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Promoting Rule of Law and Responsible Business Conduct in Central and Eastern Europe: Reflections from Jernej Letnar Čerňič

Olena Uvarova: Hello. And we have today our podcast with Jernej Letnar Čerňič, full Professor of Human Rights and Constitutional Law at the European Faculty of Law and the Faculty of Government and European Studies of the New University Ljubljana, Slovenia. Jernej, hello.

Jernej Letnar Čerňič: Hello. Thank you for the invitation. It's an honor to be here on this podcast and to have a conversation with you Olena.

Rule of Law & Business and Human Rights Issues

Olena Uvarova: Thank you. And actually you are a perfect guest for this podcast because I know just you as an expert on business and human rights and as well as an expert on rule of law issues. You published this great book “The Impact of European Institutions on the Rule of Law and Democracy, Slovenia and Beyond” in 2020. Additionally, we will share with our listeners the link to the scoping study, a regional study on business and human rights in Eastern and Central Europe and Central Asia. It was your idea to include this component on the rule of law environment in the region and how it impacts corporate actors. So, my first question to you is, what is the situation in the region regarding the rule of law, and why is it important to discuss when talking about business and human rights issues?

Jernej Letnar Čerňič: Yeah, the rule of law is a principle that is the backbone of any social democracy, of any democracy based on laws. It basically means that the power of the state and not only the state, but also non-state actors such as businesses and corporations, should be curtailed. So the rule of law is about curtailing and limiting potential arbitrariness in the actions of the government, but also businesses. Having



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said that, of course, the notion of the rule of law, the principle of the rule of law, has a lot to do with the current situation in Central and Eastern Europe, but also beyond the European continent, because it's about the power and how we limit the power and business. Human rights are very much about limiting power. As listeners know, is basically to put obligations and to make sure that business conduct its operation responsibly.

So in Central and Eastern Europe, the rule of law in the last decade has been something new in the last decades coming to the fall of Iron Curtain and democratization. Rule of law was not basically the principle which the governments and businesses complied with. It was more about rule by law. All the states, essentially in Eastern Europe, have had constitutions and rules and laws. But those laws, often they were adopted and adapted to the interest of governing elites, which at the same time were very much connected with the business environment. We know that before the Iron Curtain fell, a lot of economists in Eastern Europe have been very much state involved. There was a lot of presence of state in the economy. So after the fall of Iron Curtain rule of law has become important. But of course it's very difficult not to translate that from paper to action you. It's almost impossible to do that in a couple of decades. And that's why Central and Eastern European states have been struggling with translating the rule of law, not only in the government, but also in the business sectors. In Eastern Europe, the way companies have been doing business, it was somehow different than in a more stable environment. And one of the reasons why it was different because the institutions are not very strong. You know, the institutions such as judiciary or executive or legislative branch are not very strong. There is also a very huge presence of corruption or nepotism or vested interest.

Ukraine perhaps is the prime example. And for sure, you know, much better than me, the Ukraine situation where a lot of powerful businessmen, oligarchs, when they obtained quite a lot of power in the business sector and then they started to run for elected offices or they supported other persons who ran for elected office. So, you know in Central and Eastern Europe rule of law is very much connected to the business and human rights because it's all about power. So it's about how business can seize the power or how politicians can seize the power. And unfortunately you have a lot of politicians, and the businessmen have been very much aligned in using the power not for public good, not for public interest, but for their private interests.

And that in turn resulted in so many business related violations ranging from violations of civil and political rights to socioeconomic business related violations. So that's why the rule of law so much important and that's why I always bring this up when we talk about business and human rights, because at the end, both business and human rights

and rule of law are about limiting power of those who have very extensive power in a society.

Rule of Law, Transparency, and Accountability of the Corporate Actors in Central and Eastern Europe

Olena Uvarova: Agree with you. And, of course, it could be simplification. But, if I ask you what should be the drivers of positive changes, because you mentioned Ukraine and you know that have been trying to implement various reforms, including anti-corruption and judicial reform, for many, many years. However, we still unfortunately witness negative practices. So, in all Ukrainian society and I believe in other societies within our region, people are thinking the same. What should be done to change this situation?

Jernej Letnar Čerňič: I mean, the first step would be to comply with some basic competence of the rule of law. And one of the basic components is the equal protection before the law, so that every person, both legal and natural person, is treated equally before the law. And then secondly, of course, transparency, make all that institutions are doing very much transparency. And of course, you can request that from state and public institutions. And when EU institutions come to Central and Eastern Europe, they always talk about transparency. But it's much more difficult to do this, to implement this in practice. There's a lot of resistance in environments, which have been doing business the old way, which is a secretive way, because transparency also brings accountability, which is also the third step. To make those persons, both in business or in state and public institutions accountable for violations. And for that to happen, you have to have very strong judicial institutions. By strong I mean fair, independent, impartial state institutions which are not subject to influence from politics, but also from internal pressures.

I find that in Central and Eastern Europe, there is a lot of also these internal pressures on independence from higher levels of judiciary. I think there is a there is even a judgment against Ukraine from European Court of Human Rights. It's a case some years ago called Volkov versus Ukraine.

Olena Uvarova: Yeah, yeah ...

Jernej Letnar Čerňič: Violations of internal independence, Article 6.1 of the European Convention. So yeah, transparency, accountability and equal protection through the law. But then also educating people who are inside these institutions, who are in the business sector, was one of the largest obstacles in our region. We are all for translating rule of law standards to Ukraine, to Slovenia, Croatia, other countries. But then the problem is how to implement them, how to make sure that people, so all of us, comply with those standards. Because these normative standards meet very embedded values, traditions, and cultures in our countries, which have been developed and formed for many decades. So, and it's very hard to change this overnight or even in two or three decades. We still see so many problems, many cases from Central and Eastern Europe show, both from obvious examples from Hungary, and Poland, perhaps Bulgaria recently, also Slovenia, Romania, but also from former Soviet countries. There are many examples. There is a disagreement about basic prohibitions, such as conflict of interest, prohibition of conflict of interest.

Particularly in business and human rights there is a lot of conflict of interest between business and state, state actors in our countries. What I've observed is that there is no consensual condemnation when something like that happens, even when you have I mean, recently in Slovenia, we had an example of one case where a company won a tender, and that company is headed by a by a man who is family member or in family relations with vice minister of the ministry who awarded the tender. So very obvious cases where there is a conflict of interest. But even there, there is no consensus on that issue condemn such a such violations. And when there is no violations, then of course everything is allowed. Everything go and power prevails over law, over regulations and so on.

Addressing Responsible Business Conduct Amidst Challenging Environments

Olena Uvarova: Yeah. Thank you for this response. And, I should say that your vice Prime Minister just is not so clever as the vice ministers in the post-Soviet republics because they just they avoid these correlations in formal way. So it's not a problem for them at all. Yeah, but I have some dilemmas in particular when we have a conversation with different companies in post-Soviet region, they are telling us that we can't start to be to examples of responsible business conduct because we are operating in this environment. And you can't expect from us responsible conduct when the state actually doesn't show responsible conduct per se. And in some cases, I even don't

know what we can respond to them. Because it's true they have so strong pressure from some state agencies, they are operating in a very unfair environment and unpredictable environment. What can you respond to this companies? I know that it's not an easy question, but sorry for this.

Jernej Letnar Čerňič: The rule of law is a basic principle. And every company which operates in any legal systems around the world is expected to comply with basic constitutional and statutory requirement, period. There should be no negotiations, no compromise. There is a legal provision, there is a law, companies should comply with that. Another thing is when a government has a certain position or certain geostrategic position or certain, perhaps, conflict affected area, then of course it's difficult for companies to expect responsible business conduct. And there a dilemma arises. I was recently in a Armenia in Yerevan and Armenia is an example of such a country, because of its geographical location, which is not good from a geostrategic point of view, a lot of problems with different neighbors. Of course, one of the issues is how to generate economic growth and investment. And since the aggression on Ukraine started from the side of Russian Federation last February, of course, Armenian government and also Armenian economy, they seized this opportunity. And for example, if you look at the data for Armenia, Armenian economy for the last year, 2022, you can see that there is a quite impressive economic growth, which they experienced around 10%. And most of this economic growth is not because some new fantastic product, which was found or produced in Armenia, but it's because of a so-called parallel, you know, imports and exports.

Armenia serves as a you know, as a as a country where, you know, a lot of companies import products from EU or export products to EU and then they re-import and re-export them to Russian Federation. And of course, if you ask and I was talking with some companies there, they would not mention any problems or any hindrance or any dilemmas concerning responsible business conduct having business with also state owned companies from Russian Federation which are involved in the aggression in Ukraine, which some of them they also have their own private armies. They don't see any dilemmas, or any business-related human rights related risk.

And they are even more so they supported from the government because the government wants investment and growth and jobs and so on. And in that circumstances, of course, it is difficult to persuade companies which operate in Caucasus or Central Asia, which in the last year, almost year and a half have ceased this business opportunity to increase their profits or investment.

And it's very difficult then to persuade them. But still, I think even in that kind of environments, companies should be aware of risks which are facing them. And I think they should not just follow what the government say, what the executive branch say, that one should have good relations with that or that or another site in the war, but they have to comply with some business and human rights. They have to comply with the UNDP's guide on the heightened due diligence, human rights in conflict affected areas. So Olena I wouldn't say that this is a persuasive excuse. If the government says, well, business and human rights risk are not our concern, our concern are people and growth and investment and jobs. I wouldn't agree that this is persuasive from the point of view of business and human rights and rule of law. Because the rule of law, in a way, also includes business and human rights. Particularly when we talk about thick conception of the rule of law, I would argue that it also includes business and human rights regulation. It also includes the UNDP's on business and human rights. So such arguments which we often see from some companies in some countries in the last year and a half, yeah, I don't think very persuasive.

Olena Uvarova: Yeah, I agree. But of course we see and probably especially when the situation is very complicated in the economic sphere that the investments go first and all other things should go next, so it's a problem really. A problem how to balance this. And because of the social expectations, because the business and human rights framework from the very beginning is based on this idea of social expectations. But we see that in our societies, social expectations are mostly about investments and economic growth, not about real human rights and responsible business conduct, unfortunately. So probably, we need to change social expectations.

Jernej Letnar Čerňič: Exactly.

Dilemma of Oligarchic Companies: Reflections on Accountability and Human Rights

Olena Uvarova: And also my another dilemma, and I should say, I already asked some of my guests about that, but probably you are once again the best person to respond to it. I have a dilemma about oligarchic companies. We have some companies that impacted our legal system and our political system very significantly in a negative way. And these companies are still in the market and they are still quite successful. And probably it's fine. But they also are going to be somewhat like champions on business

and human rights. They have resources to implement human rights policies and so on. But the question is, should we just give them a chance to be good companies or should we expect that they should recognize their past? What do you think?

Jernej Letnar Čerňič: When we're talking about companies which are led by oligarchs or tycoons or they were established by oligarchs and tycoons here, would make like a distinction between those companies which were established by oligarchs through privatization process in the early 1990s, certificates ... and then some of them, particularly in the Russian Federation, they were in the beginning of 2000, again nationalized, the state took control of some of these companies and then some of them or many of them also stays privately owned.

When we are talking about those who are now state owned, for sure state has obligation and responsibilities to lead by example. The obligations of state concerning state owned companies either oligarch based or oligarch related or not, it's greater than privately owned companies. But when we are talking about privately owned oligarch and tycoon based companies, I think it falls under pillar two corporate responsibility to respect that those companies are very clear. The owners of those companies are very clear about the origins and also about how they were established, how were these processes. And I think they have I would say I would argue that they have obligations to explain how they created those companies, because one of the expectations of society, as we said just now, is that people are informed about the origins and how particular oligarchs and tycoons, without mentioning any names established, were established. Because most of them and there has been a lot of written on, for example, Russian or Ukrainian oligarch companies. And they their origins, many of them a lot of commentators in different the researches and books, they argued, were established through corruption, through the help of vested interests, some of them also through use of former or actual help of secret services. So yeah, you're right that their origin is in some aspects is quite great. So I think they have to explain their origins from the business and human rights point of view. Why from business and human rights point of view? Because the way they were established a lot of employees, but not only employees have suffered business related injuries, business related human rights violations, either by violation civil and political rights, curtailing freedom of association, collective bargaining, or terminating their employment, curtailing socio-economic rights of employees or larger populations, making difficult for people to to make their ends meet.



But nowadays, of course, I would welcome if any company, particularly in Central and Eastern Europe, is very much on board, on business and human rights standards. I would welcome that. But of course, as you know, Olena, now in Eastern Europe, I think there is also one article which is forthcoming in the special issue on business and human rights concerning Russia. Those companies which take business and human rights on board very rarely move beyond rhetorical commitment. They very rarely measure the impact of their activities on rights and anti-corruption and so on. So to answer your question, I would say, that all companies have to be very clear and transparent about their origins if they want to be a legitimate and credible actor in business and human rights. If they want to fight persuasively the critics that doing complying with business and human rights standards because of pressures from outside, and that their commitments are only rhetorical. So yeah, they have to start from the scratch to be taken seriously.

Olena Uvarova: Thank you very much. Actually, I heard that I wanted to hear. So, thank you for this response and thank you for this great conversation. I enjoy it very much.

Jernej Letnar Čerňič: Thank you very much, Olena, for invitation. All the best.