ELI Webinar Series on the Conference on the Future of Europe

Business and Human Rights

30 November 2021

Event Report

1. Background

Founded in June 2011 as an entirely independent non-profit organisation, the European Law Institute (ELI) aims to improve the quality of European law, understood in the broadest sense by initiating, conducting and facilitating research, making recommendations, and providing practical guidance in the field of European legal development. ELI is committed to the principles of comprehensiveness and collaborative working, thus striving to bridge the oft-perceived gap between the different legal cultures, between public and private law, as well as between scholarship and practice. ELI undertook to contribute to the Conference on the Future of Europe by holding three lectures dedicated to the three pillars of its project portfolio:

Rule of Law in the 21st Century

- Business and Human Rights: Access to Justice and Effective Remedies (with input from the EU Agency for Fundamental Rights, FRA), 30 November 2021

Law and Governance for the Digital Age

- AI and Public Administration – Developing Impact Assessments and Public Participation for Digital Democracy, 25 November 2021

Sustainable Life and Society

- Climate Justice: New Challenges for the Law and Judges, 11 November 2021

Below is a brief report on the **Business and Human Rights webinar**.

2. Context, purpose, subject and structure/methodology of the event

Human rights are traditionally viewed as an exclusive bond between a State as the duty bearer and an individual as the rights owner or in terms of the opposition between public power and private subjects, but lately this view has been changing. As multinational corporations continue to gain economic and social power that rivals that of nation States, it is necessary to also review their impact on human rights.

Their actions touch upon civil, political, economic, social and cultural rights of individuals and thus the very core of human, and in an EU or constitutional context, fundamental rights. Where this impact amounts to violations of human rights, effective remedies should be made available to the victims of such infringements to avoid rendering the most basic rights meaningless. In turn EU citizens, consumers and corporate entities have a right to expect that those corporate entities active and competing within the EU Internal Market adhere to human rights standards in relation to their global activities.

At present, access to justice, in ensuring maintenance of such standards, is often hindered by a number of factors, partly inherent in the imbalance of power between the victims of human rights

abuse and international businesses. It is therefore essential to find ways to alleviate the burden on individual claimants and facilitate redress of their grievances.

To address these issues ELI's Council gave a mandate for a project to be conducted on Business and Human Rights in 2018. To garner the public's views on the above topic and the ELI team's recommendations, a webinar took place on 30 November 2021. The team's report has since been approved by the ELI Council and will be uploaded onto ELI's website shortly.

3. Number and type (general or specific public with details if possible) of participants present

There were 81 participants from 29 different countries who took part in the event. The event was opened to the public and advertised on the ELI website and on social media, as well as at the Conference on the Future of Europe portal. Most participants (63%) are employed in the legal field, followed by education and training occupations (16%) and students (10% each), with several individuals representing other occupations.

4. If available, demographic information about participants (eg age, gender, etc)

68% of participants were female, 32% were male. 23 participants (28%) indicated that their age fell within the 50–59 category, 22 participants (27%) were in the 40–49 category, 14 participants (17%) were between 30–39 years old, 11 (14%) participants indicated their age as falling between 20–29 years old, 10 participants (12%) indicated they were 60 or over, and 1 participant (1%) was under 20 years old.

5. Main subjects discussed during the workshops

ELI's First Vice President, Lord John Thomas, introduced ELI, outlining the significant contributions it has made to the development of European law. He explained the idea behind the event and introduced the other speakers, one of the Reporters of the ELI Project on Business and Human Rights (with input from the EU Agency for Fundamental Rights, FRA), Diana Wallis, and project team member, Robert Bray.

Lord John Thomas emphasised the link between business and the future of Europe, stating that so many products are made outside Europe, and in some cases in conditions where the standards of safety may be horrifying, child labour is used, etc. As responsible nations that reflect on what we can do to improve situations, it is important that we do what we can to raise standards of safety and work and remedy victims where these are breached. This topic is therefore a very important part of defining Europe as a series of nations which has the welfare of others elsewhere close to their hearts.

Diana Wallis informed those present about the process leading to ELI taking on the project, referring to the FRA's initiation of a joint project with a view to using their expertise on this subject on the one hand and ELI's network of experts on the other, be they judges, practitioners, academics, etc. She referred to the drawback of the United Nation's (UN) guidelines on this subject which put it down to Member States to provide access to remedies. This has not been going well as victims continue to face many legal and practical obstacles in trying to obtain remedies for human rights abuses. This seems bizarre in light of the EU's legal framework, etc on fundamental rights. Diana Wallis explained that the team looked at issues that prevented access to remedies and she outlined these. She also spoke of possible ways of cutting through the identified obstacles, including Alternative Dispute Resolution and due diligence, before highlighting their drawbacks. Ultimately, she said, the team recommended the institution of a European level Ombudsperson with sufficient powers to investigate, fine and

compensate. She concluded that Europe is increasingly based on values and that a key to those values is the protection of fundamental and human rights. If we cannot deliver remedies for breaches to the above, something is not right.

Among other things, Robert Bray emphasised that in defending the rights of citizens outside Europe, we are also defending our own rights. He outlined real life examples of situations the project seeks to address and highlighted existing approaches, eg the EU's social audit requirement for multinational companies in compliance with the Non-Financial Reporting Directive as paralleled by the UN's Guiding Principles on Business and Human Rights, the Organisation for Economic Co-operation and Development's (OECD) Due Diligence Guidance for Responsible Business Conduct, many of which have led judges in many countries to infer a duty of care by multinationals and could form the basis of an EU instrument of the sort proposed by the European Parliament. It is evident, in fact, that some multinationals continue to pursue profits at the expense of human rights and environmental protection in practices exacerbated by weak administrations, weakening the persuasiveness of due diligence reporting alone. Moreover, imposing additional levels of bureaucracy on multinational companies may have the undesired effect of discharging liability as the Rana Plaza incident has also shown. Robert Bray also highlighted conflict of law rules that could facilitate remedies, before adding that laws in third countries might not necessarily be bad, however, they might not be applied. He added that there are reasons why it might be better to bring proceedings outside Europe, including the danger of parallel proceedings being brought in Europe and abuse of process. In light of recent cases by domestic courts and national legislatures in Europe, he advocated an EU regulation based on art 114 of the Treaty on the Functioning of the EU (TFEU) creating a statutory duty of diligence. That we are still waiting for such a regulation that the Commission promised underlines the difficulties of internal EU processes and of the matter.

The need to engage the public on this was highlighted before attendees were asked to provide their views on several questions including on the following via polls:

1. Do you think that proceedings should be able to be brought in national courts in Europe against companies supplying goods or providing services in Europe for breaches of human rights/damage to the environment in countries outside Europe?
2. What do you think is the best way to deal with these issues – formal legal proceedings in Europe or solutions in non-European countries?
3. Do you think that good corporate behaviour can be encouraged by companies insisting on high standards of behaviour in their contracts with all those they deal with so as to raise standards throughout supply chains?
4. Do you think it is helpful/sufficient to rely on a system of companies compulsorily self-reporting and auditing themselves on such activities?
5. Do you think it would be a good idea to have some form of stand-alone European Corporate Responsibility Ombudsman with substantial powers to investigate, fine and order compensation payments against corporates active in Europe (be able to name and shame)?

6. Main ideas suggested by participants during the workshops and the shared or debated narratives and arguments that led to them

The event began with a question on whether proceedings should be able to be brought in national courts in Europe against companies supplying goods or providing services in Europe for breaches of human rights/damage to the environment in countries outside Europe. 83% of those that voted

agreed, 4% disagreed, and 13% were undecided. The participants therefore felt, in the right circumstances, that it is correct that victims of violations of human rights, etc, carried out by European companies through their subsidiaries or through business partners should in general be able to bring proceedings in Europe where they cannot successfully bring proceedings at home, eg owing to local corruption or a poor court system. However, there needs to be clear system in the sense that there is so much litigation about the place where a case should rightly be litigated which is no service to victims. It should be clear that cases can or cannot come to Europe without too much argument because a lack of clarity would not serve victims well. A discussion on the potential role of international arbitration in light of the Hague Rules on Business and Human Rights Arbitration and whether the ELI team had civil or criminal actions in mind ensued. Diana Wallis said that the team concentrated on the former. As to the initial enquiry, the overwhelming feeling of the team was that it is fine to resort to international arbitration but this needs to be used against the backdrop of an absolutely clear black letter law framework to facilitate clarity. Moreover, one should be able to use the coercive power of the State to get and enforce a remedy. Arbitration can achieve that in some circumstances but what is needed is a black letter law framework that offers little or no room for argument. In answer to a question, Robert Bray said that basing some sort of class actions on the EU consumer class action was discussed in the team's report. As far as the question of arbitration is concerned, the EU has always steered clear of this, despite the Commission's attempts.

Participants were more divided as to whether formal legal proceedings in Europe or solutions in non-European countries were the best ways to deal with issues. 49% were in favour of solutions being implemented in non-European countries that trade with Europe (eg helping improve their justice systems or developing other softer means of getting corporations to work with local populations), while 38% opined that formal legal proceedings in Europe were more preferable. The rest were not sure. Some participants commented that both should be implemented to ensure optimal impact as they are not mutually exclusive. They also raised the problems of effectively improving justice systems abroad given the power of big business which may manage to subvert the justice system. That there is room for the EU to assist countries in improving their justice systems, assuming countries want this, was said. However, the best way, in Robert Bray's view, would be to create a statutory duty of care for multinationals which gets passed down the supply chain by way of contract so that one eliminates a lot of the difficulties arising out of private international law which is an expensive game. Diana Wallis agreed and added that the idea that an individual has to litigate in European courts, rather than at home makes it feel like legal imperialism. On the other hand, to ensure that the goods sold in Europe live up to European standards and that companies operate to European standards, it is important to have a system where individuals can go to their local courts and get the right answer there as well as get it properly enforced. Justice should be delivered where the action has occurred to make sure that others behave themselves as this creates an 'educative effect.' In response to an example given on the difficulties of enforcing the *Lago Agrio* case, the ease of enforcing judgments against multinationals in Europe was said to be another reason given for initiating formal legal proceedings in Europe.

Most participants (88%) agreed with the statement that good corporate behaviour can be encouraged by companies insisting on high standards of behaviour in their contracts with those they deal with so as to raise standards throughout supply chains. Participants raised current developments in various countries, including in Germany, where a law was enacted that obliges corporations to ensure that human rights are not violated along the entire supply chain. Robert Bray said that this is an important development, but that it was watered down. Civil liability does not feature and the only way of

bringing proceedings is through NGOs and trade unions. He referred to similar developments in France and Italy and to the fact that a disparity now exists as a result between Member States of the EU which in fact could prompt the EU to act and adopt a law of its own, on the basis of art 114 TFEU. His view, however, was that the EU legislator would likely face the same obstacles as the German legislator in adopting such a law. Diana Wallis said that the mismatched approach between Member States was not necessarily a bad thing as one begins to see what the different possibilities are. She concluded, however, that it does not facilitate a coherent regime which would be easier for victims to access remedies. This led participants to wonder how one can show and calculate damage caused and how courts calculate damages.

Thomas Meyer, a participant, was invited to the panel. Among other things, he explained that Germany had developed a 'fining' system as a sanction imposed in the face of corporate human rights offences. This is also the case with serious data protection breaches. The idea behind the fines is to disgorge profits cooperates make by offending human rights.

The discussion then focused on whether relying on a system of companies compulsorily self-reporting and auditing themselves on such activities is sufficient, with 63% of those who voted being of the opinion that this is not the case, 25% of voters believing it is and only 12% being unsure. Emphasis was placed on the fact that such an exercise might be good for already compliant companies, and that even if mandatory it needs the backing of the law (duty/standard of care), otherwise it is highly likely that it becomes just another box-ticking exercise. Imposing a duty/standard of care results in the burden of proof being imposed on the company to show that it kept to the duty/standard rather than in victims struggling to prove this.

In response to a question by John Gaffney on whether there is scope for a far wider equivalent(s) of the Accord signed between global brands and trade unions created in the aftermath of the Rana Plaza building collapse, in other words, whether an essentially private agreement can fill in the gaps in the EU framework and provide the firm legal basis for remedies and enforcement essential for arbitration to work, Diana Wallis agreed but said that one is dealing after the event. If there had been clear quick access to remedies backed by a legal framework, victims might have got there quicker. Robert Bray said that Rana Plaza was ad hoc and tailored to the incident. He therefore asked what sort of private instrument/legislation John Gaffney would propose, to which the latter responded that he would commit to writing an article on the subject. John Gaffney added that that while he did not believe a private agreement is a panacea, it might provide some gap-filling and provide a sound basis for arbitration, with all the flexibility that arbitration offers on some of the issues raised by the speakers. Diana Wallis agreed that arbitration could get round the cross-border issues and said she would look into the Hague's work in further detail.

That the present EU trend seems to consist in a bureaucratisation of duties, which seems to be detrimental to fundamental rights and values and that compliance seems more important than the respect for human rights and blurs liability was emphasised by one participant, with the panellists calling for enforceable due diligence.

The idea developed in the ELI project of a stand-alone European Corporate Responsibility Ombudsman with substantial powers to investigate, fine and order compensation payments against corporates active in Europe (ie a name and shame mechanism) was debated last. Most participants (74%)

favoured such an idea and suggested that it might prompt judges to award damages to victims directly, without them having to fine companies directly. It was argued that such an approach would cut through the interminable arguments that exist in Europe about collective redress and private international law. One institution, the European Corporate Responsibility Ombudsman, would be given strong investigative powers that can establish credibility within Europe. However, the question that arises is whether the Ombudsman should have the ability to fine individuals as the European Ombudsman works very well without the ability to do so. Robert Bray opined that when one gets into fines, one gets into appeals and delays. The idea of compensation payments, which the Ombudsman could negotiate for victims, can and remains interesting though. One option is that the Ombudsman could impose liability and one could look to collective action to get the money out of the company. Diana Wallis said that the team had thought about this and wanted to hear the reaction to it. She referred to national Ombudsmen that already do this but said that a European one would be more effective. A further advantage, she highlighted, is that Ombudsmen disburden courts.

Returning to the notion of domestic delivery of justice, the question of where domestic is arose: where the damage occurred/human rights abuses took place, or where a multinational company organised its supply chain and made its profits? Thalia Kruger, who raised the question, added that the place where profits are made is an interesting connecting factor as well as the one where the multinational company organised its supply chain. In addition, it would correspond to the idea of *neminem laedere* and would be consistent with other policies of the EU. The panellists agreed that this question highlights the complexity of issues. Diana Wallis said she had in mind the place where the human rights abuses occurred so that would have an educative and deterrent effect as well as encourage others that may suffer similar abuse to be emboldened to take action themselves.

A participant that arrived late suggested that the EU as well as national legislatures could draw inspiration from the Council of Europe Recommendations on Business and Human Rights, which provide elaborate guidance on issues of judicial remedy, particularly on jurisdictional and procedural questions. The latter are considered in some detail in the ELI Report.

7. General atmosphere and expected follow-up.

It was clear that the majority of those present agreed with the drafters of the ELI Report on the need for a stronger legal framework and for more meaningful legal protection in this field, ideally in European courts. However, it is important to investigate other potential options as well. In other words, it is important to keep an open mind but at the same time realise that it is about time that Europe delivered on its values. There was therefore a strong vote in favour of a sort of European Corporate Responsibility Ombudsman.

The discussions showed that Europe has values (and that it values the rights of others in other countries and wishes to see them protected). The discussions also showed that there was little faith in corporations and much faith in the State, with the overwhelming participation showing that this topic is something that required State action through the various modalities discussed. It also showed a fundamental respect for the views of others, with the concern that we do not impose our values without taking into concern the views of others but we must not allow ourselves to gullibly accept corporate assurances that all will be well. It is hoped that ELI's team will make an important contribution to the CoFoE through its findings and recommendations and in supporting Europe as it addresses the human rights infractions that corporations based in its soils cause abroad.