

LITES – Legal Issues in

Transdisciplinary Environmental Studies 1

Series Editors: Massimo Monteduro · Saverio Di Benedetto
Alessandro Isoni

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Agricultural Law

Current Issues from
a Global Perspective

LITES – Legal Issues in Transdisciplinary Environmental Studies

Volume 1

Series Editors

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The 'Legal Issues in Transdisciplinary Environmental Studies' (LITES) Book Series is based on the assumption that the process of dialogue and cultural integration between law, life and earth sciences, and social and human sciences should be strengthened and updated, by relying on transdisciplinary research platforms such as agroecology, environmental studies, environmental science, and sustainability science. According to the new paradigm of social-ecological systems (SES), the concept of the environment is conceived as a complex system of relationships between ecological and social factors, including the cultural and economic ones. The primary purpose of law, in this conceptual framework, is to preside over the durability of the essential conditions for the survival of the social-ecological systems and the protection of life at all scales (of individuals, societies, ecosystems).

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Silvia Rolandi • Andrea Saba
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Preface

Legal scholars are paying increasing attention to agricultural issues. Nevertheless, the field largely remains an underresearched area of law and is considered historically as a specific area of research for life sciences and economics. The number and scope of questions that revolve around agricultural issues are increasingly requiring the legal research community to adopt a new approach. Challenges, such as the governance of the food system worldwide, the maintenance of agricultural natural resources, as well as land governance, are making it necessary to address agri-food and agri-environmental issues with a globalized approach. Against this background, the book aims to address some of the complexities of the agri-food and agri-environmental regimes.

The Introduction traces the evolution of agricultural law and provides an overview of the new social and environmental challenges that will need to be addressed. Emerging issues are placed in the broader conceptual context of a global perspective.

The chapters are grouped into three main parts, each of which has its own brief introduction.

Part I covers the governance of natural resources and their prominence in tackling food insecurity. Every agricultural activity begins with the resources provided by nature. While in the past they were traditionally regulated by national governments, today their regulation is increasingly being addressed through a framework of international governance. This is due to the necessity to preserve the availability of natural resources and the conservation of ecosystems while at the same time responding to the growing world population and the relating demand for food, in particular for more protein-rich diets, as well as other nonfood agricultural products. With regard to these aspects, this part examines the concepts of sustainable agriculture and agro-ecosystem services in connection with food security.

Part II deals with the regulation of the main product of the agricultural activity—food. Today, the food production chain is being expanded by technological developments, interactions between “public” and “private” standards, food safety issues, animal welfare standards, and markets. This part outlines the answers that agri-food

Contents

Agricultural Law from a Global Perspective: An Introduction	1
Mariagrazia Alabrese	
Part I Environmental Protection and Food Security at the Cross-Roads with Agricultural Law	
Sustainable Agricultural Production, Environmental Sustainability and Food Security: How to Frame the Legal Intervention	15
Elisa Morgera and Andrea Saba	
The Ecological and Perpetual Dimensions of European Food Security: The Case for Sustainable Agriculture	19
Alicia Epstein	
International Law on Plant Genetic Resources for Food and Agriculture: Towards a New Balance?	53
Anna G. Micara	
Results-Based Agri-Environmental Schemes for Delivering Ecosystem Services in the EU: Established Issues and Emerging Trends	83
Andrea Saba	
The Legal Instruments for Agri-Environmental Goals and the Influence of International Factors: The Case of Swiss Agricultural Policies	123
Christa Preisig	
Part II Emerging Consumers' Interests: Answers from the Agri-Food Regulation	
The Emerging Interests of Consumers: Answers from the Agri-Food Regulation	155
Vito Rubino	

Insects in Agriculture: Traditional Roles and Beyond	163
Valeria Paganizza	
Animal Welfare Standards in Agriculture: Drivers, Implications, Interface?	181
Diane Ryland	
Legal Pluralism and the Regulation of Raw Milk Sales in Canada: Creating Space for Multiple Normative Orders at the Food Policy Table	211
Sarah Berger Richardson	
Food E-Commerce as a New Tool for the Growth of the Economy. European Legal Framework for Information of Prepacked Food Sold Online	231
Silvia Rolandi	
 Part III Land Tenure, Investment Law and Agriculture	
Land Governance, Investment Law, Agriculture, and the Rights of Local Populations	247
Adriana Bessa and Margherita Brunori	
Access to Land and Security of Tenure in the Resolutions of the United Nations General Assembly	255
Margherita Brunori	
Global Land Rush, Water Grabbing and the Human Right to Water	293
Francesca Spagnuolo	
The Regulatory Vicious Circle of Investment Operations in Agriculture	311
Federica Violi	
Between Customary and Statutory Tenure: Understanding Large-Scale Land Acquisitions in Zambia	341
Margherita Baldarelli	
Agricultural Land Ownership as Food Sovereignty: The Case of Slovakia	367
Katarína Dirgasová and Jarmila Lazíková	

The Emerging Interests of Consumers: Answers from the Agri-Food Regulation

Vito Rubino

1 Introduction

The increasing role of consumers in determining trade trends and market prospects is one of the most characteristic hallmarks of the recent evolution of international trade.

Their grown capacity for searching for information has increased a critical approach to markets and to the ethical models of production.

At the same time, the global resonance of many scandals has given rise to concerns and new needs for security that is strictly related to the transnational structure of production chains and the loss of the territorial dimension of manufacturing.

In this way, an apparent contrast has emerged between the idea of “tradition,” intended as knowledge handed down over time about know-how and its anthropological and cultural reflections, and “innovation,” intended as introduction of new technologies or exploitation of imported know-how from different countries.

In reality, a closer look shows that the contradiction is more apparent than real as it is exaggerated in common perception by the extreme conciseness of information in the social-network era.¹

It may appear obvious to state that traditions were the result of attempts made in a distant past to improve products and manufacturing processes. We can therefore assume that traditions themselves in some way stem from successful innovations (frequently in the technological or process field).

¹See on this point Keim et al. (2014), Zuckerman (2013), Bolisani (2008), Fabris (2007) and Heim (1998).

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The relevance of the contamination or circulation of knowledge (a characteristic element of innovation) and the subsequent improvement of cultural heritage with regard to specific products and production methods are equally clear: an *ante litteram* globalization brought foods such as oranges (imported for the first time from China by Portuguese merchants during the fourteenth century) and tomatoes (imported from America with many other vegetables during the sixteenth century) to Europeans, and these soon became an essential part of the Mediterranean gastronomic culture.

Furthermore, before the enlargement of the boundaries of the “old world,” trade exchanges promoted by the infrastructural network created by the Romans generated a fruitful contamination between peoples and cultures across the Mediterranean sea and toward Asia, with an evident effect in terms of traditions, cultures, and the evolution of production methods.

All these considerations may appear obvious in a general context, but from a juridical point of view globalization still represents a complex issue.

Legal rules, in fact, tend to be conservative, and therefore they are not usually a factor in promoting growth in economic development.

The juridical regulation of commercial and personal relationships is based on repeated behaviors over time, the need to transform them as mandatory rules for the general interest and with a certain caution with regard to sudden modifications of the “status quo.”

The increased importance of science today makes this tendency of the law more rigid, given that many juridical constructions and rules are based on a scientific approach that allows a balance between opposite interests: in order to change the rules, both public opinion concerning the usefulness of the modification and the existence of assumptions that require the modification of the previous discipline are fundamental.

In this way, the accelerated movement toward innovation, caused by the overwhelming progress of knowledge in recent decades, conflicts with the approach of legal systems to social problems, which is conservative by necessity (or, better, precautionary), since the general concerns connected to the speeding up of technological production processes make it difficult to foresee the long-term effects of innovations on human health and the environment.

2 Emerging Questions and Agri-Food Answers

In the framework described, the agri-food sector represents a perfect scenario in which we can measure these trends and their economic and juridical consequences since it covers all the fundamental juridical assets: consumer health, the environment, protection of the cultural identities, the ethical impact of specific production methods, and fairness in distribution in the context of the progressive dematerialization of commercial relationships.

The use of insects as new sources of nutrients in diet and natural agents in integrated pest management is a relevant example of the difficulty in finding juridical solutions to balance the opening of markets to innovative foods and the consumer concerns and expectations.²

For many people, insects are a traditional component of their diet, not only in “exotic” contexts³ but also in the Mediterranean culture, as shown by some biblical passages.⁴

Their consumption, therefore, can be included in demonstrated traditions that legitimate their circulation as generic foods.⁵

Nonetheless, in the European Union, the question is still open both from the food safety point of view and the environmental impact of their use and breeding.

As Valeria Paganizza underlines in her essay “Insects in agriculture: traditional roles and beyond,” the juridical framework is fragmented considering the lack of a common reference to insects as a food or feed at the international level. The European Union considers insects as novel food because they have not been used for human consumption to any significant degree within the Community before May 15, 1997. So they have to undergo an assessment procedure before being placed on the EU market.

The author raises questions about the apparent conflict between the juridical classification as “novel food” and their traditional consumption in many countries. She highlights that the interruption (or the absence) of a repeated consumption over time can determine the loss of the ability to absorb specific nutrients or the possibility of adverse reactions.

So the European food law identified the solution to this conflict of interests in the precautionary approach of prior assessment, imposed by EU Regulation 2283/2015,⁶ with a significant exception for food considered “traditional” in their countries of origin, intended as products with safe food use for at least 25 years, demonstrated by the applicant as a part of the customary diet of a significant number of people.

In this case, the procedure is limited to a notification with a possible later evaluation only in case of opposition by a Member State or the European Food Safety Authority.

The globalization of production raises regulatory problems also with regard to the ethical side in areas with a lower level of regulation.

²See Paoletti (2005).

³See Montanari and Sabban (2006) and Foliart (1999). It has been noted that the Aztecs made use of insects both for ceremonial occasions and as ordinary food see Costa-Neto (2003).

⁴See The Holy Bible, Book of Leviticus, 11, 9–10. For a wider analysis of the impact of Christianity on food consumption see Montanari (2015).

⁵See Huis et al. (2013).

⁶See the Regulation (EU) 2015/2283 of the European Parliament and of the Council of 25 November 2015 on novel foods, amending Regulation (EU) No 1169/2011 of the European Parliament and of the Council and repealing Regulation (EC) No 258/97 of the European Parliament and of the Council and Commission Regulation (EC) No 1852/2001, OJ [2015] L 327/1.

Dyane Ryland in her essay dedicated to “Animal Welfare Standards in Agriculture: Drivers; Implications; Interface?” reflects on the increasing role of soft law in the animal welfare sector.

The transnational extension of private standards, the lack of transparency in mechanisms of adoption of these schemes, and the absence of a democratic control on the subjects who prepare them (mostly an expression of the scientific community, by definition beyond political control) actually poses the problem of the link between public rules and private norms, due to the increasing complexity of reality.

The author, in this regard, underlines that the European Union and the Member States cannot “outsource” their responsibilities for ensuring enhanced animal welfare standards in the agri-food chain, raising questions about the boundaries between public responsibilities and the role of private bodies.

The balance between health protection, economic freedom, and consumer right to self-determination is the focus of Sara Berger Richardson’s remarks in her dissertation “Pluralism and the regulation of raw milk sales in Canada: creating space for multiple normative orders at the food policy table.”

Against the background of the debate on the Canadian prohibition of raw milk sales, the unresolved question of juridical paternalism takes shape, that is, the adoption of mandatory rules in order to guarantee a wider consumer protection, and the identity of the “consumer,” increasingly intended as a person without sufficient knowledge to make a free and safe choice of products on the market.

The raw milk movement represents, in this respect, the expression of the resilience of consumers, who want to be the protagonists of their own choices. This approach could give rise to a new economic model based on an increased ecological, ethical, and social sensitivity, intrinsically connected to the “multilevel” nature of the protection of fundamental rights.

Finally, Silvia Rolandi, in her paper “Food e-commerce: the European framework for Business to Consumer regulation and possible critical issues,” concludes the chapter dedicated to the relationship between tradition, new technologies, and consumer interests in the agri-food perspective with an analysis of the impact of e-commerce on consumer rights, with specific regard to the regulation of consumer contractual relationships in the globalized market.

The consumer scenario is nowadays totally globalized, and the possibility of concluding a contract with a professional based on a different legal order poses inevitably the problem of the protection of consumer rights in these relationships.

The rules adopted by the European Union on consumer protection highlights not only the extreme sensitivity regarding this topic but also the currently unsatisfactory situation.

All the various provisions in terms of applicable law, jurisdiction, and consumer contractual protection are seriously devalued by the lack of an “ex officio” execution mechanism of sentences that give a consumer a financial compensation.

This situation very often makes it impossible de facto to obtain the payment by the debtor due to the costs of the execution or the difficulties in the specific national juridical procedures.

3 Concluding Remarks: Who Is the “Contemporary Consumer?”

The different questions described by the authors have in common a key question: “Who is the contemporary consumer” with respect to whom an increasing protection or a wider autonomy is invoked?

The definition of the identity of the consumer is fundamental in the debate on the present and future structure of European and global food laws.

In fact, the definition of the attitudes and knowledge of consumers becomes an essential parameter in order to measure the level of protectionism in the local rules governing the specific commercial relationships.

In the European Union, this problem has been the object of a long judicial and regulatory debate.

Starting from the need to eliminate obstacles to the free movement of goods, the European Court of Justice during the last decades has described the consumer as a person reasonably well informed, observant, and circumspect.

This means that the consumer is capable of distinguishing autonomously the characteristics of products and to understand the message and content of advertising with an average ability that needs to be ascertained case by case with regard to the situation and the local traditions.⁷

In this way, as an example, in *Estee Lauder*⁸ and *Jaegermeister*,⁹ the Court analyzes the perception of communications, commercial claims, or trademarks with regard to the possible impact of social, cultural, or linguistic factors and their interference on the consumer understanding and related choices.

Outside the sphere of “perception,” in any case, the relevance of the final consumer’s expectations was not considered to be so relevant, taking into account that the solicitation of national habits can create obstacles to the free circulation of goods.

It should, however, be noted that the average consumer test is not a statistical test. National courts and public authorities must exercise their own faculty of judgement, having regard to the case law of the Court of Justice, to determine the

⁷See, as examples, CJEU, Case C-210/96 *Gut Springenheide* [1998] ECR I-04657; Case c-99/01 *Gottfried Linhart e Hans Biffi* [2002] ECR I-9375, paras 31–32; Case C-44/01 *Pippig* [2003] ECR I-03095, para 55; Case C-218/01 *Henkel KGaA* [2004] ECR I-1725, paras 47, 52, 53; Cases from C-468/01 P to C-472/01 P, *Procter & Gamble Company* [2004] ECR I-5141, paras 57, 58; Case C-136/02 P *Mag Instrument Inc.* [2004] ECR I-9165, paras 19, 20, 27; Case C-365/04 *Lid* [2006] ECR I-8501, para 78; Case C-381/05 *De Landtsheer Emmanuel SA c. Comité Interprofessionnel du Vin de Champagne, Veuve Clicquot Ponsardin SA* [2007] ECR I-3115, para 23. For a wide analysis of the evolution of the EU consumer policy see Reich et al (2014); Weatherill (2013).

⁸See CJEU Case C-220/98, *Estée Lauder Cosmetics GmbH & Co. OHG c. Lancaster Group GmbH*, [2000] ECR I-117.

⁹See the UE Tribunal Case T-81/03, *Mast-Jägermeister AG c. UAMI* [2006] ECR II-5409, points 95–97, and, with the same orientation, Cases T-350/04 to 352/04, *Bitburger Brauerei Th. Simon GmbH c. UAMI* [2006] ECR II-04255, point 64.

typical reaction of the average consumer in a given case¹⁰ without the need to resort to a judicial technical advice, opinion polls, or other measures of inquiry.

Besides the concept of the “average consumer,” created by case law of the European Court of Justice, Directive 2005/29/EC,¹¹ concerning unfair business-to-consumer commercial practices in the internal market, introduced the parameter of the “vulnerable consumer.”

The Directive states that in order to prevent the exploitation of consumers whose characteristics make them particularly vulnerable to unfair commercial practices, such as children or people with specific disabilities, the impact of a commercial practice must be taken into account from the perspective of the average member of that specific group of consumers.

Consistently, article 5 paragraph 3 of the Directive adds, in practice, a clarification with regard to the proportionality evaluation test,¹² which, taking into account the typical behavior of an average consumer, authorized a restriction of the free circulation of goods only in case of a “serious” risk of consumer deception.¹³

The individual frailties due to a physical disease, psychological suffering (fear of dying, loneliness, etc.), or socioeconomic problems (poverty, ignorance, etc.), which the professional can easily consider, allow the modification of the criteria in the context of the proportionality test. This still results in a qualitative evaluation but referred to the assumed expectations of a typical consumer of that specific category “at risk.”

¹⁰See, CJEU Case C-362/88, *GN-INNO-BM* [1990], *ECR* I-667; Case C-238/89, *Pall* [1990] *ECR* I-4827; Case C-126/91, *Yves Rocher* [1993] *ECR* I-2361; Case C-315/92, *Verband Sozialer Wettbewerb* [1994] *ECR* I-317; Case C-456/93, *Langguth* [1995] *ECR* I-1737; Case C-470/93, *Mars* [1995] *ECR* I-1923. When it is possible the Court states directly the consumer’s ability in perception or understanding the reality. When the case request a specific evaluation out of the Court’s powers the national Judge must ascertain it taking into account the ECJ case law (see, on this point, Case 94/82, *De Kilkvorsh* 1983] *ECR* p. 947; Case C-313/94, *f.lli Graffione* [1996] *ECR* I-6039; Case C-210/96, *Gut Springenheide* [1998] *ECR* I-04657; Case c-99/01; Case C-303/97, *Verbraucher Schutzverein eV e Sektellerei G.C. Kessler GmbH* [1999] *ECR* I-513; Case C-44/01, *Pippig* [2003] *ECR* I-03095.

¹¹See the Directive 2005/29/EC of the European Parliament and of the Council of 11 May 2005 concerning unfair business-to-consumer commercial practices in the internal market and amending Council Directive 84/450/EEC, Directives 97/7/EC, 98/27/EC and 2002/65/EC of the European Parliament and of the Council and Regulation (EC) 2006/2004 of the European Parliament and of the Council (“Unfair Commercial Practices Directive”), OJ [2005] L 149/22.

¹²See CJEU, *Pall* [1990] *ECR* I-4827, para 19; *Mars* [1995] *ECR* I-1923, para 19; Case C-465/98, *Verein gegen Unwesen in Handel und Gewerbe Köln eV v. Adolf Darbo AG* [2000] *ECR* I-2297, point 28, and the Opinions of General Advocates Tesauro, Case C-373/90 [1991], *Criminal proceedings against X*, *ECR* I-131; Leger, Case C-465/98, *Darbo* [2000] *ECR* I-2297; Misho, Case C-169/99, *Schwarzkopf* [2000] *ECR* I-5901; Geelhoed, Cases C-421/00, C-426/00 and 16/01, *Renate Sterbenz e Paul Dieter Haug* [2002] *ECR* I-1009.

¹³Article 5(3) of the Directive states that “commercial practices which are likely to materially distort the economic behaviour only of a clearly identifiable group of consumers who are particularly vulnerable to the practice or the underlying product because of their mental or physical infirmity, age or credulity in a way which the trader could reasonably be expected to foresee, shall be assessed from the perspective of the average member of that group (. . .).”

In other words, the reduction of the expectations with regard to consumer behavior in that kind of situations imposes, from the point of view of solidarity, a wider responsibility of professionals, in a context in which the protection of an individual's subjective experience and specific vulnerability is placed at the centre of the juridical and political action.

The evolution of this juridical topic seems, however, still to be ongoing. The continual increase in the judicial and regulatory attention to consumer vulnerability in a globalized market can be interpreted as a progressive alignment of EU legal system to the most advanced constitutional experiences in this field¹⁴ and the definitive change of the internal market from an area of free circulation of economic factors to a social market economy based on the respect and the promotion of individuals' fundamental rights, starting from solidarity.

In international law, the consumer image is not that clear, given that the instruments dedicated in different fields to relevant topics for consumers take it into account only in part.

Limiting the analysis to a general overview, the Consumer Protection Charter adopted by the Consultative Assembly of the Council of Europe with its Resolution n. 543 (1973)¹⁵ defines a consumer as a "physical or legal person to whom goods are supplied and services provided for private use." The definition concentrates on the rights connected to this eminently "contractual" approach: "A) the right of consumers to protection and assistance; B) the right to redress against damage; C) the right to consumer information; D) the right to consumer education; E) the right to representation and consultation."

Similarly, the Guidelines for consumer protection of the United Nations Conference on Trade and Development (UNCTAD),¹⁶ dedicated to business-to-consumer transactions, state that, in this area, a consumer is "a natural person, regardless of nationality, acting primarily for personal, family or household purposes, while recognizing that Member States may adopt differing definitions to address specific domestic needs."¹⁷

The approach is, therefore, fragmented. The definition of consumer characteristics and related rights is delegated to a specific discipline and to the national enforcement both for the contractual transnational conflicts and for substantial matters like transport, food, information, security, etc.

In the scenario described, the agri-food sector plays a fundamental role. It is intrinsically connected to juridical goods such as human health, the protection of cultural traditions, personal identity, protection of the environment, etc. and deeply

¹⁴On this point see Jagielska and Jagielski (2012), pp. 336–353.

¹⁵See the annex adopted by the Consultative Assembly of the Council of Europe on May, 17th, 1973 (7th Sitting), published on the official journal and available on line.

¹⁶See the last release of this document available on internet at unctad.org/en/PublicationsLibrary/ditccplpmisc2016d1_en.pdf. Accessed January 2017.

¹⁷See the UNCTAD Guidelines for Consumer Protection, point II, "Scope and application," pp. 6–7. unctad.org/en/PublicationsLibrary/ditccplpmisc2016d1_en.pdf. Accessed January 2017.

conditioned by the growth in technological innovation created by the increasing global food requirements and the reduction in international trade barriers.

As the various themes analyzed by the authors of this part show, the pooling of experience and the common identification of criteria in order to measure the proportionality of the national and international rules are crucial.

The development of the concept of “consumer” is capable of carrying out this function if it is recognized not (only) as a “weak person that needs protection” but also as a real protagonist of the market, who has the right to a free and informed choice, and to the control—also from an ethical point of view—of the characteristics of products that are offered in the market.

From this point of view, we can appreciate the contribution of the authors in making a deeper investigation, which is necessary both in the European Union and at the international level.

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