*, 2014) <a href="http://www.iansnaith.com/?page\_id=120">http://www.iansnaith.com/?page\_id=120</a> accessed 7 July 2022. For details on the SCE, see chapter 3 of this dissertation.

<sup>&</sup>lt;sup>112</sup>Ifigeneia Douvitsa et al, 'Foreword/ Editorial' (2022) issue IV International Journal of Cooperative Law 8, 8.

<sup>&</sup>lt;sup>113</sup> Cuznetov Alexandru, 'Rochdale principles – the catalyst for the functioning and individualization of cooperative societies' Scientific collection 'Interconf' No 105; Current issues and prospects for the development of scientific research ojs.ukrlogos.in.ua accessed 15 July 2022, 244-245.

<sup>&</sup>lt;sup>114</sup> ILO Recommendation R193: Recommendation concerning the promotion of cooperatives (90<sup>th</sup> International Labour Conference Geneva September 2002).

<sup>&</sup>lt;sup>115</sup> Douvitsa et al (n 112) 8.

### 2.6 Common themes with human rights philosophy and human rights law

An examination of how the first cooperatives developed and continue to develop today, does not, therefore, fail to show how cooperative thinking is aligned to central elements in human rights instruments. These elements will be discussed in this and the next section, and may be summarized as sharing, equality and democratic participation, self-help and social responsibility, human self-development, and the pursuit of happiness.

The chapter does not read today's human rights approach into the origins of the cooperative movement, nor argues that 19<sup>th</sup> century human rights thinking was the same as human rights thinking today. Though political scholars like John Stuart Mill, Harriet Martineau and Francis Power Cobbe, who all wrote on liberty and equality, are still studied, 19<sup>th</sup> century views on rights and democracy differ from current ones.

For example, it was by no means self-evident that the vote should be held by everybody; "[w]e think," wrote the prestigious *Fraser's magazine*, "that an unlimited extension of the suffrage, in the present state of society, would defeat the ends of civilization". It was acceptable to argue that some people lacked the necessary education to exercise political rights. As for the rights of women, the debate raged all through the final decades of the 19<sup>th</sup> century, with women failing to attain the vote. Proper femininity was seen as incompatible with things like politics, higher education and the business world.

Mary E. Murphy's description of Victorian (19<sup>th</sup> century) British conditions is accurate:

[a]t the time of the formation of the cooperative society in Rochdale the working classes were extremely oppressed ... and were excluded from the franchise. No system of elementary or higher education existed. Trade unions were considered as conspiracies [...]. Public health legislation had not been passed, and the factory acts [that regulated conditions of work in factories] were only beginning to be recognized as a valid use of state power. Insurance against workers' illness or unemployment had not yet been considered. 117

<sup>&</sup>lt;sup>116</sup> 'Chartism' Fraser's (n 71) 586.

<sup>&</sup>lt;sup>117</sup> Murphy (n 88) 271.

Child labour was permissible, with children suffering terribly as workers in mines and as chimney sweepers.

This is not to belittle 19<sup>th</sup> century achievements. In terms of literature, culture, and printing, the Victorians are probably unsurpassed. The remarkable feats in architecture and the building of railways were outstanding. Charity was one way in which Victorians dealt with poverty and the lack of an organized education: charity schools and church schools were numerous. Women were active in what might be termed an informal economy of charity bazaars and home/cottage industries; working class women worked alongside the men in factories and enjoyed a degree of independence. Reform happened in many areas, including politics (a gradual extension of the franchise), law and the legal system; the Victorian revision of the UK justice system has been historically judged as successful. The nineteenth century was the "great era of legislative reform". There was, for example, the creation of a divorce court and a successful overhaul of the structure of courts. Still, problems remained, and cooperation was a response to a number of them.

To repeat, the aim of this chapter is to identify common principles between cooperation, even in its early forms, and human rights thinking; themes that may be seen to run through both and across the decades in which cooperation and human rights discourse have been active. The cooperative movement developed in accordance with ideas which could now be associated with notions we are familiar with from human rights law. The idea of sharing and of equality, for instance, is prevalent in cooperative thought. As John Plummer explained, cooperation means that labouring men bring their means together and form a partnership, where they become their own employers and share profits. 120

Most obviously, the cooperative principles reflect human rights notions of equality and democratic participation – the one person one vote principle, for instance, was outstanding in an era where universal suffrage was still far way off.

<sup>&</sup>lt;sup>118</sup> An indicative list of monographs on these features of the Victorian era might contain, Leonore Davidoff and Catherine Hall, *Family fortunes: men and women of the English middle-class 1780-1850* (3<sup>rd</sup> edn, Taylor & Francis 2018); Talia Schaffer, *Novel craft: Victorian domestic handicraft and nineteenth-century fiction* (Oxford University Press 2011); John Tosh, *A man's place: masculinity and the middle-class home in Victorian England* (Yale University Press 2007); Christopher Winn, *Walk through history: discover Victorian London* (Ebury Press 2018).

<sup>&</sup>lt;sup>119</sup> R. J. Walker, *Walker & Walker: The English Legal System* (6<sup>th</sup> edn, Butterworths 1985) 76. <sup>120</sup> Plummer (n 79) 554.

### 2.7 Recognition in current human rights documents and International Organizations

The Victorian values that formed the underlying philosophy of the cooperative have made it into official ILO documents, in effect receiving current recognition on the level of international organization. The ILO, "the olderst international organization in the twentieth century", promoting "labour rights worldwide and fighting poverty and social inequality", <sup>121</sup> an organization whose standards constitute "a special category of human rights", <sup>122</sup> recognizes, in R193, the cooperative values of self-help, social responsibility, caring for others, and the protection of cultural needs (I.(1) and (2)).

Similarly, and for the purposes of this chapter most importantly, the notion of human self-development, an idea dear to the Victorians (improving yourself through education, self-making), arguably now appears and has found its way into aspects of human rights protection. Despite an ongoing debate as to content, it appears that the right to development belongs to "every human person and all peoples"; that is, it is both individual and collective. <sup>123</sup> The right to development is inalienable, and means participation in and enjoyment of, "economic, social, cultural and political development". As a concept, it is close to "a synthesis of all human rights" and aims to improve "human well-being for all". <sup>125</sup>

Cooperatives were at the forefront of calls for self-improvement and other similar life qualities, which point towards the polymorphous nature of the current right to development. In the Victorian period, cooperatives promoted culture, knowledge, and community by establishing reading rooms, libraries and lecture series. Presently, the United Nations promotes this as part of its overall human rights protection. For example, the ICCPR<sup>126</sup>

<sup>&</sup>lt;sup>121</sup> Jasmien Van Daele, 'The International Labour Organization (ILO) in past and present research' (2008) 53 IRSH 485, 486-487.

<sup>&</sup>lt;sup>122</sup> Nicolas Valticos, 'International labour standards and human rights: approaching the year 2000' (1998) 137 International Labour Review 135, 136-137.

<sup>&</sup>lt;sup>123</sup> Aristoteles Constantinides, 'Human Right to Development' in Anja Mihr and Mark Gibney (eds), *The SAGE Handbook of Human Rights* (vol 2, Sage Publications 2014) 948.

<sup>&</sup>lt;sup>124</sup> Constantinides (n 123) 951.

<sup>&</sup>lt;sup>125</sup> Constantinides (n 123) 947.

<sup>&</sup>lt;sup>126</sup> Collectively known, together with the ICESCR and the Universal Declaration of Human Rights (UNDH) as the International Bill of Human Rights, forming "the most often cited human rights

protects freedom of thought and opinion. <sup>127</sup> The ECHR, <sup>128</sup> the only human rights document in the world with an enforcement mechanism <sup>129</sup>, embraces a number of rights relating to self-development, such as privacy, freedom from discrimination and the right to education – a right especially connected to "personal growth and development". <sup>130</sup> The way this right has been interpreted by the ECHR interestingly takes us again back to cooperative thinking: the right to education includes the "transmission of knowledge and intellectual development". <sup>131</sup>

Key for the purposes of this chapter is, additionally, the phrase "the pursuit of happiness", which is found in the United States Declaration of Independence (the Declaration). The Declaration is "a substantive statement of rights", establishing "the mandates of government". Happiness might mean different things in different eras. For Victorian political thinking, it could mean the minimization of pain and the maximization of pleasure — the famous felicific calculus for the Utilitarians. It could mean doing your duty and having a pious home. As current studies have indicated, "there is no simple answer to what causes happiness", the factors, says Richard Eckersley, are many. 134

However, better health and education are an "important ingredient of a happier life" and so is "the growth of knowledge". <sup>136</sup> The Declaration guards the right to "safely pursue"

document on earth": Global Citizenship Commission, *The Universal Declaration of Human Rights in the 21<sup>st</sup> century: a living document in a changing world* (Open Book Publishers 2016) 31.

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<sup>&</sup>lt;sup>127</sup> International Covenant on Civil and Political Rights (adopted 16 December 1996, entered into force 23 March 1976) 999 UNTS 171 (ICCPR) articles 18-19.

<sup>&</sup>lt;sup>128</sup> Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention on Human Rights, as amended) (ECHR).

<sup>&</sup>lt;sup>129</sup> The European Court of Human Rights; but see, presently, the African Union with the African Court on Human and People's Rights, which can also impose sanctions (<a href="https://www.africancourt.org/wpafc/">https://www.africancourt.org/wpafc/</a>).

<sup>&</sup>lt;sup>130</sup> David Hoffman and John Rowe Q.C. *Human Rights in the UK: an introduction to the Human Rights Act 1998* (4<sup>th</sup> edn, 2013) 290.

<sup>&</sup>lt;sup>131</sup> European Court of Human Rights, *Guide to Article 2 of Protocol No. 1 to the European Convention on Human Rights: Right to education* (Council of Europe/ European Court of Human Rights 2022) 7.

<sup>&</sup>lt;sup>132</sup> Alexander Tsesis, 'The Declaration of Independence and constitutional interpretation' (2016) 89 Southern California Law Review 369, 370-371.

<sup>&</sup>lt;sup>133</sup> 'Be happy as you are' *Bow Bells* (London, 5 July 1865) 554, 554.

<sup>&</sup>lt;sup>134</sup> Richard Eckersley, 'The mixed blessings of material progress: diminishing returns in the pursuit of happiness' (2000) 1 Journal of Happiness Studies 267, 273.

<sup>&</sup>lt;sup>135</sup> Eckersley (n 134) 267.

<sup>&</sup>lt;sup>136</sup> Eckersley (n 134) 270.

personal happiness",<sup>137</sup> even "enjoy autonomy and happiness".<sup>138</sup> In Linda M. Keller's reading of the Declaration, happiness is also enrichment through moral and social virtue.<sup>139</sup> Virtue, autonomy, development; among the objects of cooperative thinking. It is, then, possible to perceive shared ground between the thought behind cooperation and the constitutive elements of human rights regulatory frameworks today.

### 2.8 Conclusion

Cooperatives did not only aim to establish employment for their members, and a way to deal with unscrupulous industrialists; they also wished to provide means for emancipation and the betterment of the self. A central aim was self-improvement through knowledge, the learning of what was good for the self and society and the eventual attainment of the means to yield or claim political power. In this sense, there is a reflection, or at least a commonality of ideas, between the cooperative framework and current human rights thought. How would present forms of the cooperative address human rights and principles of social responsibility? This is the concern of the next chapter.

<sup>137</sup> Tsesis (n 132) 378.

<sup>&</sup>lt;sup>138</sup> Tsesis (n )132 380.

<sup>&</sup>lt;sup>139</sup> Linda M. Keller, 'The American rejection of economic rights as human rights and the declaration of independence: does the pursuit of happiness require basic economic rights' (2003) 19 New York Law School Journal of Human Rights 557, 584.

### Chapter 3

# **Cooperatives and Human Rights: Presently**

#### 3.1 Introduction

The SCE promotes human rights in a number of ways. First, in its very structure and organization; second, in its activities; and, third, in relation to its nature as a cooperative. While the previous chapter looked at the connection between human rights and the history of cooperation, this chapter studies the relationship between human rights and contemporary cooperatives. Moreover, it hints at the subject of the next chapter, the place of rights in the world of commerce and company law.

# 3.2 The SCE in brief

The idea of an SCE begun in the EU in the 1970s, when the General Confederation of Agricultural Cooperatives in the European Union (COGECA) put forward a statute for a cooperative society. <sup>140</sup> The current SCE, however, was not formed until 2003, with Regulation 1435/2003 (the SCE Regulation) and Directive 2003/72/EC on the involvement of employees (the Directive).

The SCE is part of a global effort to establish a common identity for cooperatives.<sup>141</sup> Although the first proposal from COGEGA was not adopted, the idea of the SCE was reconsidered by the European Parliament. There was acknowledgment that "cooperatives addressed employment issues, gave advantages to small and medium enterprises [...] and accepted various cooperative traditions among member states".<sup>142</sup> Eventually, the SCE was created on 22 July 2003, "as a unique supranational legal form".<sup>143</sup>

<sup>&</sup>lt;sup>140</sup> Chantal Chomel, 'The long march of the European Cooperative Society' (2004) 291 Recma 1, 2.

<sup>&</sup>lt;sup>141</sup> Because of their social importance. The ICA is also part of this effort; G Miribung Agricultural (n 8) 54.

<sup>&</sup>lt;sup>142</sup> Miribung (n 8) 58.

<sup>&</sup>lt;sup>143</sup> Miribung (n 8) 60. The SCE "provides for a model of cooperative that is in line with the ICA Principles" (reference 1). It has a symbolic and political value (reference 2), having helped to promote cross-border activities and the notion of community (reference 3). Despite a lack of success of the

The importance of the SCE Regulation was underlined by the CJEU (in this case the first chamber) when it used principles contained therein to define the characteristics of cooperatives in general.<sup>144</sup> The adoption of the SCE-R by the European Union legislature and the Commission, the Court noted, has highlighted the characteristics of the SCE contained in the Regulation.<sup>145</sup> The source of these characteristics is the primacy of the individual.<sup>146</sup> In all, Antonio Fici has called the judgment a "possible means of *de facto* harmonization of national cooperative laws in Europe".<sup>147</sup>

# 3.3 The structure of an SCE as a promoter of fairness

Consequently, the SCE emphasises notions central to human rights thought. These notions are, namely, the value of the individual, irrespective of any discriminatory factor such as social background, gender, wealth and so on, and equitable distribution, which is a precept in any human rights framework.

Further, the principle of "one man, one vote" favours the democratic process. <sup>148</sup> Equality is the aim, with control "vested equally in members". <sup>149</sup> Also, shares are held by "named persons"; <sup>150</sup> this promotes transparency and alleviates money-laundering concerns.

SCE Regulation, the SCEGOL (Study Group on European Cooperative Law) considers that the SCE Regulation is sufficient, so that "further EU legislation [in the area of cooperative law] is neither desired nor desirable" (reference 4). References for this footnote: 1)Antonio Fici, 'Pan-European Cooperative Law: where do we stand?' (2013) Euricse Working Paper 047/2013, 8 <ssrn.com> accessed 10 June 2022. 2) Miribung (n 8) 62, 64. 3) Commission, 'The application of Council Regulation (EC) No 1435/2003 of 22 July 2003 on the Statute for a European Cooperative Society (SCE)' (Report) COM (2012) 72 final, 7, 13. 4) Study Group on European Cooperative Law (SCEGOL), *Draft Principles of European Cooperative Law (draft PECOL)* (2015) 14.

<sup>&</sup>lt;sup>144</sup> Fici Pan-European (n 143) 10.

<sup>&</sup>lt;sup>145</sup> Cases C-78/08 to C-80/08 *Ministero dell' Economia e delle Finanze, Agenzia delle Entrate and others* ECLI:EU:C:2011:550, para. 55.

<sup>&</sup>lt;sup>146</sup> C-78/08 to C-80/08 (n 145) para 56.

<sup>&</sup>lt;sup>147</sup> Fici Pan-European (n 143) 4.

<sup>&</sup>lt;sup>148</sup> Yen-Lin Agnes Chiu, 'European Enterprise Models – New Chances and Challenges' (2011) 22 European Business Law Review 791, 798.

<sup>&</sup>lt;sup>149</sup> Council Regulation (EC) 1435/2003 of 22 July 2003 on the Statute for a European Cooperative Society (SCE) [2003] OJ L 207/I, Recital 10. There can, nevertheless, be weighted voting, with precautions.

<sup>&</sup>lt;sup>150</sup> SCE Regulation (n 149) Article 4(3).

Importantly, upon winding up, there is what is called "disinterested distribution". This means that "assets and reserves" will be given to another cooperative body which carries out similar activities with the SCE that is being wound up.<sup>151</sup> This is a form of a rearrangement of benefits, which also informs any discussion about justice and rights.

It is one of the advantages of the SCE, as Fici has observed, that it is "the only EU legal form which citizens may make use of". <sup>152</sup> Other European business forms, such as the European Company (SE). cannot be formed by individuals. This feature of the SCE contributes to the scheme of human rights protection in the EU. Fici is correct to suggest that raising awareness on this point would help promote the SCE in the Union. <sup>153</sup>

Cooperatives promote all four objectives of the ILO Decent Work Agenda, including employment and the rights at work. <sup>154</sup> In line with this, the SCE-R is accompanied by the Directive that deals with employee involvement, providing for tensions between the single-and two-tier systems. <sup>155</sup> The European Commission has considered employee involvement in

<sup>&</sup>lt;sup>151</sup> SCE Regulation (n 149) Recital 10.

<sup>&</sup>lt;sup>152</sup> Fici *Pan-European* (n 143) 11, 7; Article 2 SCE-R makes the SCE available for formation by individuals and non-cooperative entities.

<sup>&</sup>lt;sup>153</sup> Fici *Pan-European* (n 143) 11.

<sup>&</sup>lt;sup>154</sup> The other two are extension of social protection and the strengthening of social dialogue. Jose Manuel Salazar-Xirinachs, 'Cooperatives make a better world: remarks by Mr Jose Manuel Salazar Xirinachs' (ILO-2012 International Year of Cooperatives, 6 July 2012) <ilo.org> accessed 10 June 2022.

<sup>&</sup>lt;sup>155</sup> Council Directive 2003/72/EC of 22 July 2003 supplementing the Statute for a European Cooperative Society with regard to the involvement of employees [2003] OJ L 207/25. The Directive is, arguably, a successful document as far as human rights are concerned, both in terms of content and in terms of process. It is compulsory to resolve the issue of employee involvement in an SCE, with specific time limits given (Reference 1). Reasonable timescales (here six months, Article 5) are vital for any procedure to be acceptable under a human rights regime (Reference 2). Moreover, the "fall back system known as the standard rules which are to apply [if the negotiations for employee involvement] do not result in agreement within six months ... or a further period of up to six months agreed by the parties" (Reference 3) satisfy human rights demands for at least a minimum content of protection in any regime or set of rules (Reference 4). References for this footnote: 1) Ian Snaith, 'Employee involvement in the European Cooperative Society: a range of stakeholders?' (2006) 22 The International Journal of Comparative Labour Law and Industrial Relations 213, 220. 2) See, for example, Richard Stone, p. 186, on how undue delay violates the European Convention on Human Rights, Article 6 right to a fair trial; also, the European Court of Human Rights case of L.E. v Greece (2016) on unreasonable length of proceedings. 3) Snaith Employee involvement (in this footnote) 226. 4) The fall back system is contained in Part 3 of the Annex to the Directive.

European company formations important since these were first conceived in the 1970s and has made it part of its social policy. <sup>156</sup>

# 3.4 The SCE and the common good

Because individuals that work in an SCE receive training at the same time, the SCE achieves a double goal: it gives these individuals the means of subsistence, but also education for the commercial world (participatory management). It goes without saying that skills and knowledge are priceless, assets. <sup>157</sup> In an SCE, individuals learn how to be entrepreneurs. <sup>158</sup> The development of the social and economic activities of the members is among the objects of the SCE. <sup>159</sup> Cynthia Giagnocavo calls this "capacity building". <sup>160</sup>

In its report to promote cooperative societies in Europe, the Commission has spoken about the wider reach of the SCE, which aims to achieve a market that will support welfare across the social spectrum. <sup>161</sup> The Commission has faith in the ability of the SCE to include marginalized groups. Cooperatives are part of the "social economy". <sup>162</sup> They can be used in areas like agriculture and forestry, aiming to preserve the resources of the community, and the people's right to a safe living.

<sup>159</sup> SCE Regulation (n 149) Recital 10 and Article 3.

<sup>&</sup>lt;sup>156</sup> Asterios Lahanas, 'Τα συμμετοχικά δικαιώματα των εργαζομένων στους «επιχειρηματικούς ομίλους κοινωνικής κλίμακας» και στις «ευρωπαϊκές εταιρείες»' [Employees' participation in the social policy business groups and in European company formations] (PhD thesis, National and Kapodistrian University of Athens 2008) 33-34.

<sup>&</sup>lt;sup>157</sup> Commission, 'On the promotion of cooperative societies in Europe' (Communication) COM (2004) 18 final, 6.

<sup>&</sup>lt;sup>158</sup> Chiu (n 148) 798.

<sup>&</sup>lt;sup>160</sup> Cynthia Giagnacovo, see footnote 168 below. Also see Kimberly Zeuli and Jamie Radel,

<sup>&#</sup>x27;Cooperatives as a community development strategy: linking theory and practice' (2005) 35 Regional Analysis & Policy 43, 48.

<sup>&</sup>lt;sup>161</sup>Commission Promotion (n 157) 6.

<sup>&</sup>lt;sup>162</sup> Commission *Promotion* (n 157) 16.

Furthermore, the SCE-R was designed with encouragement from the United Nations. <sup>163</sup> The UN has long encouraged cooperatives. <sup>164</sup> In a speech on the UN International Year of Cooperatives (the year 2012), Jose Manuel Salazar-Xirinachs underlined that cooperatives address existing concerns "for democracy, autonomy, independence, social and environmental responsibility, and ethical business practices". <sup>165</sup> The United Nations is interested in cooperatives and the way they act against poverty and exclusion. <sup>166</sup> All of these values fit with human rights documents and with the aims of any human rights system.

## 3.5 The activities of the SCE and the way they enhance sustainability

Another current value that ties with cooperatives is sustainability. Because cooperatives pursue not only economic, but also "social and cultural aspirations", they have proved valuable to sustainable development. Cynthia Giagnocavo succinctly says: "Within civil society, social enterprises [and] cooperatives ... build such capacities on both an individual and community level and create ... a re-oriented, sustainable approach to growth [...]". 168

The ICA includes concern for the community and sustainability in its principles and statement of cooperative identity. 169 Actually, says Deolinda Meira, "the cooperative DNA"

<sup>&</sup>lt;sup>163</sup> SCE Regulation (n 149) Recital 6.

<sup>&</sup>lt;sup>164</sup> Tapani Koppa, 'Concern for community: contributions of the cooperatives and *fraternite* to sustainable development' in W. Tadjudje and I. Douvitsa (eds), *Perspectives on Cooperative Law* (Springer Nature Singapore Pte Ltd. 2022) 215.

<sup>&</sup>lt;sup>165</sup> Xirinachs (n 154) from the ILO website.

<sup>&</sup>lt;sup>166</sup> See, for example, https://www.un.org/development/desa/cooperatives/.

<sup>&</sup>lt;sup>167</sup> Koppa (n 164) 211; Willy Tadjudje and Ifigeneia Douvitsa, 'Conclusion: current prospects of cooperative law' in W. Tadjudje and I. Douvitsa (eds) *Perspectives on Cooperative Law* (Springer Nature Singapore Pte Ltd. 2022) 3; Emanuele Cusa, 'Energy cooperatives and sustainable development)' in W. Tadjudje and I. Douvitsa (eds) *Perspectives on Cooperative Law* (Springer Nature Singapore Pte Ltd. 2022) 245.

<sup>&</sup>lt;sup>168</sup> Cynthia Giagnocavo 'Civil society, cooperative capacity building and eradicating poverty' (ILO-2012 International Year of Cooperatives, 31 January 2012) <ilo.org> accessed 10 June 2022.

<sup>&</sup>lt;sup>169</sup> Koppa (n 164) 211; the statement is not a source of law, since the ICA is a private association. However, the incorporation of the ICA International Statement into ILO Recommendation 193 has infused it with legal value; Tadjudje and Douvitsa (n 167) 6.

was always consistent with the concept of sustainability.<sup>170</sup> The dominant business logic is indifferent to the communities that make up the living environment of a business;<sup>171</sup> the cooperative is maintained by the community but also maintains it.

Further, cooperatives continue to support culture and the cultural life, as the ICA has noted. <sup>172</sup> Meira mentions commitment to education and training of members. <sup>173</sup> Further, certain activities will become more sustainable if, says Georg Miribung, with the proper help of legislation, they are pursued by cooperatives. Examples are agricultural activities, such as land cultivation, forestry and farming. <sup>174</sup>

An in-depth analysis on the way the structure of cooperatives promotes sustainability comes from Hagen Henry. He takes sustainability to contain four aspects: "economic security, ecological balance ... social justice [and political stability]". 175

<sup>&</sup>lt;sup>170</sup> Deolinda Meira, 'Cooperative governance and sustainability: an analysis according to new trends in European cooperative law' in W. Tadjudje and I. Douvitsa (eds), *Perspectives on Cooperative Law* (Springer Nature Singapore Pte Ltd. 2022) 223-224

<sup>&</sup>lt;sup>171</sup> Meira (n 170) 229. Additionally, cooperatives support "sustainable human development" by playing an important role in matters like employment, social participation, and a more equitable distribution: Meira 224, 226.

<sup>&</sup>lt;sup>172</sup> International Cooperative Alliance, *Guidance notes to the Co-operative principles* (International Cooperative Alliance 2015) 88.

<sup>&</sup>lt;sup>173</sup> Meira (n 170) 227-228.

<sup>&</sup>lt;sup>174</sup> Georg Miribung, 'Thinking beyond the principle – from an attempt to legally substantiate the principle of sustainability using the example of agricultural cooperatives' in W. Tadjudje and I. Douvitsa (eds), *Perspectives on Cooperative Law* (Springer Nature Singapore Pte Ltd. 2022) 236, 238. Emanuele Cusa argues that energy, too, can be taken up by cooperatives in ways that will promote sustainability. This is because, inter alia, the provision of energy must give proper regard to the users of that energy, something that is ingrained in the way cooperatives work (they are userowned). Users will be advised to use energy wisely, rather than waste it, something an energy company might not do, given its concern with profit maximisation. Moreover, cooperatives show concern for vulnerable consumers, and the high cost of energy affects those: Cusa (n 167) 248-249. In all, an energy cooperative will be a "sustainable economic organization": Cusa (n 167) 253.

<sup>&</sup>lt;sup>175</sup> Hagen Henry, *Guidelines for cooperative legislation* (3<sup>rd</sup> revised edn, International Labour Organization 2012) 22. Regarding economic security, this is created by cooperatives through economic stability. Cooperatives have proved themselves resilient through the present crisis and by the generally low number of cooperatives facing bankruptcies. Ecological balance is heeded because cooperatives do not opt for the economy or ecology solution; they aim at both. They pool activities and there is intergenerational solidarity. Social justice is served by the aim of cooperatives to satisfy the needs and aspirations of the members. The open door principle and the direct access of members to knowledge support social equality. As far as political stability is concerned, the cooperative is one

Patrick Develtere and Georgia Papoutsi quote a 2017 report from UNDESA (the United Nations Department of Economic and Social Affairs) when they say that cooperatives "re-invest in the communities in which they operate". This secures decent work, targets the power of the collective, and increases the wealth of the community as a whole. At the same time, the cooperative works as a tool of self-help for individuals.<sup>176</sup>

## 3.6 Cooperatives and human rights

The fair interaction between the individual and the community is a human rights aim. In any document, from the ECHR to the UN Declaration, there are rules to promote individual dignity, and a democratic functioning of the community. These notions are, as we have seen, served by current cooperatives.

Although cooperatives are not completely altruistic organizations, <sup>177</sup> they are "widely regarded as a means of promoting human rights". The needs they aim to satisfy, such as work, housing and food, are fundamental to the human personality. "[P]ersons count more than capital and all count equally, given the democratic principle 'one member one vote'". The open-door principle is "a very important instrument of socialization". <sup>178</sup>

In general, the UN has praised the way cooperatives are at the forefront of the fair-trade movement, have helped small producers across the world defend their interests (in the cotton and coffee farming, for example) and have empowered vulnerable groups. <sup>179</sup> The cooperative has been successfully applied to health, education, farming, groceries, land

of the remaining spaces where democratic participation can be organized. The whole argument, as summarized here, is contained in pp. 25-27.

<sup>&</sup>lt;sup>176</sup> Patrick Develtere and Georgia Papoutsi G, 'Rebuilding and realizing a resilient global society through cooperatives' (Expert Group Meeting on "The role of cooperatives in economic and social development: Recover Better from the Covid-19 Pandemic", June 2021) 7.

<sup>&</sup>lt;sup>177</sup> Antonio Fici, 'The essential role of cooperative law' (2014) 4 The Dovenschmidt Quarterly 147, 157.

<sup>&</sup>lt;sup>178</sup> Fici Essential (n 177) 156.

<sup>&</sup>lt;sup>179</sup> Xirinachs (n 154).

cultivation.<sup>180</sup> In a recent interview, Ian Snaith called the cooperative model a "key weapon in the armoury of vulnerable groups" which can use it to "mitigate the worst effects" of current financial concerns.<sup>181</sup>

## 3.7 The nature of cooperation and the market economy

Inside this chapter, there have been hints at the difference between cooperation and corporations; also, hints that cooperation is promotive of human rights because of that difference. Although cooperatives are businesses, their social and economic contribution to the wider community are not mere "unintentional outcomes". <sup>182</sup> Cooperatives can achieve "social objectives that would not be provided by purely profit-oriented firms". <sup>183</sup> Thus, while large corporations aim at only the most profitable services, cooperatives work for the benefit of members and the community. <sup>184</sup>

The view that the world economy revolves around profit-making is one-dimensional <sup>185</sup>. Humanity faces problems (health crises and climate change) that require synergy. Cooperatives challenge the profit-oriented perspective. <sup>186</sup> Old rules must be reexamined, while common goals must be integrated into business and the private interest; <sup>187</sup> this will be expanded upon in Chapter 5.

<sup>&</sup>lt;sup>180</sup> Ecoope, Youth Cooperative Entrepreneurship < https://youth.ecoope.eu/> Accessed 30 July 2022

<sup>&</sup>lt;sup>181</sup> Ifigeneia Douvitsa and Hagen Henry, 'Interview with Ian Snaith' (2022) Ius Cooperativum, IJCL, International Journal of Cooperative Law 384, 393.

<sup>&</sup>lt;sup>182</sup> Zeuli and Radel (n 160) 44.

<sup>&</sup>lt;sup>183</sup> Zeuli and Radel (n 160) 52.

<sup>&</sup>lt;sup>184</sup> Kimberly A. Zeuli and Robert Cropp, 'Cooperatives: principles and practices in the 21<sup>st</sup> century' (University of Wiskonsin-Extension, Cooperative Extension 2004) 77.

<sup>&</sup>lt;sup>185</sup> Koppa (n 164) 212.

<sup>&</sup>lt;sup>186</sup> Koppa (n 164) 215.

<sup>&</sup>lt;sup>187</sup> Koppa (n 164) 216.

#### 3.8 Conclusion

Not everything works in an idealized manner, of course. Despite the advantages of cooperation, despite their pedigree of human rights, cooperatives need to remain viable in a competitive world. They are sensitive to rights but should work internally for rights promotion, that is, ensure that everything functions well with their own personnel and with their own "internal ethical issues and moral obligations". Further, as Coop Sweden AB has shown, in a report prompted by Oxfam, cooperatives may encounter human rights violations during the carrying out of business, and need to "undertake ... human rights due diligence processes". 189

Nevertheless, this chapter indicates that current cooperatives serve human rights in the way they are organized and in the way the nature of the cooperative itself contrasts with, but also exists within, the world of commerce. The question that arises, then, is whether human rights have a place in this world. Also, some of the difficulties in a proposal to create a place for human rights in business. This is the subject of the next chapter.

<sup>188</sup> Nelarine Cornelius et al, 'Corporate social responsibility and the social enterprise' (2007) 81 Journal of Business Ethics 355, 366.

<sup>&</sup>lt;sup>189</sup> 'The workers behind the citrus fruits: a focused human rights impact assessment of Coop Sweden's Moroccan citrus fruit supply chains' (Oxfam Research Report 2022) 16.

## Chapter 4

## **Companies and Human Rights: Debating**

#### 4.1 Introduction

There are many difficulties when trying to insert human rights duties (human rights due diligence) into the world of business and of corporations. Yet, these approaches are gaining momentum, with measures like the UNGPs on business and human rights, an EU proposal for a sustainability Directive and legislative attempts in some countries – like France, Germany, and Indonesia.

The difficulties operate on both the conceptual level, and the level of practicality. Is it even justifiable to impose human rights obligations on corporations? Are not states supposed to be the ultimate protectors of human rights? The purpose of this chapter is as follows. First, to give a brief overview of the existing regulatory framework; second, to discuss obstacles concerning human rights due diligence for corporations; third, to introduce the proposal for a Directive from the EU. Finally, fourth, to consider the possibility that the study of cooperatives might shed some light on how human rights fare in the world of corporate power and enterprise.

## 4.2 Existing framework

The introduction of the concept of human rights due diligence into global governance happened through the UN, with *Protect Respect and Remedy: A Framework for Business and Human Rights (the Framework)* and the UNGPs. Both were the work of John Ruggie, who had been appointed as UN Special Representative of the Secretary General on Human Rights and Transnational Corporations and Other Business Enterprises. <sup>190</sup> The Framework operates on three pillars: state duty to protect human rights; a duty on business enterprises to respect

<sup>&</sup>lt;sup>190</sup> Ingrid Landau, 'Human rights due diligence and the risk of cosmetic compliance' (2019) 20 Melbourne Journal of International Law 221, 223.

human rights; and the need for victims to be provided with remedies. <sup>191</sup> The three pillars are also the operational basis for the UNGPs. <sup>192</sup>

The theme of human rights in business is current across the world. The EU has introduced the Conflict Minerals Regulation and the Non-Financial Reporting Directive, the Netherlands have enacted legislation on child labour due diligence, while Indonesia on a human rights certification process for fishing enterprises. Disclosure requirements are imposed in the US on certain companies through the Dodd-Frank Act; California is asking for transparency in supply chains for certain companies. <sup>193</sup>

In the UK, the CA 2006, s. 172, adopts the enlightened shareholder value, whereby the shareholder is expected to have concerns about social issues as well as profit. Under s. 172, directors of a company are required to consider, inter alia, the long-term impact of their decisions, high standards of business conduct, community and the environment, and fostering business relationships with suppliers, customers and others. 194

Further, the UK Modern Slavery Act 2015 requires a modern slavery statement signed by a director for commercial organisations with an annual turnover of 36 million pounds or more. Each year, all companies except small companies, are required by the CA 2006 to produce a Strategic Report. Quoted public companies must include "information about the company's impact on the environment, the company's employees and social, community and human rights issues". Also, the UK Corporate Governance Code and the Listing Rules require quoted public companies or companies seeking to enter the London Stock Exchange

<sup>&</sup>lt;sup>191</sup> Landau (n 190) 224.

<sup>&</sup>lt;sup>192</sup> John Gerard Ruggie and John F. Sherman, III, 'Adding human rights to the new *Lex Mercatoria:* the impact of the UN Guiding-Principles on business and human rights on commercial legal practice' (2015) 6 Journal of International Dispute Settlement 455, 456.

<sup>&</sup>lt;sup>193</sup> 'UN Human Rights "Issues Paper" on legislative proposals for mandatory human rights due diligence by companies' (United Nations Human Rights: Office of the High Commissioner 2020) 4-5. <sup>194</sup> Companies Act 2006, s 172.

<sup>&</sup>lt;sup>195</sup> UN Issues Paper (n 193) 5.

<sup>&</sup>lt;sup>196</sup> Companies Act 2006, s 414 A (1).

<sup>&</sup>lt;sup>197</sup> Companies Act 2006, s 414; Moore Stephens LLP, 'FRS 102 key themes and strategic report requirements' (Moore Stephens LLP, 2018) 2; Derek French, *Mayson, French & Ryan on Company Law* (34 edn, Oxford University Press 2017) 34.

to make a statement of how they apply the code principles. <sup>198</sup> These principles are explicit on the sustainability requirement. <sup>199</sup>

Legislation adopted recently in France, has introduced human rights due diligence in companies over a certain size. Annual vigilance plans must be produced and damages to victims are provided for.<sup>200</sup> Gabriela Quijano and Carlos Lopez have praised the French scheme, for imposing civil liability on non-compliant large companies.<sup>201</sup>

## 4.3 Which human rights?

The above legislative efforts refer to the enshrinement of specific human rights within company law. As Ruggie himself has noted, it is problematic to ask corporations to uphold the whole range of international human rights obligations. Should a clothing manufacturer and retailer have to find out if the supplier respects, apart from ILO principles, also the worker's right to education and right to freedom of expression and, if the supplier does not, give up the supplier? Say that the state in which the supplier operates has not built enough schools and actually the particular foreign state has never even thought of giving all citizens equal access to education. What is the supplier to do? Also, forbidding tattoos is potentially against freedom of expression: if the supplier is against tattooed workers must the corporation stop the association? Are only serious violations to matter, and what is a serious violation?

Ruggie agrees that to expect corporations to protect all human rights would add layers of difficulty.<sup>203</sup> As noted by George G. Brenkert, "what human rights are and what is a business's responsibility for human rights varies greatly among businesses as well as those with concerns to foster the ethics of business".<sup>204</sup> "[A]ttributing the same range of duties to

<sup>&</sup>lt;sup>198</sup> The Financial Reporting Council, 'The UK Corporate Governance Code' (The Financial Reporting Council Limited 2018) 2.

<sup>&</sup>lt;sup>199</sup> UK Corporate Governance Code (n 198) 4.

<sup>&</sup>lt;sup>200</sup> McCorquodale et al Theory and practice (n 5) 202.

<sup>&</sup>lt;sup>201</sup> Gabriela Quijano and Carlos Lopez, 'Rise of mandatory human rights due diligence: a beacon of hope or a double-edged sword?' 6 Business and Human Rights Journal (2021) 241, 244.

<sup>&</sup>lt;sup>202</sup> John Gerard Ruggie, 'Business and human rights: the evolving international agenda' (2007) 4 American Journal of International Law 819, 825.

<sup>&</sup>lt;sup>203</sup> Ruggie Evolving (n 202) 826.

<sup>&</sup>lt;sup>204</sup> George G Brenkert, 'Business and human rights: an overview' (2016) 1 Business and Human Rights Journal 277, 278.

corporations that currently apply to states ... would generate endless strategic gaming and legal wrangling on the part of governments alike".<sup>205</sup> Ruggie considers that businesses have the duty to respect those human rights they will actually impact.<sup>206</sup> However, an "area of uncertainty" as to a business's "specific responsibilities for human rights" seems inevitable, says Brenkert.<sup>207</sup>

Indeed, there may be broad agreement among member states as to the validity of those rights protected by the Charter of Fundamental Rights of the European Union, or the ECHR, the UN, the ILO and so forth. However, these rights are not held valid across the whole planet. Provided that a supplier or associate does not engage in child labour, and respects core rights such as right to life, to decent working conditions and to a decent remuneration, the question will be what other rights must be respected. Standards will, suggestively, need to be elaborated by the CJEU; liability for certain violations will need to be decided not automatically, but on a case-by-case basis.

# 4.4 Too general?

Another problem with human rights is that they are often drafted in language that is too broad. This may be done to cover as many situations as possible, or because of a general recognition of the relativity of human rights. States (the usual actor in any human rights regime) are given some leeway, called "a margin of appreciation".<sup>208</sup>

However, comments from Lord Briggs on equity<sup>209</sup> may well apply to human rights due diligence. Broad principles are expressed at "such a high level of generality" that they

<sup>&</sup>lt;sup>205</sup> Ruggie Evolving (n 202) 826

<sup>&</sup>lt;sup>206</sup> Brenkert (n 204) 293

<sup>&</sup>lt;sup>207</sup> Brenkert (n )204 304

<sup>&</sup>lt;sup>208</sup> The concept of the margin of appreciation has now been incorporated in the Convention: see Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention on Human Rights, as amended) (ECHR) Protocol 15; for the unfairness involved in applying the principle see Evans v UK (2006) 43 E.H.R.R. 21; for a defence see Dominick McGoldrick, 'A defence of the margin of appreciation and an argument for its application by the human rights committee' (2016) 65 International & Comparative Law Quarterly 21

<sup>&</sup>lt;sup>209</sup> Equity shares with human rights general principles like fairness, justice, protection of the weak &c. It can, therefore, be used as a fruitful ground for comparison.

can offer limited guidance. Such guidance is hardly useful "in the factually complicated world of real people, real events and real transactions".<sup>210</sup>

Indeed, the UNGPs have been criticised for being not specific enough: they are beset by "a lack of precision in the language of rights". The Proposal for a Directive on HRDD, to a large extent the subject of this dissertation, has also been criticised on the same ground: "the text of the Directive is for now imprecise and broadly formulated". Generality makes human rights tough to apply to the business world of profit and the discourses of financial success. Trade and commerce thrive on certainty. In a discussion of the principles of equity, Lord Briggs spoke of "the desirable certainty" in the world of commercial law. There is agreement among judges, that "equitable principles ... need to be kept from getting out of control in the market place". Any principles introducing morality in the business environment need to be clear and specific. The Companies prefer clear and certain rules, as McCorquodale's research has shown. Broad general statements about the desirability of moral principles are good, but they do not offer much guidance as to how these moral principles will operate and how human rights due diligence will be achieved. In fact, the pressures of the market economy are such that the only way to uphold moral standards is through legislation, Lorraine Talbot has argued.

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<sup>&</sup>lt;sup>210</sup> Lord Briggs, 'Equity in business' (The Denning Society Annual Lecture, Lincoln's Inn, London 2018) 2.

<sup>&</sup>lt;sup>211</sup> Lorraine Talbot, *Company Law* (Great debates in law series, Palgrave Macmillan 2014) 134. Also, Talbot argues that the UNGPs make the process of monitoring human rights for corporations "largely self-regulatory". Moreover, they push stakeholders into a role that is only marginal. "The Guiding Principles have ... enabled companies to be their own lawmaker [...]" (135).

<sup>&</sup>lt;sup>212</sup> Guido Ferrarini, 'Corporate sustainability due diligence and the shifting balance between soft law and hard law in the EU' (*Oxford Business Law Blog*, 22 April 2022) < <a href="https://blogs.law.ox.ac.uk/business-law-blog/blog/2022/04/corporate-sustainability-due-diligence-and-shifting-balance-between">https://blogs.law.ox.ac.uk/business-law-blog/blog/2022/04/corporate-sustainability-due-diligence-and-shifting-balance-between</a> accessed 30 August 2022. Ferrarini argues for a gradual and flexible approach to sustainability due diligence, an approach that will first apply to the corporations that are more likely to negatively impact human rights and the environment.

<sup>&</sup>lt;sup>213</sup> Lord Briggs (n 210) 1.

<sup>&</sup>lt;sup>214</sup> Lord Briggs (n 210) 33.

<sup>&</sup>lt;sup>215</sup> McCorquaodale (n 5) 223.

<sup>&</sup>lt;sup>216</sup> Adapting an idea from Lord Briggs, on p. 32.

<sup>&</sup>lt;sup>217</sup> Talbot Company Law (n 211) 161.

## 4.5 States are supposed to be responsible for human rights

Not only the content, but also the structure of a human rights regime make it difficult to fit in the business world. As Brigitte Hamm, Christian Scheper and Maike Drebes have pointed out, the basis of such a regime is the state. The state is both seen as the possible violator of human rights and as the principal protector: "private actors like corporations [have not been usually] considered as prime violators nor as holding a distinct responsibility". If a corporation violates human rights, it is the state that has the duty intervene to remedy the situation. Potentially, a victim must move in domestic courts and then internationally, to seek remedy against the state for not protecting him/her against the violation.

Hamm, Scheper and Drebes consider that a strong role for human rights in business contains two challenges. First, relegating human rights from far-reaching international obligations (a privileged position they have attained after centuries of human history) to the level of political and business options. The second challenge is a normative conflict. Economic institutions are based on liberalism and utilitarianism: less institutional control and the greatest good for the greatest number, not a concern for the whole of society. Political effort is necessary to turn human rights into a valid discourse in commerce and trade.<sup>219</sup>

A further complication arises when entities in a company's supply chain or a close associate violates human rights inside a state that is endorsing such violations. That is, when the foreign-based suppliers or associates exist in a foreign state with laws that expressly or impliedly breach human rights obligations. Ruggie's answer is that, although the UNGPs do not impose any new legal obligations on businesses, <sup>220</sup> when local law violates human rights, the international human rights obligations prevail. This may result in difficulties. The company will either have to abandon the supplier or associate altogether or urge it to undertake local law violations. The first option may lead a company to turn a blind eye to the human rights violation, while the second may result in business or legal trouble. <sup>222</sup>

<sup>&</sup>lt;sup>218</sup> Brigitte Hamm, Christian Scheper and Maike Drebes, 'Business, trade and human rights' in Anja Mihr and Mark Gibney (eds), *The Sage handbook of human rights* (volume 1, SAGE reference 2014) 376.

<sup>&</sup>lt;sup>219</sup> Hamm, Scheper and Drebes (n 218) 386.

<sup>&</sup>lt;sup>220</sup> Ruggie and Sherman Lex Mercatoria (n 192) 456.

<sup>&</sup>lt;sup>221</sup> Ruggie and Sherman Lex Mercatoria (n 192) 457.

<sup>&</sup>lt;sup>222</sup> Having to abandon the supplier/ associate or the supplier/ associate violating local law and dragging with it the company into legal complications.

## 4.6 Can companies be moral?

To be able to make a human rights judgment, one must possess the capacity to act morally, or at least hold a belief in certain basic principles and values. Are companies able to do that? Lord Briggs referred exactly to such conundrums when he spoke of the combined business drivers of "success, self-interest, wealth, winning and not getting caught".<sup>223</sup> In such a world, can companies be moral? It might be plainly unrealistic to try to introduce "the moral standards of the vicarage"<sup>224</sup> in corporate transactions.

A discussion on companies acting morally, says Denis G. Arnold, does not seek to make any radical claims concerning the "ontological status" of companies. That is, it does not seek to prove that they have a status that would permit them to bear moral duties. To consider whether companies can be moral is not to say that corporations are moral persons. What is investigated is the idea of "corporate moral agency". For Arnold, corporations are moral agents, "because they have internal decision structures comprised of human agents, including the ethical infrastructure of the firm, corporate intentions understood primarily as plans, and the capacity of reflective assessment of ... plans and practices". Further, companies must respect core human rights for social contract reasons: 227 "the legal status of corporations is ... designed to promote public goods" and, over the centuries, corporations have not been static. They have been adapting to changes in society. 228

Ability to act and perform a social function is also the basis of corporate responsibility for human rights under the UNGP. The Guiding Principles recognise "the role of business enterprises as specialized organs of society performing specialized functions, required to comply with all applicable laws and to respect human rights".<sup>229</sup>

<sup>&</sup>lt;sup>223</sup> Lord Briggs (n 210) 2, quoting Lord Sacks.

<sup>&</sup>lt;sup>224</sup> Lord Briggs (n 210) 2.

<sup>&</sup>lt;sup>225</sup> Denis G. Arnold, 'Corporations and human rights obligations' (2016) 1 Business and Human Rights Journal 255, 256.

<sup>&</sup>lt;sup>226</sup> Arnold (n 225) 262.

<sup>&</sup>lt;sup>227</sup> Arnold (n 225) 275.

<sup>&</sup>lt;sup>228</sup> Arnold (n 225) 264.

<sup>&</sup>lt;sup>229</sup> UNGPs (n 7) 1.

David Bilchitz bases the moral responsibility of companies on their capacity to affect the lives and the livelihoods of people. "Indeed, the fact that rights are concerned with protecting the fundamental interests of individuals implies logically that they must have binding consequences for all agents who have the capacity to impact upon them". Corporations and businesses are such agents. <sup>230</sup> After all, why shouldn't they be? Human rights obligations have been imposed on rebel groups and individuals. They can also be imposed on corporations, which have acquired "a status that is similar to states". <sup>231</sup> They may be held responsible for human rights responsibilities. Acting rationally within the social environment, businesses can also be moral actors or agents. <sup>232</sup>

# 4.7 Introducing the proposal for a Directive

Thus, the current EU proposal for a sustainability Directive has emerged from a context where there is no broad agreement about how and to what extent should human rights due diligence be implemented. In the consultation undertaken by the Commission, civil society considered that there is no adequate protection; large companies found human rights due diligence desirable but wished for rules that will ensure "legal certainty and ... a level playing field".<sup>233</sup>

The proposal introduces mandatory human rights and environmental due diligence as well as a duty for directors to oversee and implement this. The new rules apply, under Article 2 to three groups of companies: first, all EU limited liability companies with 500 plus

<sup>&</sup>lt;sup>230</sup> David Bilchitz, 'The necessity for a business and human rights treaty' (2016) 1 Business and Human Rights Journal 203, 206.

<sup>&</sup>lt;sup>231</sup> Brenkert (n 204) 289.

<sup>&</sup>lt;sup>232</sup> Brenkert (n 204) 290. The responsibility of corporations towards the community and the national economy are also discussed in relation to a seminal US case, *Paramount Communications v Time Inc*, in an article by Trevor S. Norwitz. A corporation can legitimately act not only in the interests of shareholders but also to protect the wider society and achieve social goals. See Trevor S. Norwitz, "The Metaphysics of time": A radical corporate vision' (1991) 46 The Business Lawyer 377, 385-386, 389-390.

<sup>&</sup>lt;sup>233</sup> Finally, in December 2020, the Council of the EU (the Council) called the Commission to launch an EU action plan on sustainable corporate governance and submit a proposal for an EU legal framework. Stefano Spinaci, 'Corporate sustainability due diligence: could value chains integrate human rights and environmental concerns?' (Briefing: EU legislation in progress, European Parliament 2022) 5.

employees and a net turnover worldwide of £150 million and above (Group 1); second, EU companies in defined sectors called "high impact", such as the clothing sector, with 250 plus employees and a net turnover worldwide of £40 million and above (Group 2); third, non-EU companies active in the EU with threshold turnovers as in Group 1 and 2. The proposal applies to operations, subsidiaries and value chains, that is, established business relationships, whether direct or indirect. The relevant human rights and environmental impacts are identified in an Annex.<sup>234</sup>

Adverse human rights impacts are those resulting from a violation of the enumerated human rights or a violation of a right not listed but protected in the legal instruments listed in the Annex. Adverse impacts need to be identified and stopped; companies should trace the effectiveness of their integrated due diligence policies and measures and publicly communicate on due diligence.<sup>235</sup>

## 4.8 Can companies be moral revisited

The Annex to the proposed Directive has done some work to answer one criticism as to the vagueness of human rights duties for corporations, for it contains the relevant list. There may, thus, be no need to settle philosophical matters like whether a corporation can be a moral person or a moral agent. A problem which, arguably, remains here, is that the list of protected rights is too wide. It is possible to say that the CJEU will be at some future point required to give further guidelines. For example, "freedom of thought, conscience and religion" is insisted upon, with practical implications like those raised in the discussion of freedom of education or expression above.

Despite disagreement as to the theoretical underpinnings of a moral approach to corporations, there seems to be general agreement on a corporation's duty to act with

<sup>&</sup>lt;sup>234</sup> 'Corporate sustainability due diligence' (Briefing: EU Legislation in Progress, European Parliament 2022) 6.

<sup>&</sup>lt;sup>235</sup> Michael Littenberg, Samantha Elliott, and Austin Bohn, 'A Q&A on the European Commission's proposed due diligence directive' (*Oxford Business Law Blog*, 10 May 2022) < <a href="https://blogs.law.ox.ac.uk/oblb">https://blogs.law.ox.ac.uk/oblb</a>> accessed 15 August 2022

<sup>&</sup>lt;sup>236</sup> Commission, 'Annex to the proposal for a Directive of the European Parliament and of the Council on corporate sustainability due diligence and amending Directive (EU) 2019/1937' COM (2022) 71 final, part 1, point 6, 1

integrity and show that it is working for the benefit of a wide range of stakeholders: "[c]ompanies do not exist in isolation". Good governance includes sustainable governance and only that can ensure "long-term sustainable success". <sup>237</sup> In fact, there are arguably at least three grounds for arguing that a company can act morally. Afterall, if, as Lord Templeman has said, companies possess "a conscience" then they must be able to act in a principled manner.

First, in relation to its officials. In a relevant discussion, French mentions that it is morally corrupting to restrict the lives of those who work for a corporation to one single purpose – that of maximising shareholder wealth. Corporate managers are not capable only of profit making. They are also capable of "taking moral and social decisions". <sup>239</sup>

Second, in relation to what J.E. Parkinson calls "the legitimacy of corporate power". Incorporation is a privilege granted by the law which can, in some respects, be described as expressing the democratic will of the public via its representatives. Corporations must give something back for this privilege. Companies, says Parkinson, are "social enterprises" and that is how they claim legitimacy. To make profits for the shareholders is a mechanism, but not an end in itself. The rules of company law serve the interests of society as well as the interests of the shareholders. The company is a public or social body.<sup>240</sup>

Third, it might also be mentioned that, since companies are recognised human rights holders, they might as well have a reciprocal duty to uphold human rights. Though corporations, by their nature, do not enjoy the full range of human rights, they are protected by charters and conventions in respect of rights such as a fair trial, freedom of expression, peaceful enjoyment of possessions, and the right to property. An example of the law enforcing a company's human rights is the case of *Bank Mellat v Her Majesty's Treasury (Respondent) (No. 1) and (No. 2)*. Here a decision of HM Treasury, taken through a closed material procedure, to stop Bank Mellat (on suspicion of some of its customers being involved in terrorist activity) from trading in markets was held to infringe the bank's human

<sup>&</sup>lt;sup>237</sup> Corporate Governance Code UK (n 198) 1.

<sup>&</sup>lt;sup>238</sup> Speaking in *Winkworth v Edward Baron Development Co Ltd* [1986], quoted in Sarah Worthington, *Sealy & Worthington's Text, Cases, & Materials in Company Law* (11 edn, Oxford University Press 2016) 368.

<sup>&</sup>lt;sup>239</sup> French (n 16) 31.

<sup>&</sup>lt;sup>240</sup> J.E. Parkinson, *Corporate power and responsibility: issues in the theory of Company Law* (A Clarendon Press Publication, Oxford University Press 1995) 23-24.

<sup>&</sup>lt;sup>241</sup> Worthington (n 15) 55.

right to a fair trial (Article 6 ECHR) and to enjoy its possessions in an unfettered manner (article 1 Protocol 1 ECHR). Business goodwill was held to be among the bank's "possessions". <sup>242</sup>

### 4.9 Conclusion

The chapter has explained the current legal and regulatory framework respecting business and human rights and has outlined some of the question marks. It has also introduced the present EU proposal for a sustainability Directive. Several concerns relating to a corporation's human rights liability have to do with the nature of the rights themselves – philosophical and metaphysical questions that remain unanswered, though they impact the drafting of sustainability rules and legislation. Others, however, relate to the nature and legitimacy of corporate power and the business environment. The next chapter, therefore, will consider whether cooperation (with its established links to human rights) might have anything to teach about entrepreneurship that might be of use to company law and the nature and purpose of companies.

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<sup>&</sup>lt;sup>242</sup> Bank Mellat (Appellant) v Her Majesty's Treasury (Respondent) (No.1) [2013] UKSC 38; Bank Mellat (Appellant) v Her Majesty's Treasury (Respondent) (No.2) [2013] UKSC 39. See for instance paragraph 32 of the first case and paragraphs 9, 19-20 of the second case.

## Chapter 5

# **Cooperatives and Companies: Concepts and Applications**

#### 5.1 Introduction

This chapter examines the extent to which cooperative principles may contribute to the implementation of human rights by company law. The argument of the chapter is that a major contribution from the cooperative movement is conceptual, for core company values are not incompatible with human rights schemes.

The chapter first outlines the differences between companies and cooperatives, then moves to areas of similarity that validate the use of the cooperative form to draw conclusions for the corporate form. It might as well be noted here that all conclusions in the chapter refer to the area of HRDD and do not extend to the ways companies deal with internal matters like the allocation of shares, conflict of interest, insider dealing and so on.

Moreover, concerning differences, the list is not meant to be exhaustive, for this is not the main subject of the chapter. The main purpose is to consider how cooperation may aid in the implementation of HRDD in company law. This chapter argues that cooperation can help produce a discourse that connects human rights to the economy and business enterprise, a discourse that can prove valuable for HRDD.

## 5.2 A world of difference?

The first impression given by a study of limited companies and cooperatives is how the two differ.

Some of those differences are listed by the ICA's Guidance Notes on the Co-operative principles. For example, in a cooperative, members have a dual role. They control the enterprise and are, at the same time, its beneficiaries.<sup>243</sup> This is the double-quality of the

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<sup>&</sup>lt;sup>243</sup> ICA Guidance (n 172) 20.

members, which connects to the cooperative's "mutual purpose". 244 In a company, members do not make use the enterprise. They are owners, but not users. 245

Notably, in the UK legislation, not having the object of making profits for payment of interest, dividends or bonuses to investors is what defines a cooperative society.<sup>246</sup> Cooperative or community benefit shares "have features which distinguish them from company shares"; for example, they remain at par value and do not give votes in relation to the number of shares held.<sup>247</sup>

The way capital moves in a cooperative is also antithetical to that of a limited company: "[c]apital paid by members is not money primarily invested to generate an investment return on capital, but is 'pooled capital' invested to deliver goods, services or employment needed by members at a fair price". Member control and local roots also help cooperatives avoid seeking profit at the expense of the community to which they belong.

However, as hinted by Lord Cozens-Hardy *In re Yenidje Tobacco Co Ltd* [1916], there is a "substance" in any enterprise that is not affected by form and is common to partnerships, cooperatives, and companies.<sup>249</sup> Besides, cooperatives are not totally altruistic,<sup>250</sup> they must survive in the market world possessing a dual character.<sup>251</sup> There is an area of commonality between companies and cooperatives.

## 5.3 Similarities: good faith and common purpose

Furthermore, company law is not devoid of concepts like good faith and fiduciary duty.

Though the fiduciary relationship is an elusive concept, directors are fiduciaries to the extent

<sup>&</sup>lt;sup>244</sup> Fici Essential (n 177) 151.

<sup>&</sup>lt;sup>245</sup> Fici Essential (n 177) 153.

<sup>&</sup>lt;sup>246</sup> Co-operative and Community Benefit Societies Act 2014 s 2(3).

<sup>&</sup>lt;sup>247</sup> Ian Snaith, 'United Kingdom' in Gemma Fajardo-Garcia and others (eds), *Principles of European Cooperative Law: principles, commentaries and national reports* (Intersentia 2018) 676.

<sup>&</sup>lt;sup>248</sup> ICA Guidance (n 172) 131.

<sup>&</sup>lt;sup>249</sup> Excerpt from the judgment in D.S. Ribbens, 'Quo vadis corporate personality and partnership: why not the incorporated partnership proper' (1982) 1982 Journal of South African Law 128, 134. <sup>250</sup> Fici Essential (n 177) 157.

<sup>&</sup>lt;sup>251</sup> Henry Guidelines (n 175) 1. Cooperatives have, in fact, proved quite resilient during the recent financial crisis: Henry Guidelines (n 175) 2.

that they are sometimes referred to as trustees, or commercial trustees, or quasi-trustees.<sup>252</sup> As fiduciaries, directors are expected to protect the interests of the company<sup>253</sup> and the duty is one of "undivided loyalty".<sup>254</sup>

The essence of a company is thus not unrelated to notions of a common purpose, confidence and trust. As shown by the case of *Ebrahimi v Westbourne Galleries*<sup>255</sup>, for instance, shareholders may owe equitable duties to other shareholders. The absence of a common goal may result in the court ordering the dissolution of the company, under powers given to it by the Companies Act. After being unfairly treated by his partners, Mr. Ebrahimi applied under section 210 of the Companies Act 1948 for Mr. Nazar and his son to purchase his shares or sell their shares to him as the court saw fit; or, alternatively, for the company to be wound up on the "just and equitable" ground under section 222 (f) of the same Act. The action, resolved in the House of Lords, considered the relationship between partnerships and companies. It also made clear that notions of good faith and common purpose apply to companies as well as to partnerships. The company had to be wound up because any ground of common purpose between the three shareholders had ceased to exist.

In *Ebrahimi*, the House of Lords held that "a limited company was more than a mere legal entity".<sup>258</sup> Though the peculiar character of the specific company played a role in the judgment, the truth is that the judgment enables the court to impose "equitable considerations" on legal rights, depending on the circumstances. Moreover, the court was prepared to recognize that the term "just and equitable" is not confined to instances of bad faith, as this would equate the interests of company with the majority.<sup>259</sup>

<sup>&</sup>lt;sup>252</sup> Andrew Keay, *Directors' duties* (2<sup>nd</sup> revised edn, Jordans 2014) 22-24

<sup>&</sup>lt;sup>253</sup> Jonathan Parker LJ in *Bhullar v Bhullar* [2003]; excerpt from the judgment in Worthington (n 15) 399.

<sup>&</sup>lt;sup>254</sup> Rimer LJ in *Allied Business and Financial Consultants Ltd v Shanahan* [2009] , excerpt from the judgment in Worthington (n 15) 406.

<sup>&</sup>lt;sup>255</sup>Ebrahimi appellant and Westbourne Galleries Ltd. and others respondents [1973] AC 360

<sup>&</sup>lt;sup>256</sup> Mohammad Rizal Salim, 'Relevance of partnership principles in company law – winding up on the "just and equitable" ground' (2001) 28 Journal of Malaysian and Comparative Law 169, 174

<sup>&</sup>lt;sup>257</sup> In *Ebrahimi*, a partnership was converted into a company. The company took over the business. The initial partners had been Mr. Nazar and Mr. Ebrahimi; then, Mr. Nazar also brought in his son. All three were directors, while the father and son were the majority shareholders. They failed to pay any dividends and, after some time, father and son passed an ordinary resolution to remove Mr. Ebrahimi as director (the articles entitled them to do so).

<sup>&</sup>lt;sup>258</sup> Ebrahimi judgment (n 255) 361.

<sup>&</sup>lt;sup>259</sup> Ebrahimi judgment (n 255) 362.

## 5.4 A world of similarity?

Apart from a core of shared values, there are further links. These refer to the past, present and future of the business enterprise, whether it is a corporation or a cooperative.

To begin with, in some parts of Europe cooperatives begun life as joint-stock enterprises. With Germany, France and Spain as case studies, Timothy W. Guinnane and Susana Martinez-Rodriguez show that,

in some countries, cooperatives organised themselves under the general incorporation statutes. More generally, the corporate form closely resembled what many cooperatives wanted for themselves: an enterprise form that had legal personality; limited liability for owners; and capital divided into shares such that the entity could exist in the face of changing membership. The essential *legal* similarity of the corporation and the cooperative will surprise those accustomed to thinking of cooperatives as the very opposite of the corporation. ... But at their heart, *both the corporation and the cooperative are vehicles for assembling capital and undertaking contracts* that do not depend on the enterprise having any particular set of investors.<sup>260</sup>

Cooperatives have roots in commercial organizations and commercial law; this is a fact that would not surprise any 19<sup>th</sup> century observer.<sup>261</sup>

Indeed, as Ian Snaith has noted, it was possible in the 19<sup>th</sup> century for a cooperative to register under the Joint Stock Companies Act 1844.<sup>262</sup> The definition of cooperatives as a form of company is common in a number of countries, including Switzerland, Germany, and

<sup>&</sup>lt;sup>260</sup> Timothy W. Guinnane and Susana Martinez-Rodriguez, 'Cooperatives before cooperative law: business law and cooperatives in Spain' (2011) 29 Journal of Iberian and Latin American Economic History 67, 70. Italics in "legal" original, the other italics mine.

<sup>&</sup>lt;sup>261</sup> Guinnane and Martinez-Rodriguez (n 260) 90.

<sup>&</sup>lt;sup>262</sup> Ian Snaith, 'Co-operative principles and co-operative law in the United Kingdom' (1996) Research paper 1996, 3 <a href="https://www.researchgate.net/publication/259570170\_Co-operative\_Principles\_and\_Co-operative\_Law\_in\_the\_United\_Kingdom">https://www.researchgate.net/publication/259570170\_Co-operative\_Principles\_and\_Co-operative\_Law\_in\_the\_United\_Kingdom</a> accessed 10 October 2022. Admittedly, however, this choice was unpopular.

Italy, as Efi Tziva has shown.<sup>263</sup> Did cooperatives start life as joint stock companies? Robert Owen, one of the founders of cooperativism might as well give the answer. A master or labourer who wishes to better his position might form with others "a partnership, or a joint stock company".<sup>264</sup>

Secondly, there are commonalities between the two forms of enterprise in the present. There are hybrid forms, for example the Community Interest Company in the UK. As its inspirer Stephen Lloyd has colourfully put it, the CIC injects company law with the DNA of community purpose. The CIC shares characteristics with cooperatives: the pursuit of public interest and an asset lock whereby payment of interest and distribution to members is subject to a cap. Moreover, in case a CIC closes down, the proceeds will be used for similar public interest purposes. Asset to the purpose of the purpo

Hybrid forms exist the other way round as well. The SCE has been described as a "hybrid legal form", for the SCE-R defines it as a company and allows for non-user members. 269 Moreover, according to Vasileios D. Kiantos, an SCE can be a commercial company if its main activities are commercial, because the SCE-R does not demand that an SCE be not a commercial company. This depends on the SCE's real seat: 270 the formation of an SCE is governed by the cooperation laws of the Member State where it has been registered. 271 The so-called New Generation Cooperatives exhibit some of the characteristics

<sup>&</sup>lt;sup>263</sup> Efi Tziva, *Η εταιρική συμμετοχή στο συνεταιρισμό και ειδικότερα τα δικαιώματα των συνεταίρων*. [Cooperative participation focusing on the rights of cooperators]. (Sakkoulas Publishing 1997) 35-36 <sup>264</sup> Owen speaking at the Third Cooperative Congress in London on the 23<sup>rd</sup> of April, 1832;

<sup>&#</sup>x27;Cooperation' (1832) Monthly Repository 521, 528.

<sup>&</sup>lt;sup>265</sup> Stephen Lloyd, 'Transcript: Creating the CIC' (2010) 35 Vermont Law Review 31, 33-36.

<sup>&</sup>lt;sup>266</sup> Strategy Unit Report, 'Private action, public benefit: a review of charities and the wider non-profit sector' (Cabinet Office 2002) 54-55.

<sup>&</sup>lt;sup>267</sup>Lloyd (n 265) 38; Ian Snaith, 'Recent reforms to corporate legal structures for social enterprise in the UK: opportunity or confusion?' (2007) 3 Social Enterprise Journal 20, 24; and also the brief section on the CICs in Paul L. Davies and Sarah Worthington, *Gower Principles of Modern Company Law* (10<sup>th</sup> edn, Sweet & Maxwell Ltd 2016).

<sup>&</sup>lt;sup>268</sup> Private Action, Public Benefit (n 266) 54-55.

<sup>&</sup>lt;sup>269</sup> Ruud C.J. Galle, 'The Societas Cooperativa Europea (SCE) and national cooperatives in comparative perspective' (2006) 3 European Company Law 255, 257.

<sup>&</sup>lt;sup>270</sup> Vasileios D. Kiantos, *Ο Ευρωπαϊκός Συνεταιρισμός*. [European Cooperation]. (Sakkoulas Publishing 2014) pp.3-6, chapter 1 Aa.

<sup>&</sup>lt;sup>271</sup> Lambros E. Kotsiris, *Ευρωπαϊκό Εμπορικό Δίκαιο* [European Commercial Law]. (Sakkoulas Publishing 2018) 1033.

of corporations, such as issuing preferred stock to non-members and the selling of shares.<sup>272</sup> If the articles of incorporation allow, shares might be sold to non-members.<sup>273</sup> The two forms we consider as "traditional" cooperatives and companies also share characteristics, the most important of which being limited liability and perpetual succession.<sup>274</sup>

Very much upon this point, Antonio Fici, in an elaborate piece<sup>275</sup> has mentioned that, in relation to asset partitioning, cooperative law operates like company law: it grants limited liability.<sup>276</sup> Cooperatives are for-profit entities, also like companies.<sup>277</sup> Concerning a firm's "ownership structure ... one may correctly conclude that investor-owned companies cannot be distinguished from cooperatives", with companies representing "a particular species of producer cooperatives".<sup>278</sup> If it is possible to "correctly" identify similarities in terms of assets and ownership, it is also possible to use some of the expertise accumulated by cooperatives in the area of human rights protection in mandatory HRDD for companies.

The common ground between the two entities has been elaborated further by Henry Hansmann<sup>279</sup> who finds it possible to say that, in legal terms,

the statutes under which business corporations are formed are simply more specialized versions of the more general cooperative ... statutes. In principle, there is no need to have a separate business corporation statute at all. Business corporations could just as well be organised under a well-drafted general cooperative corporation statute, just like other types of cooperatives.<sup>280</sup>

<sup>&</sup>lt;sup>272</sup> 'New Generation Cooperatives' (*Coop Mastery, The Ohio State University*) https://u.osu.edu/coopmastery/the-cooperative-model-2/new-generation-cooperatives/ Accessed 25 October 2022.

<sup>&</sup>lt;sup>273</sup> 'What are new generation cooperatives?' <a href="https://www.gov.mb.ca/jec/busdev/coop/pdf/rib01s63.pdf">https://www.gov.mb.ca/jec/busdev/coop/pdf/rib01s63.pdf</a> Accessed 25 October 2022, 5.

<sup>&</sup>lt;sup>274</sup> 'Differences between cooperatives and other enterprises' (*National Cooperative Business Association CLUSA International*, 4 June 2019) <a href="https://ncbaclusa.coop/blog/differences-between-cooperatives-and-corporations/">https://ncbaclusa.coop/blog/differences-between-cooperatives-and-corporations/</a>. accessed 25 October 2019.

<sup>&</sup>lt;sup>275</sup> Where he argues that the distinguishing feature of cooperative law is the cooperative purpose, that is the mutual purpose expressed in the three forms of workers', producers' and consumers' cooperative; Fici Essential (n 177) 151.

<sup>&</sup>lt;sup>276</sup>Fici Essential (n 177) 148.

<sup>&</sup>lt;sup>277</sup> Fici Essential (n 177) 150.

<sup>&</sup>lt;sup>278</sup> Fici Essential (n 177) 153.

<sup>&</sup>lt;sup>279</sup> This is not to argue that their positions are similar. Hansmann seems to focus more on the way cooperatives and companies are governed.

<sup>&</sup>lt;sup>280</sup> Hansmann Theory and practice (n 52) 388.

Corporation and the cooperative "are simply variations of the same blueprint". A particular constituency group gives up contractual rights "in return for a residual claim". Management works for the owners and tries to maximise the value of the residual claim. This is the structure of both cooperatives and corporations. As both Fici<sup>282</sup> and Hansmann<sup>283</sup> have written, corporations and cooperatives as "business entities" operate under the heading of organizational law – "comprising the bodies of law that govern standard legal entities" <sup>284</sup>.

The particular section of organizational law that is company law presently seems to be at a juncture where the lexicon of cooperatives is already in use, covertly if not overtly. It is now possible to speak of "stakeholder capitalism", where companies have a social and environmental mission, aiming to build a cleaner and fairer future. The UK Corporate Governance Code and the Financial Reporting Council (FRC) Governance Code recognise a purpose beyond profit". Profit with purpose", "creating positive impact", "the interests of the wider society", a "broader agenda" that will "integrate social impact". All these terms, bring the future of HRDD in company law close to the working of cooperatives.

In sum, cooperative law and company law have common ground in the form of core values, origins, hybrid forms, certain features, and function (such as asset partitioning, assembling capital, "the allocation of authority and earnings among participants of the firm" 289). Another shared element is, arguably, that nowadays, with human rights and environmental demands on the rise, company law is looking for ways to accommodate a social purpose and the needs of the community into the functioning of corporations. Company law is being asked to reformulate basic definitions and has been using terms and a form of discourse that could belong to cooperative law.

<sup>281</sup> Heath (n 53) 10-11.

<sup>&</sup>lt;sup>282</sup> Fici Essential (n 177) 148.

<sup>&</sup>lt;sup>283</sup> Hansmann and Kraakman (n 54) 807.

<sup>&</sup>lt;sup>284</sup> Hansmann and Kraakman (n 54) 807; see also, Holger Bonus, 'The cooperative association as a business enterprise: a study in the economics of transactions' (1986) 142 Journal of Institutional and Theoretical Economics JITE 310, 310-311.

<sup>&</sup>lt;sup>285</sup> Business in the Community, 'Is legislation the best way to achieve stakeholder capitalism?' (Report, The Prince's Responsible Business Network 2022) 1-3.

<sup>&</sup>lt;sup>286</sup> Business in the Community (n 285) 2.

<sup>&</sup>lt;sup>287</sup> Regenerative Business Working Group, 'Amending UK Company Law for a regenerative economy' (The Institute of Directors Centre for Corporate Governance 2021) 4.

<sup>&</sup>lt;sup>288</sup> Regenerative Business (n 287) 11.

<sup>&</sup>lt;sup>289</sup> Hansmann and Kraakman Asset partitioning (n 54) 807.

To repeat, drawing resources from cooperative law to work on company law is done, for the purposes of this dissertation, only in relation to human rights and the prospect of mandatory HRDD. On this issue, and this issue alone, cooperatives may indicate ways to resolve resulting tensions; this is especially so on the conceptual level.

## 5.5 Conceptual contribution of cooperatives to HRDD in company law

Fici has hinted at the conceptual link between companies and cooperatives when he said: "conceptually companies pertain to the category of cooperatives" and vice versa. The "cooperative is the general conceptual category of patron-owned firms". <sup>290</sup> Business corporations, says Hansmann, may be defined as capital cooperatives. This is so because "they are owned collectively by the persons who supply capital to the organisation." <sup>291</sup> The cooperative form is the organising principle behind nearly all enterprise. <sup>292</sup>

The description of companies as capital cooperatives has implications for HRDD, for HRDD does seem to call for a redefinition of the term "capital". If maximization of moneyprofit remains the norm, then obviously any human rights action that will lower profit is undesirable. Consequently, there must be a widening of the notion of profit to cover for gains in terms of human rights success. Cooperatives have done considerable work on the issue already. In the Guidance Notes on the cooperative principles, it is mentioned that capital in a cooperative "is the servant, not the master, of the enterprise […]". Capital is in the "service of people and labour", not the other way round. <sup>293</sup>

This is not to say that companies should lose the flexibility they have in the way they acquire capital, for example through various types of shares, or their power to create profit or generate wealth. Simply, it will be considered legitimate to divert, or be ready to sacrifice, an amount of capital in the service of upholding human rights. J.E. Parkinson saw this as early

<sup>&</sup>lt;sup>290</sup> Fici Essential (n 177) 153

<sup>&</sup>lt;sup>291</sup> Henry Hansmann, 'All firms are cooperatives – and so are governments' (2013) 2 Journal of Entrepreneurial and Organizational Diversity 1, 2; Fici also mentions the term in Essential (n 177) 148.

<sup>&</sup>lt;sup>292</sup> Hansmann All firms (n 291) 2

<sup>&</sup>lt;sup>293</sup> ICA Guidance (n 172) 30

as 1998, when he said that corporate social responsibility means placing the interests of third parties over maximum profits, but only in "appropriate cases. In doing this, a relaxation of the obligation of management to operate the business in the interests of the shareholders would be required [...]". Proper mechanisms would need to be designed to allow the public interest to carry weight in decision-making".<sup>294</sup>

Human rights, consequently, acquire a financial aspect; they are a form of capital. Pierre Bourdieu has spoken of physical capital (a healthy body) and cultural capital (skills that have value within a specific culture). It might also be possible to speak of human rights capital, a translation of human rights into value that circulates within a company's finances. In other words, HRDD may be seen as a valid form of *investment*. The need for a conceptual shift in core company law concepts has been identified by Beate Sjafjell: to effect the "overarching purpose" of creating sustainable value and protecting human rights, "EU company law should redefine the purpose of the company [...]". Furthermore, the way this purpose can be put in practice is by a redefinition of the duties of the board. Conceptual redefinitions must occur before HRDD is properly put into effect.

The fruitful relationship between human rights and economics, in terms of vocabulary and in terms of reciprocity, has been examined by Dan Seymour and Jonathan Pincus. The vocabularies of the two disciplines –human rights theory and economics—are both specialized and technical yet vary. For economists, development means an individual's command over goods and services, while for human rights theory development means an individual's ability to realise his or her social, political, cultural, and civil rights.<sup>298</sup> Economists emphasise property rights,<sup>299</sup> while for human rights theorists rights cannot be

<sup>&</sup>lt;sup>294</sup> Parkinson (n 240) 261

<sup>&</sup>lt;sup>295</sup> See, for example, Pierre Bourdieu, 'The forms of capital' in J.G. Richardson (ed), *Handbook of theory and research for the sociology of education* (Greenwood Press 1986)

<sup>&</sup>lt;sup>296</sup> The value of CICs and social enterprise companies and their ability to act as a form of brand and generate profits has been excellently discussed by Michelle Cho (see, for example 169-170, in Michelle Cho, 'Benefit corporations in the Unites States and Community Interest Companies in the United Kingdom: does social enterprise actually work' (2016) 37 Northwestern Journal of International Law & Business 149). The success of brands like Fairtrade, also reveals the extent to which the public now values and will pay for goods and services that respect human rights.

<sup>&</sup>lt;sup>297</sup> Beate Sjafjell, 'How company law has failed human rights – and what to do about it' (2020) 5 Business and Human Rights 179, 196.

<sup>&</sup>lt;sup>298</sup> Dan Seymour and Jonathan Pincus, 'Human rights and economics: the conceptual basis for their complementarity' (2008) 26 Development Policy Review 387, 387.

<sup>&</sup>lt;sup>299</sup> Seymour and Pincus (n 298) 394-400.

ranked.<sup>300</sup> Yet, there is common ground between the disciplines. Both focus on the autonomy of the individual and approach social questions through individual circumstances, they both try to understand the development process. The disciplines are not incompatible.<sup>301</sup> Seymour and Pincus point out that human rights theory can help economics, in areas such as public policy, where economic concepts are poor in vocabulary; also in areas where economics has no suitable framework, like HRDD: "exploitative child labour might be growth promoting, but most people consider it wrong, regardless of its economic consequences".<sup>302</sup>

Arguably, this reciprocity can be extended, so that human rights theory might be translated into terms suitable for economics. Success in HRDD might be seen as a form of profit; a cooperative idea (see Chapter 3). Abdullahi A. An Na'im has spoken of the ability of human rights to reach into many disciplines, in effect of the inter-disciplinarity of human rights, when he said: "[a] legal approach to human rights cannot adequately analyse the ethical, political, sociological, economic and anthropological dimensions of human rights". The "social practice of human rights" can be illuminated by the social sciences. 303

The development of cooperation, arguably, establishes a connecting discourse between human rights, economics and the business enterprise, one that is now finding its way into company law through the legislative initiatives discussed in Chapter 4 and the Proposal for a sustainability Directive. Buckley has spoken of the need for companies, in order to achieve sustainability, to "broaden notions of what constitutes the company interest" so that directors' decisions for the common good would be legitimate and defensible. Ooperative principles, arising out of the need for survival of disadvantaged groups, and Robert Owen's idea that human labour must serve human needs, hend themselves well to the challenge of establishing a discourse that will successfully insert the terminology of human rights into the world of profit and competition. Cooperation can aid in the protection and implementation of human rights in company law by the groundwork it has carried out on basic concepts and

<sup>300</sup> Seymour and Pincus (n 298) 397.

<sup>&</sup>lt;sup>301</sup> Seymour and Pincus (n 298) 388-389.

<sup>&</sup>lt;sup>302</sup> Seymour and Pincus (n 298) 401.

<sup>&</sup>lt;sup>303</sup> Abdullahi A. An-Na'im, 'The interdisciplinarity of human rights' in Conor Gearty and Costas Douzinas (eds), *Human Rights Law* (Cambridge Companion series, Cambridge University Press 2012) 109.

<sup>&</sup>lt;sup>304</sup> Buckley (n 25) 26, 33, 48.

<sup>&</sup>lt;sup>305</sup> Kassavetes (n 11) 1-4.

terms. These terms include notions like profit, capital and success, but also corresponding to the needs of the community (social goals).

Such a daring approach would, arguably, be in line with Lorraine Talbot's proposals: to create a "responsible economy, one that distributes wealth fairly", <sup>306</sup> and give company "greater autonomy from the demands of shareholders and markets for profit maximization" what is needed is a change in corporate governance that will "ensure more responsible outcomes" for capitalism. Talbot's proposed reforms are practical (including reforms to executive pay, and linking executive pay to social and environmental factors). <sup>309</sup> The reforms proposed here are on the level of a change in the theoretical bases of the workings of capitalism within a company.

## 5.6 Cooperation, HRDD and the needs of the community

Cooperatives have always considered investment in people to be an appropriate goal of enterprise, as explained in Chapter 2. Nearly two hundred years ago, Charles Dickens described how investment in education returns profit to society in a speech at the Liverpool Mechanics' Institution on February 26, 1844. The passage aptly uses the language of finance and investment. Commending the institution for its library holding 11,000 volumes, 310 Dickens remarked: "[e]very man who has felt the advantages of, or has received improvement in this place, carries its benefits into the society in which he moves, and puts them out at compound interest; and what the blessed sum may be at last, no man can tell". 311

Mechanics' institutes, as self-help organisations, developed in relation to the cooperative system. 312 Cooperatives invested capital to build reading rooms and libraries, and this might be one way in which companies and corporations will exert positive influence in any community, foreign or local. Having ensured that workers in the supply chains work

<sup>&</sup>lt;sup>306</sup> Talbot More responsible (n 32) 36.

<sup>&</sup>lt;sup>307</sup> Talbot More responsible (n 32) 28.

<sup>&</sup>lt;sup>308</sup> Talbot More responsible (n 32) 1.

<sup>&</sup>lt;sup>309</sup> See also the Introduction to this dissertation.

<sup>&</sup>lt;sup>310</sup> Charles Dickens, *Speeches: literary and social* (reprint of older book, Kessinger Publishing) 21

<sup>&</sup>lt;sup>311</sup> Dickens *Speeches* (n 97 and 310) 22

<sup>&</sup>lt;sup>312</sup> Cooperators supported their founding. ICA Guidance (n 172) 57

within ILO established frameworks money can be donated to create a reading-room and a lending library. Josiah Ober, in a study of the economic rise of classic Greece, considers the accumulation of useful knowledge to be part of financial development.<sup>313</sup>

At the same time, cooperatives suggest that every community is different. As a result, its needs are different, and the human rights concerns that arise in each community must differ too. HRDD might do well to remain sensitive on this point: there are simply too many aspects of human rights that need protection, and it may not be possible for all companies to be mindful of all human rights norms all of the time. Thomas Donaldson rightly points out that "corporations might differ to the [human rights] obligations they possess". Some have greater responsibilities than others. Individuals are each expected to respect all the human rights of other individuals. Yet, the one-fits-all policy must not be applied to corporations.

Cooperatives adjust themselves to the requirements of their specific communities and have done so with considerable success since the nineteenth century. They have been created to correspond to differing needs, from housing to nursery-services and from Internet connection to banking. This suggests that approaches supporting the common good must be rooted to the level of the specific and the concrete. Rather than imposing wide human rights obligations, cooperation suggests that each company large enough to apply HRDD must investigate the needs of the community or communities in which it operates. This way, it will know which human rights are more in danger of violation.

Cooperative practices can, therefore, aid a company in the risk assessment for HRDD; a company can determine the needs of a community in the manner carried out by cooperatives (or look to local cooperatives for guidance) and calculate the human rights risk, that is, identify "the actual and potential impacts on the human rights of stakeholders". The CIC is, suggestively, already working on such a principle – it has created the notion of the

<sup>&</sup>lt;sup>313</sup> Josiah Ober, *The Rise and Fall of Classical Greece* (μετάφραση Μιχάλης Λαλιώτης, The Princeton History of the Ancient World series, Εκδόσεις Δώμα 2020) 64; also in footnote 56.

<sup>&</sup>lt;sup>314</sup> Thomas Donaldson, 'Intrinsic values and human rights: corporate duties depend on industry values' (2022) 7 Business and Human Rights Journal 189, 194.

<sup>&</sup>lt;sup>315</sup> Donaldson (n 314) 189.

<sup>&</sup>lt;sup>316</sup> Chiara Macchi, *Business, human rights and the environment: the evolving agenda* (Springer – Asser Press 2022) 92.

"social entrepreneur", who looks forward to the production of "social goods" and combines trading with a social purpose. 317

### 5.7 Conclusion

Hagen Henry has called for an end to "the companisation of cooperatives" (28).<sup>318</sup> Contrariwise, the "cooperativisation" of company law in the field of HRDD might prove beneficial. This chapter has suggested that, on the conceptual level, cooperation can act as a useful tool for a revisiting of terms. It can contribute to an enhancement of the lexicon of company law that will promote HRDD and tilt the balance of the debate on the appropriateness of HRDD in company law in favour of human rights.

Therefore, the next chapter will turn to the most current EU articulation of HRDD in legislative form – the proposal for a sustainability Directive—and examine further ways in which cooperative principles can act as a springboard for the role of HRDD in the working of corporations but also ways in which they cannot.

<sup>317</sup> Lloyd (n 265) 32

<sup>&</sup>lt;sup>318</sup> Henry Guidelines (n 175) 28. See also Fici Essential (n 177) 149. Though Fici does not refer to "companization" as such, he speaks of the continuing need for the existence of a separate cooperative law, that will protect the special purpose of cooperatives.

## Chapter 6

# **Cooperatives and Companies: Framing Principles, Unresolved Questions**

#### 6.1 Introduction

On the 23<sup>rd</sup> of February 2022 the European Commission published its proposal for a corporate sustainability directive, aiming to make HRDD mandatory for specific companies. The proposal is the result of discussion and consultation and is intended to work in synergy with a Corporate Sustainability Reporting Directive (CSRD) proposal. In turn, the CSRD will enhance the already existing Non-Financial Reporting Directive (NFRD). Indeed, a human rights review of the NFRD expressly stated that the one thing needed after the UNGPs and the NFRD was "a legislative duty to undertake human rights due diligence". <sup>319</sup>

In this chapter, there is first a brief discussion of the basic provisions of the proposal. Then, the chapter will suggest how cooperative principles may be used to alleviate an important weak point, that which refers to the human rights to be protected under the proposal. The second and third sections of the chapter will point out areas where improvement will be more appropriately done by amending the proposal by resort to company law.

## 6.2 Basic Elements of the Directive Proposal

The Directive proposal is a welcome development in an area where the need for legislative intervention was much needed.<sup>320</sup>

As explained in Recital 27, companies covered by the Directive will need to "integrate due diligence into corporate policies, identify, prevent and mitigate as well as bring to an end and minimise the extent of potential and actual adverse human rights and

<sup>&</sup>lt;sup>319</sup> Commission, 'Proposal for a Directive of the European Parliament and of the Council on Corporate Sustainability Due Diligence and amending Directive (EU) 2019/1937' COM (2022) 71 final, pp. 3-4; also in footnote 4.

<sup>&</sup>lt;sup>320</sup> ECCJ, 'European Commission's proposal for a directive on Corporate Sustainability Due Diligence: A comprehensive analysis; (Legal Brief, European Coalition for Corporate Justice 2022) 3.

environmental impacts [...]".<sup>321</sup> The "due diligence policy" should contain a "code of conduct" and "a description of the company's approach" and "a description of the processes put in place to implement due diligence, including the measures taken to verify compliance".<sup>322</sup> The policy and complaints procedure is elaborated upon in various proposal articles, such as 7, 8 and 9.<sup>323</sup>

A company covered by the Directive will bear responsibility for its own actions, those of its subsidiaries and, "where related to their value chains [for the adverse human rights and environmental impacts of] their established business relationships".<sup>324</sup>

Article 22 establishes civil liability for companies failing to comply with the Directive or identify, mitigate and bring to an end adverse impacts.<sup>325</sup> Importantly, Article 25 makes sustainability also a part of the directors' duty of care, and in particular "their duty to act in the best interests of the company". The set up and overseeing of due diligence is the responsibility of directors.<sup>326</sup>

The EU succinctly explains the way the new rules will be enforced. Apart from civil liability, there will be administrative supervision:

Member States will designate an authority to supervise and impose ... effective ... sanctions. ... At European level, the Commission will set up a European Network of supervisory Authorities that will bring together representatives of the national bodies to ensure a coordinated approach.<sup>327</sup>

The rules are contained in Articles 17 and 21 of the Directive proposal.

<sup>&</sup>lt;sup>321</sup> Directive Proposal (n 319) 36; also Article 4, p. 54.

<sup>&</sup>lt;sup>322</sup> Directive Proposal (n 319) 36, Recital 28. Also Article 5, p. 54.

<sup>&</sup>lt;sup>323</sup> Directive Proposal (n 319) 55-56, 58.

<sup>&</sup>lt;sup>324</sup> Directive Proposal (n 319) 6(1).

<sup>&</sup>lt;sup>325</sup> Directive Proposal (n 319) 22(1)(a)(b).

<sup>&</sup>lt;sup>326</sup> Directive Proposal (n 319) Article 26.

<sup>327 &#</sup>x27;Corporate sustainability due diligence' (*European Commission*, 2022) <a href="https://ec.europa.eu/info/business-economy-euro/doing-business-eu/corporate-sustainability-due-diligence">https://ec.europa.eu/info/business-economy-euro/doing-business-eu/corporate-sustainability-due-diligence</a> accessed 10 October 2022.

A serious form of criticism against the Directive proposal concerns the way it has defined the human rights to be protected<sup>328</sup>. Gian Domenico Mosco and Raffaele Felicetti point out that the mechanism of the "many international conventions" that applies "does not provide legal certainty". Companies could eventually become "prisoners of the complications and uncertainties of international conventions".<sup>329</sup>

Significantly, the United Nations concurs in this. The Annex, says the UN Feedback on the Directive proposal, is at odds with the UNGPs, which require that the rights under the International Bill of Rights and the ILO's Declaration on Fundamental Principles and Rights at Work be included.<sup>330</sup> The ECCJ has also noted the failure to include certain basic ILO protected rights, such as those contained in "the ILO Convention 190 on violence and harassment in the world of work", "the relevant ILO instruments on occupational safety and health" and the failure to guarantee the "right to a living income". The ECCJ has concluded that the list in the Annex is "far from comprehensive". <sup>332</sup>

On the matter of the Annex, the United Nations has, notably, recommended that the proposal "[a]void the use of selective lists of standards which [risk becoming outdated]. Instead, provide for the incorporation of new standards into the mandatory regime in other appropriate ways, including through the issuance of authoritative guidance". 333

This recommendation is worth pursuing and can be put into effect by considering how cooperatives have managed to guide themselves in relation to, inter alia, human rights standards by a set of established principles.

<sup>&</sup>lt;sup>328</sup> Some of these criticisms apply to the environmental concerns as well. However, these are not the subject of the dissertation.

Gian Domenico Mosco and Raffaele Felicetti, 'The EU's Corporate Sustainability Due Diligence Directive: An Excessively Diligent Proposal' (*European Business Law Blog*, 7 September 2022) <a href="https://blogs.law.ox.ac.uk/blog-post/2022/09/eus-corporate-sustainability-due-diligence-directive-excessively-diligent">https://blogs.law.ox.ac.uk/blog-post/2022/09/eus-corporate-sustainability-due-diligence-directive-excessively-diligent</a> accessed 10 October 2022.

<sup>&</sup>lt;sup>330</sup> OHCHR, 'OHCHR Feedback on the Proposal for a Directive of the European Parliament and of the Council on Corporate Sustainability Due Diligence' (Office of the High Commissioner for Human Rights, United Nations Human Rights 2022) 5.

<sup>&</sup>lt;sup>331</sup> ECCJ Legal Brief (n 320) 8.

<sup>&</sup>lt;sup>332</sup> ECCJ Legal Brief (n 320) 9.

<sup>&</sup>lt;sup>333</sup> ECCJ Legal Brief (n 320) 6.

Rather than resorting to an Annex, that will feature a particularly long list of human rights treaties and documents, all of them binding, it might be easier to create a binding set of corporate principles. The list need not be very long; after all, the European Convention on Human Rights, one of the most powerful human rights treaties, is not particularly long either.

One of the corporate principles could be the adoption of ILO standards, another a statement against gender discrimination (need to be gender sensitive also recommended by the ECCJ).<sup>334</sup> The statement on gender policies may encompass equal pay, maternity leave and protection from harassment.

An examination of the set of cooperative principles as these are outlined by the ICA, indicates that cooperatives use them to define, in an ethical manner, three kinds of relationship. First, internal arrangements: principles 1 (voluntary and open membership), 2 (democratic member control), and 3 (member economic participation). Second, relationships with other cooperatives or other business entities: principles 4 (autonomy and independence) and 6 (cooperation among cooperatives). Third, relationship with the community: principle 7. Cooperatives work for the sustainable development of their communities.

In a similar manner, the Directive proposal could suggestively formulate the "new standards" recommended by the United Nations, structuring them according to stakeholder or theme, for example, internal matters like duties to shareholders and non-discrimination concerning employees, matters concerning the value chain, and principles in relation to the community and other stakeholders. There could be a broader principle, that can address the need for a redefined company purpose identified by Beate Sjafjell (see previous chapter). This broader principle could adopt basic human rights, ILO requirements and any other rights that may be relevant to the community or communities within which the specific company works or may work in the future. As a result, the company will be asked to inquire into specific human rights risks that may exist in a new context (see discussion in chapter 5).

In the *Preface* to the ICA *Guidance Notes*, Jean-Louis Bancel has explained that the seven cooperative principles are not rigid rules to be followed; they are "sound ethical principles to be applied with vision and proportionally" according to context and particularities.<sup>335</sup> They form, in other words, a living instrument. Arguably, the standards to

<sup>&</sup>lt;sup>334</sup> ECCJ Legal Brief (n 320) 12.

<sup>&</sup>lt;sup>335</sup>Jean-Louis Bancel, 'Preface' in *International Cooperative Alliance: Guidance Notes to the Cooperative Principles* (International Cooperative Alliance 2015) xi.

be introduced by the Directive proposal should be drafted in the same spirit, using vocabulary that will make them clear yet adaptable and able to cover a variety of new needs and situations. Such a sum of principles or standards would create legal certainty and a level playing field, as they would gradually become the point of reference according to which companies would create their HRDD policies and direct their actions.

To argue that corporations might benefit from some of the methods employed by cooperatives in relation to how they respond to human rights and sustainability requirements, is not to argue that corporations should become cooperatives. Sjafjell is also quick to stress this point concerning her ideas on redrafting the purpose of companies as being to create sustainable value. 336 Profit remains an intrinsic element of European business and its distribution will not change. What can be subject to change is a definition of the company's purpose, to which will be added binding human rights standards. Such an approach is not incompatible with company law; in the UK, the Institute of Directors Centre for Corporate Governance endorses the Better Business Act proposal to revise s. 172 of the Companies Act 2006 (provision for the "enlightened shareholder value) in order to acknowledge "profit, people and planet" as corporate purpose. Under the amended s. 172, directors will have a duty to promote the purpose of the company and must have regard to considerations such as the need to act fairly and the impact of the company's actions on the community and the environment. 337

In sum, needs that have arisen concerning the insertion of HRDD in company law point towards notions and practices that have already been adopted by cooperatives for decades. Examples are the need to articulate a company purpose that must include protecting the interests of the community and to establish provisions for the protection of workers. Cooperatives have been able to successfully navigate entrepreneurship, rights and the requirement to make profit. The two types of entity (company/corporation and cooperative) are separate. Yet, this is a point in the history of company law where parts of the vocabulary and terminology surrounding companies have started to sound similar to corresponding vocabulary and terms surrounding cooperation. As a result, the former type of entity may be said to be able to benefit from the practical experience of the latter.

<sup>&</sup>lt;sup>336</sup> Beate Sjafjell, "Sustainable value creation within planetary boundaries – reforming corporate purpose and duties of the corporate board" (2020) 12 Sustainability 1, 6.

<sup>&</sup>lt;sup>337</sup> Regenerative Business Working Group, 'Amending UK Company Law for a Regenerative Economy' (Report, The Institute of Directors Centre for Corporate Governance 2021) 15-16.

## 6.4 Questions left unanswered: brief review

Cooperation can, then, arguably, prove a valuable resource for company law to use to find ways to endorse mandatory HRDD effectively. There are, however, questions concerning the new Directive where cooperation does not seem too capable of giving answers. The answers will need to be given by recourse to company law by the legislator or, ultimately, by the CJEU.

The Directive proposal has been, for instance, targeted for its narrow scope concerning the companies covered. There is the idea that the Directive, once approved, should apply to all companies. HRDD must be made universal.<sup>338</sup> There is also a major practical difficulty with the distinction between larger companies covered by the Directive and smaller which are not. It will be in practice complicated for Member States to implement one regime for the directors of the large companies group and another for those of the smaller companies group.<sup>339</sup>

Other criticism suggests that the Directive will have a negative impact on SMEs that work with larger companies; indirectly, SMEs will need to comply with HRDD as well. Also, that by outlining a list of exhaustive (rather than indicative) list of due diligence measures confined to the company's own operations the Directive proposal risks a tick-box approach.<sup>340</sup>

Moreover, the established business relationship is not defined.<sup>341</sup> Limiting the scope of HRDD to established business relationships is counter to international standards; all elements of the value chain must be covered<sup>342</sup> including direct suppliers.<sup>343</sup> The limitation of

<sup>&</sup>lt;sup>338</sup> Kenneth Haar and Vicky Cann, 'Inside Job: how business lobbyists used the Commission's scrutiny procedures to weaken human rights and environmental legislation' (Research by Corporate Europe Observatory, BUND, Corporate Europe Observatory and Friends of the Earth Europe 2022) 7. <sup>339</sup> Federica Agostini and Michele Corgatelli, 'Article 25 of the Proposal for a Directive on Corporate Sustainability Due Diligence: enlightened shareholder value or pluralist approach?' (2022) 19 Company Law Journal 92, 97.

<sup>&</sup>lt;sup>340</sup> Christopher Patz, 'The EU's draft Corporate Sustainability Due Diligence Directive: a first assessment' (2022) 7 Business and Human Rights Journal 291, 292.

<sup>&</sup>lt;sup>341</sup> Patz (n 340) 292; Inside Job (n 338) 4.

<sup>&</sup>lt;sup>342</sup> Shift Project Ltd, 'The EU Commission's Proposal for a Corporate Sustainability Due Diligence Directive' (Shift's Analysis, Shift Project Ltd 2022) 1.

<sup>&</sup>lt;sup>343</sup> Inside Job (n 338) 36.

established business relationship is creating "legal uncertainty", says Anne Lafarre. The contract criterion (with whom a company has the most contracts) is too lenient.<sup>344</sup>

Other drawbacks identified cover a variety of points. Supervision must be done by an EU body and not national authorities.<sup>345</sup> The several exceptions for the financial sector contained in the proposal do not align with the UNGDPs.<sup>346</sup> There is no legal definition of who is a protected person in terms of victimhood and no legal criteria by which to establish a violation.<sup>347</sup> The most important, or at least the most discussed, type of criticism, however, seems to be the Directive's impact on directors' duties.

# 6.5 Questions left unanswered: directors' duties

The way directors' duties have been enhanced by the proposal for a Directive is a matter of concern.

For instance, Federica Agostini has argued that the Directive does not define what the company's interest is 348 and has formulated directors' duties so vaguely that its overall value is merely symbolic. Mosco and Felicetti believe that the duty of care imposed on directors is ineffective and dangerous, creating a form of directors' "hyper-liability". Do we need additional directors' duties? Asks Lafarre. The board's role must be clarified; Article 25 is vaguely formulated. In its position on a mandatory due diligence Directive in 2020, the H&M Group had emphasised the need for practical reasonableness so that the scope of any liability

<sup>&</sup>lt;sup>344</sup> Anne Lafarre, 'Mandatory corporate sustainability due diligence in Europe: the way forward' (*Oxford Business Law Blog*, 21 April 2022) < <a href="https://blogs.law.ox.ac.uk/business-law-blog/blog/2022/04/mandatory-corporate-sustainability-due-diligence-europe-way-forward">https://blogs.law.ox.ac.uk/business-law-blog/blog/2022/04/mandatory-corporate-sustainability-due-diligence-europe-way-forward</a> accessed 1 August 2022.

<sup>&</sup>lt;sup>345</sup> Professional Training for Lawyers & Barristers in the UN Guiding Principles in Business & Human Rights Working Group, 'Submission to the EU on the Regulation on Mandatory Human Rights and Environmental Due Diligence' (Professional Training for Lawyers & Barristers in the UN Guiding Principles in Business & Human Rights Working Group 2022) 3,4.

<sup>&</sup>lt;sup>346</sup> Shift's Analysis (n 342) 2.

<sup>&</sup>lt;sup>347</sup> United Nations Feedback (n 330) 5.

<sup>&</sup>lt;sup>348</sup> Agostini and Corgatelli (n 339) 96,97.

<sup>&</sup>lt;sup>349</sup> Agostini and Corgatelli (n 339) 99.

<sup>&</sup>lt;sup>350</sup> Mosco and Felicetti (n 329).

<sup>&</sup>lt;sup>351</sup> Lafarre (n 344).

should be reasonable<sup>352</sup> with the different actors' roles, including the governments' roles, being clearly defined: "one company cannot be held accountable for lack of or slow impact when tackling complex topics in challenging environments". <sup>353</sup>

Another line of thought goes that judicial enforcement of directors' duties is generally not desirable, due to the "business judgment rule" (reluctance to interfere with the honest judgment of a business professional). For the Danish government, the differences in directors' duties among member states make it prudent for the Commission to first weigh and consider those differences very carefully. The Sustainable Corporate Governance Initiative of the Director General for Justice and Consumers have also spoken about this.

The Nordic and Baltic Company Law Scholars have challenged the new demands placed on directors, pointing out that the initiatives of the Directive proposal are actually two – one on directors' duties and another on sustainability due diligence. The Nordic and Baltic Company Law Scholars mostly oppose the directors' duties part, underlining that the Regulatory Scrutiny Board (RSB) has already overruled any initiative concerning directors' duties. According to the Nordic and Baltic Scholars, HRDD is an external matter, while company governance and decision-making an internal one. Internal and external matters should not be mixed. What is more, shareholders have property rights over their shares; the EU must respect those rights. Attempts to interfere with the rights of shareholders is a serious intervention. Attempts to interfere with the rights of shareholders is a serious intervention.

<sup>&</sup>lt;sup>352</sup> H & M Group, 'H & M Group's position on mandatory due diligence' (H & M Group 2022) 2.

<sup>&</sup>lt;sup>353</sup> H & M Group (n 352) 1.

<sup>&</sup>lt;sup>354</sup> Law and Business Professors, 'Submission to the European Commission's call for feedback on its Sustainable Corporate Governance Initiative' (8 October 2020) 15

<sup>&</sup>lt;sup>355</sup> Ministry of Industry, Business and Financial Affairs, 'The Danish Government's response to the public consultation on a roadmap on sustainable corporate governance' (Ministry of Industry, Business and Financial Affairs 2020) 2.

<sup>&</sup>lt;sup>356</sup> Alexander Bassen, Kerstin Lopatta and Wolf-Georg Ringe, 'Sustainable corporate governance initiative of the Directorate-General for Justice and Consumers' (Feedback Statement, University of Hamburg, no date given) 4.

<sup>&</sup>lt;sup>357</sup> Twice, writes Jesper Lau Hansen: in May 2021 and in November of the same year. See footnote 360 for the reference.

<sup>&</sup>lt;sup>358</sup> Nordic & European Company Law Consortium, 'Response to the Proposal for a Directive on Corporate Sustainability Due Diligence by Nordic and Baltic Company Law Scholars' (LSN Research Paper Series No. 22-01, Nordic & European Company Law Consortium 2022) no pagination.

Further elaborating on the position of the "so-called" <sup>359</sup> Nordic objections to the proposal, Jesper Lau Hansen considers that the proposal is a "good initiative" but the insistence on directors' duties inappropriate. The duties must "pertain to [a] company as an entity" and directors must not be made the instruments of state policy. In general, the state exists to serve the individuals; individuals must not be made the servants of the state. The articles on directors' duties must, consequently, be removed. <sup>360</sup>

On the other hand, Sjafjell and Jukka Mahonen have argued against the duties to shareholders or stakeholders dichotomy in favour of a broader approach. Company law must "take sustainability seriously" and "give a principle-based instruction to boards [of directors] on how to do their jobs in this era that is defined by the extreme unsustainabilities resulting from business as usual". <sup>361</sup>

Here, it should be noted that corporations, or at least its managing officers, directors, will not view sustainability due diligence favourably if the only thing it does is impose on them new demands or new forms of liability. There should, arguably, be amendments to the proposal to provide protection for directors as against the demands of the shareholders. <sup>362</sup>

This need was foreseen by Alistair Alcock as early as 1995, a time when the value of HRDD had not yet been widely recognised<sup>363</sup> (Alcock, in addition, rightly predicted that any change must happen at EU level).<sup>364</sup> As he argued elsewhere, care must be taken to avoid a Catch-22 for directors. If they pay too much attention to stakeholders, such as the social good and the environment, they may be found liable for ignoring the interests of the shareholders. If they pay too small attention to stakeholders, and this proves disastrous for the company,

<sup>&</sup>lt;sup>359</sup> Jasper Lau Hansen's comment: he argues that similar objections have been voiced across the EU. <sup>360</sup> Jasper Lau Hansen, 'Unsustainable sustainability' (*Oxford Business Law Blog*, 8 March 2022) <a href="https://blogs.law.ox.ac.uk/business-law-blog/blog/2022/03/unstainable-sustainability">https://blogs.law.ox.ac.uk/business-law-blog/blog/2022/03/unstainable-sustainability</a> accessed 10 August 2022.

<sup>&</sup>lt;sup>361</sup> Beate Sjafjell and Jukka Mahonen, 'Corporate purpose and the EU corporate sustainability due diligence proposal' (*Oxford Business Law Blog*, 25 February 2022) < <a href="https://blogs.law.ox.ac.uk/business-law-blog/blog/2022/02/corporate-purpose-and-eu-corporate-sustainability-due-diligence">https://blogs.law.ox.ac.uk/business-law-blog/blog/2022/02/corporate-purpose-and-eu-corporate-sustainability-due-diligence</a> accessed 10 June 2022.

<sup>&</sup>lt;sup>362</sup> With also some incentives, see Mosco and Felicetti (n 329). The CFA Institute also agrees on the matter of (perhaps tax) incentives: CFA Institute, 'CFA Institute Feedback on Sustainable Corporate Governance' (CFA Institute 2020) 1.

<sup>&</sup>lt;sup>363</sup> Fearful of personal litigation against themselves, directors will also call for insurance protection (as well as for protection through legal provisions). Alistair Alcock, 'Review Article: Corporate governance: a defence of the status quo' (1995) The Modern Law Review 898, 911.

<sup>364</sup> Alcock (n 363) 904-905.

they may be found in breach of their duty to exercise reasonable care and skill.<sup>365</sup> B Lab Europe and the Interdependence Coalition agree on this point. Although they very much welcome Article 25 and the mandate on directors to consider the interests of all the company's stakeholders,<sup>366</sup> they also believe that the Directive should guarantee for directors the freedom to favour stakeholders and sustainability over shareholder interests. This guarantee must be drafted in an express and clear manner.<sup>367</sup>

### 6.6 Conclusion

The Directive proposal responds to an urgent need for the Commission to create a sustainable context within which corporations can operate. Cooperative ways of operation may, suggestively, help in the improvement of the proposal concerning the standards to be followed, the rights to be upheld, and the way these rights will be identified.

However, there are also drawbacks which call for resort to company law in order to further elaborate on certain issues, such as the established business relationship limitation or fears for an indirect application to SMEs. The most controversial area of disagreement seems to be directors' duties and what protection, if any, will be afforded to directors vis-à-vis the company's shareholders should mandatory HRDD eventually come to pass. As Lord Buckmaster stated in the 1916 case of *Cook v Deeks*: "It is quite right to point out the importance of avoiding the establishment of rules as to directors' duties which would impose upon them burdens so heavy and responsibilities so great that men [and women] of good

<sup>&</sup>lt;sup>365</sup> Alistair Alcock, 'An accidental change to directors' duties?' (University of Salford Manchester 2009) 16.

<sup>&</sup>lt;sup>366</sup> B Lab Europe and the Interdependence Coalition, 'Reaction paper of the Interdependence Coalition –led by B Lab Europe—to the Proposal for a Directive of the European Parliament and of the Council on Corporate Sustainability Due Diligence (CSDD)' (Reaction Paper, B Lab Europe and the Interdependence Coalition 2022) 3.

<sup>&</sup>lt;sup>367</sup>B Lab Europe (n 366) 2.

position would hesitate to accept the office". $^{368}$  A standard impossible to hold is certainly not a viable guide to action at all. $^{369}$ 

<sup>368</sup> Lord Buckmaster, 'Speech in *Cook v Deeks* [1916] 1 AC 554 (Privy Council)' in Sarah Worthington, *Sealy & Worthington's Text, Cases and Materials on Company Law* (Oxford University Press 2016) 389.

<sup>&</sup>lt;sup>369</sup> As noted by Latham CJ in *Mills v Mills*: Latham CJ, 'Speech in *Mills v Mills* (1938) 60 CLR 150 (High Court of Austrialia)' in Sarah Worthington, *Sealy & Worthington's Text, Cases and Materials on Company Law* (Oxford University Press 2016) 347.

# **Chapter 7: Conclusion to the Dissertation**

This dissertation has examined the present debate concerning the place of human rights in company law. The most recent expression of the debate in European Union law is the Commission's Proposal for a Sustainability Directive and the responses to it. The Directive will impose duties on large corporations to uphold human rights and the protection of the environment. These duties will be legally enforceable.

The dissertation has aimed to contribute to this debate by considering whether, and in what ways, cooperative principles can facilitate the achievement of sustainability in human rights (HRDD). Arguably, cooperative law shares enough common ground with company law in terms of origins and function to make it a valid resource; what is more, recent writings on how HRDD may be effected employ terms from cooperative law, such as a social purpose for companies, the economy as a living system, shared prosperity, the company as a social enterprise and so on.

To achieve its aims, the dissertation posed three research questions (see Introduction) which it has answered as follows. First, cooperatives have, from the start, developed with an ingrained understanding of the rights of individuals and of the common good, of individual self-worth, and the right of people to better themselves. Cooperatives continue to promote these aims today, working within communities (in developing and developed economies) both to achieve profit and support human rights and the environment.

Second, the parameters of the debate on HRDD in company law refer to the purpose and function of companies. Not everyone yet agrees whether it falls within the responsibility of a company to perform a duty that ordinarily belongs to states, which human rights should be enforced by companies or, indeed, whether companies are moral in nature so that they should be expected to enforce any rights at all.

Third, cooperatives can contribute to this debate in three ways. They can set an example as to which rights can be protected in each community, positing each community as different. Companies should not be expected to protect every right imaginable, but core rights and those that are relevant and in danger in the specific community in which the company operates. Further, cooperatives can give some much-needed conceptual guidance as to how rights and the common good can be inserted into the company purpose and definitions of the company interest. Finally, company law may produce, like cooperatives decades ago, a set of

broad yet clear principles that may be upheld and form the substance of the duty to promote human rights.

Nevertheless, there are unanswered questions, which the Commission might, suggestively, address by redrafting elements of the Directive Proposal, such as protection of directors against the general meeting in cases there is an insoluble conflict between the interests of the shareholders and those of the community at large.

In all, it may be said that the dissertation places itself at a point in the development of company law where fundamental changes seem to be forthcoming; it responds to the need for companies to be examined in terms of the philosophy of law, in terms of their purpose and obligations to the community; indeed, also in terms of their very nature.

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