

Developments in the Field: Special Issue on Agribusiness and Accountability

Guest Editorial: Agribusiness and Accountability

This special thematic ‘Developments in the Field’ (DiF) section explores accountability initiatives in Argentina, India, Peru, the United States and at the European Union (EU) level that draw attention to human rights aspects of industrial agriculture and the due diligence expected of agribusinesses to avoid harmful impacts. In particular, the authors analyse past and ongoing litigation and legal liability arguments in a variety of forums – ranging from transnational tort claims to domestic administrative proceedings, public interest litigation and advocacy campaigns. In addition to legal aspects of these accountability efforts, such as the precautionary principle and the challenge of proving causation, the pieces also address strategic aspects, such as the organization of claimants, procedural hurdles to gain access to justice and relevant choices made in building cases. As the problems of agribusiness and challenges to accountability are highly similar across the world, the pieces in this special DiF issue should provide valuable lessons for movements, activists and lawyers everywhere.

AGRIBUSINESS

From a human rights perspective, the industrial model of agriculture promoted by agribusinesses poses a number of problems. Land grabbing, pesticides, fertilizers, machinery and genetically modified crops, which are increasingly used to replace labour-intensive farming with the promise of increased yields, have become an essential part of food and fibre production. However, contrary to the arguments of its proponents, industrial agriculture, with its narrow focus on cash crops and the export market, does not necessarily provide people with reliable access to nutrition. Instead, rising input costs of technology and specialized knowledge frequently put farmers in a position of dependency and at risk of exposure to hazardous chemicals, while yields may actually decrease after a few years.¹

Moreover, the use of pesticides by plantation workers and farmers in countries where protective equipment and training are not widespread or easily available poses a health and environmental threat to pesticide users and their communities. Lack of understanding of pesticide labels can lead users to overspray or fail to use appropriate protection. In addition, the absence of proper disposal mechanisms in many places risks creating soil and water pollution. Thus, the widespread and often improper use and disposal of pesticides affects a number of human rights (including the rights to life, health, food,

¹ Olivier de Schutter, ‘How Not to Think of Land-Grabbing: Three Critiques of Large-Scale Investments in Farmland’ (2011) 39:2 *The Journal of Peasant Studies* 249.

water, sanitation, and to a clean, healthy and sustainable environment) as well as labour rights. Pesticide use also disproportionately affects the rights of children and women, due to their heightened exposure to pesticides in many contexts.

Over the course of several decades, the pesticide industry has developed the idea of ‘safe use’ as a pillar of support for its continued manufacture and export of hazardous chemicals. The rationale behind the concept is that pesticides are safe if they are used ‘properly’ and ‘responsibly’, that is, if the correct precautions for their use are taken.² Examples of such precautions include following the directions that are printed on the container labels, wearing suitable personal protective equipment (PPE), careful storage and responsible disposal of chemicals, as well as adherence to proper agricultural practices for mixing, loading and application of pesticides.³ Unfortunately, it is not realistic that such guidelines can or will be followed under the current general conditions prevailing in the Global South. Coherent labels, explanatory leaflets and proper training are limited or non-existent. Access to and use of PPE is also limited due to a lack of supply, low levels of demand due to sparse resources, lack of awareness regarding its necessity and the inability to comfortably or safely use appropriate PPE in hot and humid climates.⁴

Even if adequate PPE were to be consistently used, it would only protect the workers who are applying the pesticides – it would not protect other people from indirect exposure or mitigate the environmental harm caused by pesticide application. Such indirect harm may be experienced by people living near agricultural fields or children and staff at neighbouring schools. It may impact the reproductive health of pregnant women, and it can even affect international consumers of food products grown in areas where pesticides were applied. Thus, family members and neighbours of pesticide users are also at risk of harm from indirect exposure to pesticides as a result of unsafe storage and disposal procedures, as exemplified in the piece by Gomero et al. Safe use presupposes an awareness of risks and knowledge of precautionary measures. However, training of pesticide users by the relevant government bodies or manufacturers and distributors, with respect to chemical application and protective measures, is often inadequate.

Another factor complicating the idea of ‘safe use’ that underlies current pesticide approvals is the inconsistent and incomplete testing of agrochemicals. Pesticide companies and regulatory authorities rely on inadequate safety testing of the chemicals contained in pesticides. Generally, only the main active ingredient of the pesticide is tested for adverse effects. However, some pesticides are most toxic when their main ingredient is combined with other ‘inactive’ chemicals. Testing related to the effects of cumulative exposure to multiple pesticides, as well as the specific effects of pesticide exposure on children, is severely lacking, as Montenegro emphasizes in his piece on

² See, e.g., ‘Letter from Bayer to the FAO re: Ad Hoc Monitoring Report’ (13 January 2016), stating: ‘Bayer only distributes crop protection products...which are safe when used responsibly and according to label instructions, and which do not pose a risk to neither the operator nor the environment.’ Document on file with the authors.

³ CropLife, ‘Guidelines for the Safe and Effective Use of Crop Protection Products’, *CropLife International* (2006), https://croplife.org/wp-content/uploads/pdf_files/Guidelines-for-the-safe-and-effective-use-of-crop-protection-products.pdf (accessed 12 February 2019).

⁴ The Food and Agriculture Organization (FAO) of the United Nations explicitly recognizes this in Article 3.5 of the Code of Conduct on the Distribution and Use of Pesticides: ‘Pesticides whose handling and application require the use of personal protective equipment that is uncomfortable, expensive or not readily available should be avoided, especially in the case of small-scale users in tropical climates.’

Argentina. Generally, the testing of pesticides is quite limited, but even more so in the Global South, where research, resources and training are scarce.⁵ These considerations coalesce to transform the concept of ‘safe use’ into a patent myth.

Given the scientific uncertainty about the cumulative and long-term effects of pesticides, as well as the possible gaps in the implementation of protective measures, the European Union (EU) explicitly requires its Member States to apply the ‘precautionary principle where there is scientific uncertainty as to the risks with regard to human or animal health or the environment posed by the plant protection products to be authorised in their territory.’⁶ On the basis of this principle, the EU Court of First Instance annulled the authorization for use of paraquat in the EU on 11 July 2007.⁷ Courts in other countries have also applied the precautionary principle to ban pesticides, such as when the Indian Supreme Court banned endosulfan, as discussed in the piece by Kumar and Chelaton.

ACCOUNTABILITY

In the developing field of ‘business and human rights’ (BHR), cases of pesticide litigation are not well known. This is unfortunate because they provide important lessons for everyone in the BHR community. Past litigation experiences can suggest ways forward for securing accountability and provide examples of how to overcome or bypass recurring challenges, such as the legal and factual difficulty of proving causation or the need to disentangle corporate structures of decision-making. Fascinating and exemplary litigation has been developed in the Global South, as the contributions on India and Argentina show. Taking a comparative perspective towards pesticide litigation makes sense given that many of the same companies are engaged in agribusiness around the globe, often with pesticides that contain the same active ingredients and thus rely on the same scientific information for their registration approvals.

The contributions in this special DiF issue show that agribusiness is an industry determined by economic interests and often too closely inter-twined with government authorities. Approvals of a pesticide’s registration or renewal frequently depend heavily on corporate science, which is used as the basis for decision-making, a fact that is rightly criticized by civil society, as shown in the piece by Clausing. The agrochemical market is dominated by a few companies that own seeds and so-called ‘plant protection products’. Mergers and acquisitions have led to even higher concentrations of market power. These developments warrant closer scrutiny from a BHR perspective.

This thematic DiF section seeks to shed light on current trends of accountability related to various aspects of transnational agribusiness. The pieces contribute case studies from several countries and highlight the use of different legal means to remedy negative human rights impacts. Each of the contributions analyses a particular type of legal remedy that is part of a wider tendency to look for innovative ways to hold the transnational

⁵ Paula Barrios, ‘The Rotterdam Convention on Hazardous Chemicals: A Meaningful Step Toward Environmental Protection?’ (2003–2004) 16 *Georgetown International Environmental Law Review* 679.

⁶ Article 1(4) EU Pesticides Regulation 1107/2009.

⁷ Case T-229/04, *Kingdom of Sweden v Commission of the European Communities*, Judgment of the Court of First Instance, 11 July 2007, ECLI:EU:T:2007:217.

agrochemical industry accountable. The authors include academics, activists, lawyers and practitioners from different countries, whose contributions address both practical and legal challenges involved in securing corporate accountability in this field. As the pieces here show, accountability in agribusiness is both about the responsibility of pesticide companies as well as about proper approval procedures on the basis of good science and the precautionary principle.

In the first piece, Raul Montenegro discusses the historical court decision in the ‘Mothers’ Case’ of Ituzaingó, where grassroots mobilization was combined with scientific research to push for criminal proceedings. In the second piece, the poisoning of 24 children by a Bayer pesticide in Taucamarca, Peru, became the focus of a long-winded trajectory through civil courts. Luis Gomero Osorio, Erika Rosenthal and Douglas Murray trace this trajectory and analyse the various legal efforts used along the way. The third contribution by a US lawyer David Strouss discusses the possibility of transnational litigation by sharing the hurdles encountered so far in the attempt to bring a civil claim in the US against Philipp Morris and Monsanto for the harms allegedly caused by the pesticide Glyphosate at tobacco farms in Argentina.

Moving from Latin America to Asia, Dileep Kumar and Jayakumar report on their successful judicial fight against the harm caused by the pesticide endosulfan in India. In a historic decision in public interest litigation proceedings, the Indian Supreme Court judges applied the precautionary principle as they issued a nationwide ban on the chemical. The fifth piece takes a closer look at the bureaucratic pesticide approval mechanisms in the EU. Toxicologist Peter Clausing of PAN Germany analyses the uneven battle over access to information and the interpretation of scientific evidence. In the sixth piece, Mirka Fries, Andrés López Cabello and Santiago Sánchez examine legal strategies for challenging the approval of genetically modified seeds at the Argentinean Supreme Court. After first dissecting the arguments put forward by Monsanto in favour of a re-invigorated patent regime, the authors highlight civil society’s arguments on why the current special regime in Argentina should be kept in order to safeguard the rights of farmers and indigenous peoples and to protect the environment. Finally, Karol Boudreaux and Scott Schang discuss large-scale land acquisitions as a necessary precursor to practising industrial agriculture in Africa, Latin America and Asia. The authors highlight the current strategies for challenging problematic land deals and preventing their negative human rights impacts. In addition to urging industry and multi-stakeholder initiatives to change the dominant corporate approach, they identify legal interventions as a possible, but so far under-utilized, tool for advancing accountability.

The pieces presented in this special DiF issue all emphasize the importance of strong local groups and organizations in pushing for accountability. They also highlight the relevance of collaboration with universities and scientists in order to strengthen the evidentiary basis of legal claims. The legal strategies followed by the diverse actors in different parts of the world highlighted in these pieces also shed light on the manifold possible meanings of accountability and justice. Some strategies emphasize preventive effects for the future, such as the ban on endosulfan, while others aim for remediation of past violations, such as the push for criminal prosecution in Argentina seeking the punishment of specific individuals. In the US cases discussed in this special issue, remedial accountability in the form of compensation is sought by those who were

injured due to the use of pesticides. At its core, this special thematic issue shows the creativity of those who are struggling to hold agribusinesses accountable for human rights abuses connected to them.

The contributors not only analyse the challenges faced so far and the methods used to overcome them, but also highlight the results of these efforts, embodied in the victories achieved and setbacks experienced. Because agribusiness operates transnationally, the challenges of holding corporate and governmental actors to account for the harm caused by their decisions share similarities across country contexts. The pieces in this special DiF issue share the lessons learned throughout lengthy procedures driven by farmers, plantation workers and concerned communities. Communities facing the negative consequences of agribusiness as well as lawyers can draw upon these existing experiences to sharpen their tools and strategies.

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