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Access to justice and business in times of difficult economic conditions

Podcast with Viktor Smorodinsky

About the rule of law as a limitation of any power, including the power of business, for the protection of human rights, about the influence of business on public trust in the judicial system, about responsible business conduct in difficult economic conditions.

The purpose of the rule of law is to limit power, including corporate power, for the human rights

Olena Uvarova:

- Greetings, dear colleagues and friends! Today we're going to talk with Mr. Viktor Smorodynskyi, who is a scientist, lawyer, assistant professor in human rights and legal methodology at the Yaroslav Mudryi National Law University, the Chairman of our University's Academic Integrity Committee, Deputy Chief Editor of the Philosophy of Law and General Theory of Law Journal; Viktor is also a member of the scientific and advisory board under the Chairperson of the Verkhovna Rada of Ukraine and the scientific and advisory board at the Supreme Court.

I invited Viktor to discuss access to justice in the context of the rule of law, but, naturally, with an emphasis on the ways to secure this access to justice in the context of violations of, or certain negative effects on, human rights by businesses. Is there a certain specificity in access to justice and how common barriers to access to justice work with this category of cases?

But before we get down to the discussion, I'd like to ask Viktor, what is the first thing that comes to your mind when you hear about the rule of law and business?

Viktor Smorodinsky:

- Thank you for the invitation and thank you for the interesting question. When we talk about the rule of law and business, the first thing coming to mind is the paragraph, or rather the section, on the rule of law in our department's textbook, where I first managed to give a definition to the rule of law. Anyway, I'm not going to reiterate it now. Of course, it's a set of general, baseline principles and stuff, but I made an emphasis on *the purpose* there, and it's not my know how. The idea was prompted by my colleague, Dmytro Vovk, in one of his works, and I just expanded it a bit. I believe any definition whatsoever should be given through the purpose. And I specified this purpose in the very first iteration as: "the rule of law is a set of principles that have a specific purpose of limiting the power of the government and protecting human rights." Later on, having encountered certain things, practices, our reality, I altered this definition and the purpose for the second edition. At first, I wrote "limiting the power of the government in order to protect human rights," thus emphasizing that limitation of the government's power alone isn't the purpose, it's not a goal in itself. Because really,

why limit the government when it's doing okay? But it's exactly for human rights' *protection*, meaning protecting human rights is the ultimate goal of the rule of law. But that too, was a tentative definition. So, for the next edition I removed a single word — "government" — and that's how it appeared for the first time in our Ukrainian legal science and education. And I'm proud of it. I mean, in textbooks, in academia, the purpose of the rule of law was defined as "limiting the power in order to protect human rights," and by the power I mean not just public authority, but any power, including private, such as the power of private corporations, employer's power. That's a power too, and the very purpose of limiting this power is to protect human rights, including protection of workers, because it implies that businesses have multiple social roles. The role of employer is one of them. It's certainly important, with a worker as its recipient. Which means the power of employers should be limited in order to protect workers' rights. But apart from that, there is another role of businesses, i.e. production (manufacturing, providing services, delivering certain products of social significance). Then the recipient is a consumer of those products. So, when we mention limiting power, we mean limiting power to protect consumer's rights. There's also the role of taxpayer, when the power is limited to protect the rights of citizens and so on. We may go further and mention such roles as benefactor, philanthropist, volunteer, but those are derivatives and a business owner acts as a bearer of certain powers in all those roles, relative to their business or corporation. And those powers need to be limited in order to protect a worker, a consumer, a citizen, and a human being in general, i.e. all those social actors. This is what I wanted to say from my standpoint about the rule of law. Of course, businesses involve people too, that's a given. So, then we should say that their rights need to be protected too, because they're human beings, but in this case a business is a recipient, and the party whose power is to be limited will most likely be public authorities, like national governments, local governments, municipalities and so on.

Business and human rights in difficult economic conditions

Olena Uvarova:

- Thanks a lot, actually I believe it's a very important revision of the definition of the rule of law. So, I'm really grateful to you for making this revision for our textbook. In this context, by the way, the questionnaires for the Rule of Law Index by the World Justice Project include even such hypothetical situations. For instance, how realistic is it for a worker to protect their rights using the legal instruments in place in the country when their rights are being violated? I mean this dimension of 'worker-employee' and the actual access to justice in a dispute between employee and employer. That's why my question to you is how would you evaluate the barriers, if any, to the access to justice, when it comes to possible adverse impact by businesses on human rights?

Viktor Smorodynsky:

- Existing barriers to human rights protection in Ukraine, including protection of employee's rights, are obvious. We have huge problems with the judiciary, or the judicial system, to be accurate. From my standpoint, we have no judiciary as an authority yet, because authority implies independence, and there's no 100% independence, so these barriers are understandable, and access to justice in Ukraine has its flaws — both quantitative and qualitative. Access to justice is obviously about the ease, in the first place. As a former Chairman of the Dutch Supreme Court mentioned in his very interesting work titled *Courts and the Rule of Law*, access to justice is a very simple thing. It amounts to ease, or ease of access, affordability of access, and speed of access. When we talk about affordability, that's a question for the legislators, in terms of court fees. Our judiciary is quite cheap, I mean in line with our citizens' average income. Plus we have a lot of privileges provided for in the judiciary law. As for the ease, that's one more question for the legislators. It's quite complicated overall in Ukraine, but we do have free legal assistance and it somehow relieves the problem. Well, not exactly as we would like in terms of quality of this assistance, but that's another matter. The third criterion is speed and things are actually very bad with speed. This is because a lot of judicial positions remain vacant in Ukraine. Two to three thousand such positions are vacant, according to various estimates. But

that's how it was before the war. We don't really know now if things have changed for better or for worse. This is a question for the State Judicial Administration and for the High Council of Justice. But things are really bad with speed, courts are overloaded with various cases, first of all, and mostly with criminal cases that require specific procedures to be carried out, hindering and hampering all the other proceedings, including so-called civil cases, which include labour matters related to employment disputes. Such congestion constantly inhibits accessibility of justice to workers, but I still wouldn't say that everything is so bad. There is a kind of tradition, it's rather controversial, but it's been there since the Soviet times and through the post-Soviet decades as a rule of thumb that a worker is 'right.' And today's Labour Code, let's say, takes the employee's side in most disputes and matters. Plus, there is a practice of the European Court of Human Rights now, which in most cases, I can't call it some advantage of sorts, but nonetheless, an employee still has advantages over an employer in terms of protecting their rights. Let's not speculate whether it's good or bad right now. Well, it may be good in general, but given today's situation with businesses, with market economy... That's a another topic.

Human rights in exchange for economic preferences?

Olena Uvarova:

- I see, thank you. But actually we have cases of informal employment too. I mean, one situation is when all procedures work, the employment is duly formalized, and an employee can go to court and feel protected enough. But when we step aside from such a classical ideal situation a bit, then, perhaps, we face more problems. For instance, if we have a large share of informal employment and we get the feeling that this share might be even larger than before in the current circumstances. Then do you think our judicial system is ready to respond in principle to such unusual situations?

Viktor Smorodynsky:

- Thank you for this question. I always try to extrapolate such general questions to specific examples, because the inductive method is more understandable for me and I believe it to be more productive in such matters. Let's take IT businesses, for example. You might have witnessed our argument with an IT business representative during one of academic events at our international forum. I asked him "What kind of security for employees are you talking about, when all the contracts are concluded as ones with individual entrepreneurs, although there are obviously labour relations behind them?" As you may recall, his answer was that "it's a common practice for European countries, at least, but in no way any rights of those employees who are contracted as individual entrepreneurs are limited." That's not quite true from my point of view, because, of course, security of individual entrepreneurs tends to zero, compared to security of employees. But such a situation does exist in multiple sectors, like trade and so on. Some contracts have quite questionable causes, in my view. They are too expanded. The very idea of employment contract has slowly began to expand and keeps expanding beyond any limits. All of this definitely restricts employee's opportunities. However, I see that lately, over the last year or two, the approach of the Supreme Court, for instance, the approach of the European Court of Human Rights, of other international courts or even national courts in other countries, comes down to the fact that there is such a thing as job function, defined by persistence, duration, consistency of various tasks, so when it comes to settlement of such disputes, the key point is not formal characteristics of the sides to this dispute, but whether the contracted activities correspond to job functions or not. And if they do, then all the guarantees an employee has pursuant to Labour Codes of these countries (and our country, in particular) should apply to those activities. As far as I know, there are even several draft laws being considered — some of them being hampered, the others are at some initial phase — according to which not the formal status of a contracting party, but whether characteristics of a job function are present or not should be put at the forefront. Nonetheless, there is one thing I would like to highlight. It's not even about the legal proportionality principle we all know, but rather about some sort of economic proportionality, about current economic opportunities. We do realize that in some cases, in most cases, such relations exist not because an employer or a business just wants to infringe someone's rights, but first of all because

they seek to minimize taxation on a legal basis. And this minimization is a forced action, impelled by the situation we all know about. For many years, our country's economy as well as economies of many other countries, including some European ones, has been experiencing a nosedive. And it's not a fact that we're going to get out from it anytime soon. And this nosedive calls for certain instruments that enable the economy and businesses as a component of the economy to stay afloat. By no means this justifies limitations of human rights or infringements of workers' rights, but we need to understand why this happens.

Olena Uvarova:

- Thanks a lot. I guess I have two rather general questions on this matter. My first question is related to the IT industry. Our government has introduced a number of online services like Diia.Business, Diia.City, e-Resident and so on. But the point is that businesses are given certain preferences, including tax preferences, but businesses have to offer more guarantees, including formalizing employment relations. To me, it's an indication of a larger trend, typical of our specific region, I guess. Because when we communicate with businesses, with business associations in Kazakhstan, Kyrgyzstan or other countries, we explain them the prospects for introduction of human rights due diligence and other similar practices, and their usual reaction is like "what kind of preferences will we get for this?" It's a really curious characteristic of the region, I would say, that businesses are only willing to discuss human rights when they see some direct economic preferences for themselves. And it's not about them improving their image, their attractiveness for investors, but rather like: "Okay, right now, let's make a deal with the government that we implement human right policies and so on, but instead we'll be granted some tax preferences or other favourable regimes from the government." So, based on your experience, how would you possibly explain this? Because such a trend is really obvious in all discussions about human rights with businesses.

Viktor Smorodynsky:

- Thank you for this question. My explanation is rooted in where we began, namely multiple social roles of businesses. The employer's role is very important indeed, creating jobs is an essential social function, but it's not the only one, not even a primary one. The primary function of any business is still production. Production of certain goods, certain services. So, given today's situation in the economy, a very difficult situation, a situation of permanent force majeure for some four years, we ought to consider this situation somehow, because businesses as producers, including IT businesses, have a really extremely hard time now, as we all know. Let alone workforce migration, market shrinkage and so on. Reduction of consumption capacity and so on. Then, naturally, an employer's primary goal as a business is to stay afloat and not to go bankrupt. That's why they seek such opportunities, to maintain their reputation while preserving themselves in this economy. There's a lot of such opportunities. When we say that they must protect their employees, protect their rights, it's true. I agree with this, but they need to protect consumers' rights too. They also need to protect the rights of those whom they pay taxes. And besides, it's not only the government that demands from them — people also demand, society demands, their own internal convictions (if we talk about the most diligent representatives) demand from them to be a philanthropist and even a volunteer these days. How to align all of that? It's very difficult on the limited islet left to them today. I don't represent large business, I don't have employees, except for an accountant. So, I tell you I don't envy today's manufacturers, but I nonetheless see certain limits that are really dangerous for them to cross. Because such actions will certainly violate rights. But, when we mention violation of workers' rights, I see from your profile and even from today's subject that the main thing for you is this link "business-worker," "employer-employee."

Olena Uvarova:

- Why, though? Not just "business-employee," but business and the community it operates in, too. Business and consumer, of course. I've got a few questions about it, by the way. But yeah, maybe business and worker are at the top of the list, but there's much more.

Viktor Smorodynsky:

- I see. Well, that's what a business is like. Its limitations and capabilities are roughly the same everywhere and they are somewhere near the line between legal and illegal. I'll give an example you may find irrelevant to employees and to protection of their rights, but I just want to make my point clear through the example about customers. All of us who stayed in Ukraine, we go shopping everyday of every week, buying things like milk or cooking oil. And you may have noticed this trend of the last two years or so, that, for one thing, litres have been replaced with kilograms and grams. You won't see anything like that in Europe, that's an absolute nonsense. Or some other things businesses are doing to stay afloat, that might not be against the law, but are basically an outright deception. Things like reducing packaged amounts so that no one could see. I mean, four hundred gram becomes three hundred and fifty, then three hundred and fifty becomes three hundred, but the package is the same and we don't notice those changes right away. Similar changes are taking place in a relationship between employers and employees. After all, an employer, a manufacturer, a taxpayer — it's all one and the same actor. That's why it's hard to imagine them trying to deceive customers by making smaller packages or converting litres into some confusing ridiculous kilograms, while being absolutely honest as an employer. It's just like saying "who cares about customers or tax office, I'm gonna protect my employees' rights." That's not how things are in real life, and getting back to the justice issue... I really liked a post by Arkadii Bushchenko, a once-known human rights activist, now a Supreme Court judge. He said that no perfect judge can exist in an imperfect environment, in an imperfect society. The same could be said about businesses, employers, producers et cetera. Our society is imperfect. The environment we live in is imperfect, far from perfect. Plus it's getting worse and worse. So, I believe that in the current situation, there's no point expecting any improvements to this "employer-employee" link, not only before the war is over, but before certain initial devastating impact of this war has been dealt with. So, employers have no other choice but to appeal to the government: "please help, we have no one else to ask." But really, no milk producer will appeal to the international community, to the IMF — that's a totally different level. The IMF doesn't care much about a specific producer of milk or oil, or a specific taxpayer, or a specific employer. They think more global, that's why national governments are needed as mediators. And when employers say: "please help us, then we'll be able to take some definitely civilized steps to protect the rights of our employees as well as our customers," they address this very actor that is both their mediator and the recipient of funds from international organizations and institutions, among other things. In other words, they speak to the world through their representative in this world, which is the national government. This is today's logic.

The influence of business on trust in justice

Olena Uvarova:

- Thank you very much. I have one more question, going back straight to the access to justice. As you know, the credibility level of the judicial system in Ukraine is rather low, to say the least. And the latest developments in the Supreme Court have made things even worse. So, my question in this context is about the role of businesses in development of public trust towards the judicial system, even through the recent developments around the Supreme Court Chairman. The business aspect appears here as well, so it's about such indirect effect of businesses on confidence in the system of justice. What actors do you think can contribute to this effect? Maybe, civil society should pay more attention to businesses' behaviour? Or what instruments are there? Or we just have to wait for the society itself to change? Such a very open question.

Viktor Smorodynskyi:

- Thank you. It's an extremely complex question, and I've already tried to answer it. It's not a secret that I once competed for a certain position in the High Qualification Commission of Judges. I had two interviews with the competition commission, one with international members involved, and one without international members. It was the second interview when I was asked a similar question by international experts, I think. And my answer was that it's a matter of need. If the business community sees the need in fair, impartial, unbiased litigation... That's what justice is, basically. Justice is fair litigation. Then they'll start making appropriate demands, and the judiciary will eventually be forced to listen to those demands. As we know, it's extremely rare for large businesses to turn to our judicial system's arbitration capabilities. Large businesses usually have enough opportunities and resources to hire international lawyers to apply anywhere, any court outside the Ukrainian judicial system. They just don't trust this system, so they go to the High Court of London, to other European courts, to courts in the United States, anywhere other than Ukraine. As we see, they got every reason to do so. I do want to believe that they will seek true justice from the Ukrainian judiciary sooner rather than later, because even those recent developments indicate that even some unofficial leverage can be countered by unofficial leverage of other parties to the lawsuit. So, anyway, when businesses see such a need, when the market sees the need for fair justice, then, I think, they start demanding those things. And the judiciary will gradually become fair and just. So, it's sort of a mutual process, when one thing determines another and vice versa: fair businesses will turn to Ukrainian justice, to the Ukrainian judicial system, when it becomes fair. And for the Ukrainian judicial system to become fair, the demand for this fairness has to be raised by the business community. That's why I agree with you by fifty per cent. A do agree that it depends on businesses whether Ukrainian litigation can become fair and just and whether society's trust to it can increase. But the opposite is also true. Society's trust to the system will only increase when this system becomes fair and independent, first of all. And to be honest, my experience suggests that judicial independence should come before everything else, and judicial independence depends primarily on other public institutions, especially on executive authorities that are obviously interested in such independence, in the integrity of judges, but fail to see this correlation between integrity and independence. So, the country's executive authorities feel no urgent need in independent justice at the moment. We can see this clearly from recent examples of criminal cases, from some other trials, proceedings and such.

Olena Uvarova:

- Thank you very much, Viktor. You managed to give a very clear and distinct answer to this difficult question. Thank you. It was a very valuable experience and very intriguing ideas. I appreciate this conversation and I wish you further professional success.

Viktor Smorodynsky:

- Thank you. It was a real pleasure to talk to you. Thank you for the invitation.