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Ensuring access to remedies for victims of human rights abuses by companies. In Europe and beyond

Podcast with Professor Robert McCorquodale

About intercorrelation between different components of the rule of law to ensure access to remedies for victims of human rights abuses by companies as well as perspectives of the Corporate Sustainability Due Diligence and its impact beyond the EU

Business that prefers the lack of the rule of law

Olena Uvarova: Hello. You are hearing the podcast series on the rule of law and corporate actors. And today we talk about extremely important component of the rule of law – access to justice. And my distinguished guest today is Professor Robert McCorquodale.

Dear Professor, I appreciate very much that you agreed to be a guest of this podcast. It's extremely valuable for us. Professor McCorquodale is an international lawyer who has experience of research, legal advice, litigation, teaching, training and publications. He works a lot with companies, law firms, governments, international organizations and civil society on business and human rights issues. Professor is a member of the UN Working Group on Business and Human Rights and he is a legal practitioner. He was a professor in law schools for nearly 25 years. He was Director of the British Institute of International and Comparative Law for ten years, and he has been ranked as an eminent practitioner in business and human rights by Chamber Partners Global Rankings. So hello, dear Professor.

Professor McCorquodale: Thank you very much, Olena, for asking me to join you.



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Olena Uvarova: Thank you. And so the key question for our discussion today is the following: access to justice in litigations against private companies. Does the rule of law have potential to overcome barriers? But I would like to start with a question that I ask all my guests. What are your associations when you hear "the rule of law and corporate actors"? Because it's not very common still to raise the rule of law issues in our discussions about business and human rights.

Professor McCorquodale: Thank you for that question. When you first alerted me that this was one of the issues you were going to raise, I immediately thought of, of course, is what do I mean by the rule of law? I particularly think of situations where the lack of most elements of the rule of law in a state usually mean that the victims of human rights abuses by business have no means of access to an effective justice in that state.

Olena Uvarova: Yeah, I totally agree. And what do you think what criteria we can use to assess the impact of corporate actors on the general rule of law environment in a concrete country?

Professor McCorquodale: What I see is that, whereas for most businesses having a rule of law in a state is actually enormously beneficial because they've got legal certainty and clarity. They know if they've got a dispute, they can have it resolved. However, for some businesses they can use the lack of a rule of law in a state to operate in a way where they consider that they are completely unaccountable for their actions, including actions which lead to human rights abuses. They know that the government will support them against protests by local communities, that they can fire workers without legal consequences and they can pollute or whatever without going to be prosecuted and without the courts finding against them. They can also be involved, of course, in corruption in this whole process without any kind of accountability. They can say they're simply following the law in the state, whatever that might be.

I guess the criteria I start with is under the UN Guiding Principles. Guiding Principle 23 says that businesses simply following the law in a state that's not enough, that businesses should also seek ways to honor the principles of internationally recognized human rights. That means that simply following the national laws, which sometimes even these businesses have helped create, is not sufficient.

So we need to look back at the UN Guiding Principles and say if the businesses are not acting in accordance with international human rights law, then they are acting contrary to the UN Guiding Principles. So compliance with the law in that state is not enough. We need to look higher than that, which is international human rights law.

The rule of law and the ability to have access to justice

Olena Uvarova: Okay. Thank you. Thank you very much for this point. And when we talk about barriers to access to justice in general usually we list the legal barriers, for example, discriminatory laws and policies, lack of legal certainty and so on. We talk about social, economic barriers, cultural barriers and many other things. Are these general barriers relevant in the situation of human rights abuses by corporate actors in the same regard? And what is the most influential barrier in these cases?

Professor McCorquodale: I'm going to start by just going back one step, if that's okay. What do we mean by the rule of law? Because the rule of law, of course, includes many elements: legality, legal certainty, prohibition of arbitrariness, respect for human rights, non-discrimination and equality, and also access to justice for independent and impartial courts. That's what the Venice Commission considered to be the rule of law. I have argued in the *International Comparative Law Quarterly* that the international rule of law has many of the same elements.

The reason I say that is because access to justice is really, really important. But it's not the only element of a rule of law or the only element that might affect the ability to have access to justice. For example, the rule of law is, of course, not the same as the rule by law or the rule by lawyers. So simply because there's a law in the state does not make it the same as the rule of law. That can often be where some of these barriers are.

For example, access to justice, in my view, has to include an access to an effective remedy, as simply going to a court or having even an impartial and independent court, but without an effective remedy, is still problematic. This remedy has to be able to be enforced. My concern in this is, if the remedy - even is determined by an independent and impartial court - is a fine to be paid by a business, that is not a remedy to the victim. Even a criminal sanction of the business is not a remedy to the victim.

So I think before I can get into the barriers, I have to be clear that what we're looking for in the rule of law with an access to justice should include a remedy to the victim. The remedy has to be also appropriate to that victim and their particular circumstances. They may be a person with disabilities. There might be gender issues. There may be location issues. That remedy should be preventative and also has deterrent aspects.

So having said all that, let me come back to one of your many questions about the general barriers which you've expressed really well.

I would say that many of those barriers are the same for victims of corporate human rights abuses. Yet because of the transnational situation of many legal actions in this area, because in many instances the

victim lives in the Global South and the business is headquartered in the Global North. How do they even get to the stage of being able to bring a claim?

I tend to think of this as a practicing lawyer if you're considering a legal claim. My starting point is, how do you even know you've got a claim? What are the costs? How do you secure legal representation for bringing the claim? What resources do you have? Very often you have lack of resources or even the time to bring the claim, and then you have to find from the business what information they have, because usually most relevant information is held by the business itself, which they don't want to give up.

Then there might be procedural limitations which could be restrictive time limits. It could be that the claim is unavailable in your own state because of lack of the rule of law and other situations. Then you have to look elsewhere to bring a claim. So then you're thinking what immunities or non-justiciable doctrines there are by the courts in those states or other limitations of applicable law, and the simple complexity of corporate structures working out who are you bringing the claim against? Only then can you begin to think, okay, how do I prove my human rights violation and how do I enforce it?

I can give an example. There are many cases against Shell for its pollution and actions in the Niger Delta in Nigeria, with claimants arguing that their human rights, including those arising from environmental damage, have been breached. For example, there was a case against Shell in the United Kingdom, in which I had a small involvement. In that instance, it took 12 years to get to the stage that the UK Supreme Court held that Shell's parent company based in the UK did have a duty of care to those people affected by the actions of Shell's subsidiary in Nigeria. It has not even got to the remedy stage in the UK. However, in the Netherlands the Hague Court of Appeal has given a remedy to the victim based on a very similar facts. Yet it took 17 years since the first oil spill until that decision was made, and that's because of many barriers to access to justice.

We have to be realistic that, in most instances around the world, they never even get to court. Even if they do, it can take many, many years. So guess what I'm saying is many of these barriers are still there and are still very, very present.

Another question you asked is what are the most influential barriers? Well, if we go back to the base where most victims start, even if they're workers. The key barrier is lack of knowledge about their own rights and what they can do and even the language to use. Because the potential claimant may not even speak the language of the business or the language of the state. So they have to undergo quite a considerable amount of knowledge increase and then there's little practical and legal support for them. The business can very much feel all-powerful and be linked into the state so closely that the state will support them in every way. Often the business is the key financial support for a community. So if victims protest, they can lose their jobs, lose their community, be put in jail without any access to remedy even

for that. For victims who do manage to start a complaint, usually it'd be much, much better if they can bring a claim in their own state. Yet that's where your key point about the lack of a complete rule of law in a state means lack of legal aid, lack of legal expertise, lack of an independent and partial judiciary, and this means there's not even an ability to bring a case there. If they do, then it will probably be dismissed.

I think what I'm saying is that the lack of any substantial rule of law is part of this barrier. Often there are also other barriers which are practical depending on the situation of a particular state. Some of those barriers can be ones which happen at a particular time, such as during a conflict or during a particularly difficult financial circumstance or a change of government. There are a whole range of factors which can also play into that. The type of barriers to access to justice will vary depending on particular circumstances and will also vary depending on the location of the victims, because even if it's a victim in the Global North, it's still not easy to bring a claim and get a remedy.

Take a particular example. If it's a criminal case, it requires the prosecutor in the city where the business is based to bring a charge, which they may be reluctant to do because that business may be the major employer of the region. So these barriers to justice in bringing a claim are very, very present in most states, not just some. That's a very long answer to your question.

Corporate sustainability due diligence directive and its potential to impact on the access to justice

Olena Uvarova: This answer actually gives a lot of information to further discussions. And in this context, I need to ask you about current developments related to corporate sustainability due diligence directive. Do you see that these developments could change the situation for access to justice positively?

Prof. McCorquodale: That's a really good question. I think that, obviously, we're still in a little bit of uncertainty as to what the final form of the corporate sustainability due diligence directive will be. I think, as a general rule, having states create good regulation on this area has to be a positive step both for businesses because they have legal certainty, and also for the victims involved, as long as there is an ability to bring some form of claim and some access to justice in that regard. Some of my concerns still remain. Firstly, is it going to be a remedy to the victim as against a fine to the business? I think that will still be an issue in this because some of the proposals only lead to a fine against or sanction against the business.

Secondly, I think it will depend a bit on how the supervising authorities, which will vary in each state, decide to bring their actions or at least apply their knowledge base.

Thirdly, there is a worry of diversity of implementation across the EU. So I think this directive could be one way of getting a degree of coherence across the EU.

I'm also concerned by the position of financial institutions because I think financial institutions are major players in this and yet are often seen by some states as not having any human rights impact. Yet they can have adverse human rights impacts if they are funding a company which then does certain abusive things. If the financial institution have not done their own human rights due diligence, there could be an adverse human rights impact. So those are some of the concerns I have.

I would just add one other, which is that there is a concern about to what extent has the Global South been involved in any of these discussions, because that's where, as I said before, most of these victims come. Are we looking at it purely from the Global North perspective, whereas obviously there is an impact on the Global South. I would like it to include some capacity building in the Global South so that business and human rights issues are more neatly aligned globally.

The only other addition I would say is the fact that this is designed to include companies from outside the EU which are operating in the EU is good. Yet it still runs the potential that the companies that are going to be directly impacted by this directive could still be a tiny minority of companies. I think that it could be potentially cause a problem. Why? Because it can even be your local shop which could be employing child labour and would not be included.

So I think there are ways forward that this Corporate Sustainability Due Diligence Directive could expand. Even on where it is now, with all limitations it has, I think it is a good step forward in making clear that businesses have responsibilities to respect human rights and that is turning into a legal obligation.

The role of legal practitioners in BHR developments

Olena Uvarova: Thank you very much. And also we have very different barriers and the role of different actors to solve particular problems. Of course, we can discuss it in very long conversation, but as I have an aim to try to compare the situation in Western democracies, well-established democracies, and in post-Soviet new democracies, I have hypothesis that our region is not very active to promote business and human rights agenda partly (or even mostly) because we have few civil society actors who are active in the area of business and human rights. Legal practitioners are not really equipped with knowledge on business and human rights. When I see business and human rights developments in Western democracies, I have the impression that, in many cases, legal practitioners played and still play crucial role. Some very popular cases were very important moments in the history of business and human rights concept. Could you confirm this?

Professor McCorquodale: Well, yes, I can confirm that largely. However, it is still a very thin bit of activity so far. Let me talk about what legal knowledge is required for a business and human rights case. The person, will have to know international and national human rights law. They also have to know a bit of international environmental law, local corporate law, as well as local criminal law, tort law, contract law, employment law, international labour law, competition law, corruption law. There's actually an awful lot which we are trying to cram in to try and understand even how to bring a claim, because a claim will rarely be packaged or argued even as a human rights claim.

Indeed, most states do not enable a claim against a business for human rights directly. Human rights will fall under public law and therefore against the state. So trying to fit it into any legal system is actually quite difficult. You're quite right that, whereas there has been across a few states some developments in this area, there's also an awful lot of states, even states which you and I would think of as sort of rule of law, developed democracy, where there's very, very little law in this area. So there's still a considerable gap. That's going to remain, sadly, for some time. I've been working in this field, for about 30 years and it's moved from the stage when I would talk to companies about human rights matters and they'd say it has nothing to do with us: who cares?; go away to the state" - to where I now appear in the UN and there's general consensus that issues of business responsibilities for human rights abuse should fall under within UN human rights issues.

So I think there have been developments, but at the litigation level it's still very slow. To come back to your point about civil society, I think that is relevant because if a company is operating in a particular way and abusing human rights within a state where there's not a lot of civil society protest or action, they can often get away with it simply for lack of publicity. Certainly in my experience in the UN Working Group, when there's a complaint to us about a corporate action and we take action by sending a letter to the company (as well as its state and the host state), sometimes the company will respond and sometimes not, partly depending on whether it feels there's a reputational consequence of it replying or not. In regard to some of the Eastern European states, if there's no one who's brought that complaint even to our attention, we have nothing on which to act. The company involved will not take any action even when we do act because they feel no one's going to be concerned about it.

So I would encourage civil society bodies that ,even if there's no national action or even no method of complaint nationally, to bring it to a UN body so we then get the chance to act on it. Of course, as part-time experts we don't act on all complaints, but if we do, at least there's then a sense to which a UN body has said publicly that we don't like what's going on.

Even in a vibrant, functioning economy, businesses still have a strong role and businesses for many people are often their first point of engagement with an economic power. It could be they could be subsistence farmer where it is to the business where they're sending all their products, or they could

be working in a factory run by a business. As you know that occurs across the world, including in Central and Eastern European states,. Yet the economic power of business also means very often governments are nervous of putting any restrictions on corporate powers and therefore it has a consequence that businesses can get away with their actions without any constraint. That's where we began with the rule of law. Unless there are constraints against all actors, not just the state, then it can mean that businesses can do much more than they should do and they can lead to adverse human rights impacts.

The rule of law and “business friendly” environment

Olena Uvarova: Thank you. This is very true. In our region, governments are trying to be very business friendly and it's one of the key barriers, I would say, because all developments related on business and human rights actually are considered as barriers for business environment. It's one of the key problem for us to change this kind of thinking.

Professor McCorquodale: I agree. Oddly enough, I've done a lot of research with companies I've interviewed and surveyed. Most of the companies actually want clarity in the law. They often don't want no law. Obviously, some companies want no law because they want to get around it. Yet better companies often want some law on this because they want clarity as to what their obligations are, as well as for competitive reasons. They don't want the company which are doing child labor and undercutting them to be able to get away with it. However, governments don't always see it; they only just think, that they are better to have no regulation.

Olena Uvarova: Yeah, true. As a result we have an opposite result that companies that would like to implement some responsible business practices they avoid implementing them because they are afraid that they will be less competitive because all other companies don't implement such practices.

So actually, to be honest, my main hope is that civil society and academic institutions will be more active in our region and probably their efforts will push governments to be more active. That's why we have this podcast series, to attract attention to these issues and to exchange experience.

Thank you very much for your very, very valuable thoughts. We will have our podcast in English and in Ukrainian. I hope that it will make a contribution to developments in our region. Thank you very much.

Professor McCorquodale: Someone like you and the work you do is really crucial in this, not just in your public profile and your engagement, but also in your influence of your students and of other sort of actors and your training, because that can have a ripple effect. If you begin to talk on this enough, it

begins to have a broader impact. I think that people like you and the fabulous work you do is really, really important in moving forward this agenda. So it's a delight to be talking to you.