

GUEST ESSAYS CIVIL SOCIETY & THE PRIVATE SECTOR

TRANSNATIONAL STRATEGIC LITIGATION: AN EMERGING PART OF CIVIL SOCIETY'S REPERTOIRE FOR CORPORATE ACCOUNTABILITY

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INTRODUCTION

Civil society's engagement with the private sector can take many forms. In response to transnational corporate involvement in human rights violations, civil society is increasingly exploring the tools offered by the law, and using strategic litigation to complement longstanding practices of campaigning, public protest, boycotts and negotiation. The importance of accountability and access to justice is recognised, for example, in Goal 16 of the Sustainable Development Goals. Civil society can play an important role in demanding accountability and facilitating access to justice for those who are marginalised.

The language of the law and the format of legal proceedings can provide an impetus for the articulation of the demands of social movements towards corporations and offer an alternative vocabulary, rooted in discourse about rights. When people such as farmers, plantation workers and factory workers act as rights holders, this can trigger new dynamics, while hearings can provide a forum and stimulus for public debate. Legal interventions can draw attention to the ways in which companies disregard the human and environmental impacts of their products, while expanding or outsourcing their businesses abroad. As an example of the collaborative civil society efforts to achieve accountability and access to

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justice, this contribution to the 2017 State of Civil Society Report looks at ongoing litigation in relation to global textile supply chains, the agro-chemical industry and arms exports.

ACCOUNTABILITY THROUGH HOME STATE LITIGATION REGARDING THE TEXTILE INDUSTRY

Justice, not hand-outs; liability, not voluntary giving: these are the calls made by survivors and relatives of victims of the fatal fire at the Ali Enterprises textile factory in Karachi, Pakistan. A fire on 11 September 2012 left 260 people dead, and a further 32 injured.

German discount clothing retailer KiK was, by its own admission, the factory's main customer. On 13 March 2015, four of those affected by the disaster filed a lawsuit against KiK at the Regional Court in Dortmund, Germany. Claimants Muhammad Hanif, Muhammad Jabbar, Abdul Aziz Khan and Saeeda Khatoon are all members of the Ali Enterprises Factory Fire Affectees Association, the organisation run by those affected by the fire. On behalf of all members they are seeking €30,000 (approximately US\$31,300) each for their pain and suffering. On 29 August 2016 the court issued [an initial decision](#) that it had accepted jurisdiction, and granted legal aid to the claimants to cover their costs.

Such litigation is the result of intensive transnational collaboration between many different actors. The lawsuit would not have been possible without the key roles played by, for example, the Pakistani National Trade Union Federation and the German development organisation medico international. In addition, the collaboration between the Berlin-based legal team at the European Center for Constitutional and Human Rights (ECCHR) and lawyers in Karachi and Islamabad was indispensable to obtaining all relevant documentation and developing the strongest legal arguments.

Shortly after the significant judicial decision in Germany, in separate negotiations, [an agreement](#) was reached in which KiK committed to pay US\$5.15 million to those affected. The agreement, signed on 9 September 2016, was the result of talks enabled by the International Labour Organization (ILO) with KiK, IndustriALL Global Union and the Clean Clothes Campaign, at the request of both the German and Pakistani governments. The Ali Enterprises Factory Fire Affectees Association [welcomed](#) the promised compensation.

Notwithstanding this important victory, the Association decided that the legal claim filed in Dortmund against KiK should continue. The legal claim asks for payment of damages for pain and suffering, which are not covered by the ILO agreement. Further, KiK's promised upcoming payment is voluntary. A dependence on the goodwill of companies gives no future guarantees for workers. Where voluntary commitments have failed, the necessary incentive to ensure that proper safety measures are put in place can be provided by making retailers recognise that they are liable for harms occurring in their supply chains. The mere and simple payment of voluntary compensation cannot lead to what [has been called](#) the normalisation of 'unpardonable negligence' through the discourse of compensation rather than rights.

ADDRESSING DOUBLE STANDARDS IN HOST STATE PESTICIDES REGISTRATION

Litigation against corporations need not always take place in the company's home country. As the example of the agro-chemical business demonstrates, strategic transnational efforts can also lead to a decision to file claims in the country where the harm takes place. Moreover, while civil lawsuits offer one way to demand corporate accountability, civil society can also use litigation to demand better state oversight.

In 1990, the World Health Organization (WHO) [reported](#) that [pesticide poisoning](#) affects three million people and accounts for 20,000 unintentional deaths a year. The hazards of pesticide use disproportionately impact on people in the global south: it is estimated that 99 per cent of all fatal pesticide poisonings take place in global south countries. This is often due to the absence of effective regulatory regimes and a lack of training in safe pesticide application, which significantly increases the risk of exposure to toxic chemicals.

German chemical company Bayer and the Swiss company Syngenta continue to sell pesticides in the global south that have long been barred from the European market. For example, Bayer sells the pesticide Larvin, which contains the active ingredient Thiodicarb, in India and Mexico. This chemical has been banned in the European Union (EU) since 2007. Similarly, Syngenta continues to sell the active ingredient Paraquat in countries such as India and the Philippines. Due to its high toxicity, the use of Paraquat has not been allowed in Switzerland since 31 December 1989. Further, in 2007, the Court of First Instance of the EU annulled an earlier approval of Paraquat by the European Commission for EU use, in effect imposing a European ban on Paraquat.

In July 2014, the Indian government undertook an initiative to review the registration for use of 66 pesticides. The registration of these particular chemicals was under scrutiny due to their highly hazardous nature: the pesticides are already severely restricted or banned in other countries around the world. Nevertheless, several of these pesticides are manufactured and sold in India by European corporations, including Bayer CropScience, which sells Deltamethrin and Thiodicarb, and Syngenta, which sells Atrazine and Paraquat.

Indian organisations filed a public interest litigation (PIL) petition with the High Court of Delhi in June 2016 asking for the cancellation of the registration of these pesticides. The PIL states that given the reality of how these pesticides are used, for example, without appropriate protective equipment or proper disposal, it is critical to ban the most dangerous pesticides from India. Civil society actors in India and Europe collaborated to strengthen the transnational argument that pesticides

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registration is pervaded by pernicious double standards. Lawyers from ECCHR supported this petition by compiling information on banning decisions and restrictions in the EU.

THE CASE OF NATIVO: PARALLEL COMPLAINTS IN INDIA AND GERMANY

Recently, Syngenta had to pay a penalty of US\$1.2 million to the Environmental Protection Agency in the USA for [incorrect labelling](#) of its product. A [government officer](#) stated that, “Mislabelled pesticides are dangerous because they may display incorrect warnings and application instructions.” As this example shows, governments can use their authority to penalise companies for mislabelling. But in India, where mislabelled pesticides are a common phenomenon, no such thing happens.

While accurate and adequate labels are necessary, by themselves they are not enough to communicate all essential safety information to farmers. Any real effort to ensure that farmers and plantation workers are protected should go beyond proper labelling, and at the very least include adequate in-person training and the provision of protective equipment and good disposal mechanisms. If these basic safety measures cannot be guaranteed, the myth of ‘safe use’ should be abandoned, and hazardous pesticides should be taken off the market. Still, mislabelling should be taken seriously and the failure to inform farmers properly about the risks of pesticides should lead to sanctions.

One egregious case of double standards and mislabelling concerns the Bayer fungicide Nativo, which contains the active ingredient Tebuconazole. Bayer CropScience AG produces the pesticide in Germany and exports it to India, where it is repackaged and marketed by its Indian subsidiary Bayer CropScience Ltd. On registration of the active ingredient in the EU, Tebuconazole was classified as “suspected to be toxic to reproduction.” Accordingly, it is mandatory in the EU that the product carry the warning “suspected of damaging the unborn child.” However, this information does not appear on the Nativo product sold in India.

Working in collaboration, civil society organisations (CSOs) in India and Germany have filed complaints with the plant protection agencies in both countries. In India, Bayer CropScience faces potential charges for misbranding its hazardous pesticide Nativo 75 WG. Activists filed a petition with the Ministry of Agriculture in New Delhi calling for criminal investigations of both Bayer CropScience’s Indian subsidiary and the German parent company. Failure to provide necessary warnings of the particular risks for people and the environment constitutes a criminal offence of misbranding under the Indian Insecticides Act.

Under the German plant protection law, pesticides may only be exported if the container is labelled with warnings necessary for the protection of human health. German authorities are obliged to control compliance with the law and intervene when a violation is suspected. Therefore, a coalition of Indian and German CSOs filed a complaint to the competent plant protection service of the chamber of agriculture of North Rhine-Westphalia urging the investigation of the possible violation of national export rules. This could lead to the imposition of a fine on Bayer CropScience or prohibition of the export of the pesticide Nativo.

Litigation on pesticides management can, therefore, demonstrate the double standards that are applied in corporate policies and practices concerning the distribution and use of pesticides in Europe and India. By litigating, civil society can urge governments to take more seriously their role in exercising oversight over private sector transnational products and trade.

BUSINESS ACCOUNTABILITY FOR ENABLING THE INDISCRIMINATE USE OF FORCE: GERMAN WEAPONS IN MEXICO

A particularly dangerous area of business is the trade in arms, military equipment and surveillance technology. These goods are used to commit some of the most severe human rights violations using force, including killings and torture. Human rights violations committed with arms and surveillance technology can be used to stifle protest and restrict the expression of the legitimate concerns of civil society.

In a paradigmatic example, 43 students of the Escuela Normal Rural de Aytozinapa in the state of Guerrero, Mexico, were forcibly disappeared while preparing for a demonstration in September 2014. A further six students were killed and a number of other students severely injured. Investigations revealed that the municipal and state police used weapons made by the German arms manufacturer Heckler & Koch, which had been illegally traded to some federal states of Mexico in the preceding years. The state of Guerrero was excluded from receiving German weapons under the terms of the export licence, and yet Heckler & Koch G36 rifles still reached their fateful destination.

A criminal investigation in Germany led to the indictment of five employees of the manufacturer in Germany and a sales agent in Mexico. The competent court in Stuttgart accepted the indictment in May 2015. However, victims of the illegally exported weapons are not represented in the case, and the proceedings do not extend to the company's liability for the crimes committed against the students. Lawyers from two Mexican organisations, Centro de Derechos Humanos Agustín Pro Juárez and Tlachinollan – Centro de Derechos Humanos de la Montaña, in cooperation with ECCHR, asked the court to represent one injured student, Aldo Gutierrez Solano, who until today, remains in a coma.

The idea behind this legal intervention is as simple as it is forceful. If the court grants the application to have Aldo Gutierrez Solano recognised as a victim of an illegal arms export, those who are affected by the human rights violations of European companies abroad will be seen to have a face and a voice. The company will be faced with the consequences of its actions

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not in the technical sphere of arms export laws, but through the presence of someone who has paid the human cost of trading arms. The investigation of a company's responsibility for aiding and abetting crimes committed with their weapons, particularly where the risk of human rights violations could be known and foreseen, complements work to hold those who commit violations in the country that receives weapons to account. As Mexican perpetrators should be investigated and prosecuted in Mexico, so too should German nationals be held responsible for these crimes.

As well as criminal proceedings, administrative litigation can tackle the lack of accountability over arms manufacturers and their exports. The licensing of arms exports has long been overlooked in the litigation efforts of CSOs and human rights organisations, but not any more. As a result of demands by CSOs and the peace movement, administrative cases are pending at the time of writing in the [Netherlands](#) and the [UK](#) to highlight how export licences enable and fuel conflict. These two proceedings show the essential role that arms play in ongoing violations of international humanitarian law in Yemen. It may be difficult to oppose licenses because of a lack of information, but litigation can help in this regard. In addition, litigation on licenses can be preventive in nature, seeking to avoid human rights abuses based on corporate profits from arms deals.

CIVIL SOCIETY COLLABORATION FOR CORPORATE ACCOUNTABILITY

Litigation cannot be the only strategy for civil society's engagement with the private sector, and there are clear limits to what court proceedings can achieve. But ideally, litigation can contribute to placing checks on, and restricting the power held by, transnational companies in global supply chains, such as those of industrialised agriculture, manufacturing and the arms trade. To reach these desired effects, and in order not to disrupt other civil society efforts, such as those of social movements and trade unions, litigation needs to be strategic and coordinated. Collaboration should also be careful not to reproduce the [power asymmetries](#) that often exist between organisations of the global north and those of the global south. Only in genuine transnational collaboration with social movements, trade unions and farmers' associations on the ground can legal proceedings support the emancipatory struggle of plaintiffs, petitioners and their communities in demanding their rights and realising their vision of sustainable development. With these caveats, strategic litigation can complement and strengthen existing civil society strategies for social justice.