

Practice area	Country	Firm	Title	Summary	Contact person
International Law	Belgium	NCTM O'Connor European Lawyers	Societal concerns and the law	Regulating issues such as Animal Welfare/Rights, GMOs (genetically modified organisms), Fair Trade, Sustainable Development or Biodiversity raises many questions in law and politics. This article examines whether common characteristics can be found to make the decision makers task easier.	Bernard O'Connor bernard.oconnor@nctm.it

Author: Bernard O'Connor

OECD workshop on
Societal concerns in agriculture
2 November 2009

Introduction

The participants at this OECD workshop have been asked to address two questions. What are the characteristics of societal concerns that:

- (1) make them different from any other policy problem and
- (2) make the task of the policy-maker, including the trade policy maker, particularly difficult."

We have not been given a definition of societal concerns. The background notes for the workshop state that there is a "sense in which every government policy initiative is a response to a societal concern". However this is not considered "a useful basis on which to delimit the scope of the Workshop. Societal concern is a term that is much used but not often precisely defined. It is often used interchangeably with consumer and citizen concerns. It is therefore proposed to delineate the scope of the Workshop by reference to a specific set of characteristics of the policy problem." The background notes go on to observe that "[a] main characteristic is that the pressure for a policy response is a bottom-up movement characterized by the presence of advocacy or lobbying

groups, multiple stakeholders, often different views about desirable outcomes and active involvement of the media. Other characteristics of interest are the presence of an ethical or values dimension which may differ within and between countries; uncertainty about processes or impacts or other forms of unknown or inaccessible knowledge such as uncertainties about scientific evidence; information asymmetries; different perceptions of or aversion to risk and possible irreversibilities."

When each element set out above is examined, the possibility of defining societal concerns so as to distinguish them from other policy problems remains remote. That being said, the workshop is addressing four specific issues that are currently the subject of heated debate in agriculture and trade circles. These are animal rights or animal welfare, GMOs, fair trade, and bio diversity/sustainable development.

This paper looks at these issues from a legal perspective. In considering the law we have been asked to look at international law and the role that it will play in identifying the characteristics of these issues. This paper looks firstly at the law and the development of national and international law, it then looks at the four specific societal concerns which are being discussed in this workshop in an attempt to identify some of the general problems which arise in modern decision making. The paper also looks at the international norms that might be considered relevant and then identifies some of the characteristics of these issues which might help the policy maker in designing measures to regulate them.

Some initial conclusions

As the object of the workshop is to identify 'characteristics' an initial conclusion as to what makes these four issues different is that there is no common consensus among people as to the weight to be given to these four values relative to other values that have been weighed up and established over time and enshrined in binding rules. In that sense, these issues could be considered as not being technical adjustments to the functioning or functionality of commonly accepted or established values (for example, the need to reregulate the financial services industry so as to make financial markets, an established value, function better) but attempts to give legal recognition to new values which are not always shared by all people and not established in binding rules. As there is no common understanding as to what the new values are, let alone the weight in public law to be given to them, policy makers need to take time to examine the value itself, to see how it might fit in with other values, to give it weight. It is the establishing of the weight and the comparing of that weight against the weight already given to other values that is difficult.

Thus the simple answer to the questions is: because there is no common political consensus as to the weight (relative to the weight given to other, established, values) to be given to the four values at issue in this workshop, the task of the policy maker is more complex in designing rules in relation to them.

That being said, can it really be considered that these four issues raise problems for the decision maker different from many of the issues regularly debated in the body politic? There is no difference: in terms of the procedures for adopting rules in relation to them; in terms of the technical conflicts that they generate in the body politic; in the ways in which the interests of the body politic are voiced or expressed; in terms of the evolution of institutions in implementing law; or even in terms of the ever evolving concept of the rule of law and its role in maintaining social stability. Are there any generic or common characteristics that make these four issues much different from many other policy problems that have been grappled with in law? Where are these four issues in the scale of issues which law has had to resolve over the centuries? When viewed in that light, the societal concerns before us today are more technical than tectonic. And they do not have any special characteristics other than the fact that there is dissatisfaction with the way these values are reflected in legally binding norms.

To understand why it can be said that these four issues are not uncommon it is necessary to go back a bit in time.

Some thoughts on the development of law

In Feudal times there was no rule of law. There was the rule of the stick. A King commanded as far as his stick stretched and he was the law. Then slowly the King had to share power. First with the existing lords (the famous Magna Carta, signed by King John at Runnymede in 1215), then with the new Lords, then with the common man (rich of course) in the 'Commons' and so on. Slowly over 800 years the franchise was gradually extended down the economic ladder to cover all men, and then to include women, and then all citizens of 18 years of age (and now there is even consideration of giving the franchise to foreign residents who pay taxes). Gradually the Magna Cartas (for there were many of them) were developed into constitutions which set out how decisions could be made. The rule of Judges was established to make sure the constitution was respected. So at the domestic level, over a full 800 or 1000 years we created the system that we currently enjoy in all OECD countries. The King became the state and the stick became the rule of law. It was not easy. There were a lot of wars and civil wars and revolutions along the way. So societal concerns such as Animal Welfare, GMOs, Fair Trade, Biodiversity and Sustainability are fairly minor in historical terms, if not just mere technical issues. And in this context, the answer to the questions asked is: there are no characteristics of these four problem areas which make them different from others or makes the role of the policy maker more complex.

But let's go on with history. Feudal times were never absolute. Man did not live isolated on the Feudal estate even if the law constrained him to do so. In parallel there was the presence of towns and markets in which goods were exchanged and traded over distance. If a man could flee the estate and reach the town he was free. Towns were the jungle, not the countryside. The countryside lived under strict Feudal tutelage which provided stability. But towns sought and got the right to exist. There were Charters as to how they were to be run and to relate to the feudal power. Within the towns informal rules were established to facilitate exchange. There was competition among the towns as to the quality of these rules of exchange. They began to become formalised. Transport evolved and common rules were needed between towns. The King began to establish these common rules of exchange. The law of contract, damages for breach of contract, courts of law to adjudicate on disputes and the use of the King's power to punish, if necessary by death or the deprivation of liberty, failure to comply with the rulings of courts were all established. Slowly the King and then the State became essential to the idea and the functioning of markets.

No market can exist without law. At its most basic, the law provided transparency and stability in the very act of exchange. Law not only became the motor of, and the fuel for, markets, it began to define them. Rules developed as to what could be the subject of a market. Usury, condemned by Christianity, became the financial services of today. In the early stages of the development of this market, the Medici spent much of their fortune on philosophical and legal texts showing that their core business was not in breach of the rules of the Church. They spent a lot of the rest of that fortune hedging their bets with God just in case these new fangled ideas weren't sailing too close to Dante's precipice. Rules also developed as to how players could behave in markets (ultimately consumer protection rules) or what was the entry price into a market (guilds, professional qualifications etc.). So laws involvement in markets grew all pervasive to what it is today.

Rules not only developed in relation to markets. Rules developed as to public behaviour. State rules began to develop as to private behaviour, taking over the remit of religion. The ideas of right and wrong began to be codified. And overall, the ways in which these rights and wrongs or rights and obligations were being codified, were being enforced, evolved. An ever changing tableau. Our very understanding of the idea of rights and obligations is inextricably linked to our understanding of the rule of law, the creation of laws through democratic processes, the interpretation of law by courts and their enforcement by the state. Rights cost money. And the state apparatus pays. There can be no right to free speech without the complex organs of the state to vindicate it. It is the same for all rights. And the more complex the rights become the more costly they are. Rights and taxes and the state are like love and marriage. They go together like a horse and carriage. You can't have the former without the latter. And for one (rights) to grow the other (the state, taxes) had to grow. This is an ever changing tableau: how we make law, what the law is, what we think of the law, and how we enforce it.

The development of the rule of law in the domestic sphere was mirrored by its lack of development in the international sphere. Law was based on the geographical reach of the King and then the State. Outside the limits of the states there was no law. And in addition, each State became sovereign unto itself and thus no other state could intervene in the domestic affairs of another state. Other, of course, other than through force. So there were wars. And there are wars. Europe went on with its wars until very recently. And outside Europe the laws of Genoa, of Venice, of Lisbon, of Madrid, of Paris, of London covered trading outposts but not really the hinterland of where ever they landed to trade. Slowly, and maybe it can even be considered the situation today, Empire created some sort of International order through force and the desire for stability. Then, at the end of the 19th century the first attempts were made at making international order through law: the International Red Cross was the first international convention (and it was an NGO). Then came the Geneva Conventions, which did not outlaw war but rather set out some rules in the conduct of war. After the First World War the first attempts to replicate the domestic order in the international sphere were attempted with the League of Nations and then the United Nations. And in recent times there has been a plethora of international conventions and treaties. All of this is very, very recent in legal terms. And as our roads and rails and ships and planes and phones and internet provide more and more communication across borders (and outside the state), there is a need to examine the appropriate ways to make rules, the substance of those rules, at what level of society the rules should be set and how the rules should be enforced. *Plus ça change, plus c'est la meme chose*. This is no different from what has been happening within the state over the centuries.

What this quick look at the history of the rule of law as well as the role of law in markets demonstrates is that rules and regulations are developing all the time to reflect, depending on your perspective, economic necessity or the vindication of values. It shows that the way in which norms are made is also evolving. There is a movement from the isolated territory of the State to the global territory of international law. There is the development of a mix between norms set internationally but enforced (or not enforced) locally. There are developments in the capacities of certain actors to work both internationally and locally or only to work locally. It also demonstrates that certain topics have always been difficult and have become more difficult with the integration of economic and political spaces that make up the world. Finally it shows, that for the most part, that law follows consensus and it is only in rather rare occasions that law leads from the front.

And in this perspective the legal historian must ask: Do the workshop's four issues come very high up on the scale of issues the law has dealt with in the recent and distant past: human rights, freedom, slavery?

The example of meat

Let's take a practical example of an issue which is not being discussed in this workshop. The eating of meat is something that has significant for large parts of the global population.

- Dog meat - Western societies do not eat dogs and some outlaw its very use.
- Pork - Islamic societies forbid it for religious reasons and some prohibit trade and import of such meat subject to severe sanctions and even death.
- Beef - Hindu religious law forbids consumption of beef. Trade still allowed in India for the non-Hindi population.
- Whale meat - Outlawed for sustainability reasons on an international level but still the demand to consume remains.
- Human meat - All OECD countries prohibit and criminalize trade in human meat for consumption.

Is the issue of meat consumption a societal concern in the sense that is being addressed in this workshop? I think not. The question is why not. I think there are two reasons. Firstly the issue is not 'mature', in other words the issue of meat consumption is not an issue for which there is pressure to change the regulatory framework. Secondly, it is not an issue which raises a conflict of current established values (until maybe we start looking at it from a global warming or world capacity to feed itself, or water resource perspective). The consumption of meat is accepted (except of course human meat) by all societies to greater or lesser degrees. It is mainly on religious grounds that consideration might be given to the banning of meat. However in the OECD countries the idea of banning meat on religious grounds is difficult to envision as collectively we have determined, from the enlightenment onwards, that the state should not regulate on the basis of religion and that religious values should remain in the private sphere. In other words the weight given to the idea or the societal value of the separation of the state and the church is so dominant that, absent other non religious considerations, it is unlikely that the issue of meat consumption will arise as a societal value concern (in the sense promoted in this workshop).

A look at the four concerns being examined in this workshop

So where do Animal Welfare, Fair Trade, Sustainable Development and GMOs fit in to this evolving mix of law and the making of law? And what can they show of the idea of societal concern?

Animal welfare must be distinguished from Animal Rights. The idea of Animal Rights clashes with the fundamental Judea Christian Muslim idea (or value) of man's dominion over the earth. And it also clashes with the rights in so many societies to hunt, to feed and to clothe. Then, there are the technical questions. Which animals get rights and how do individual animals vindicate those rights? Or should we properly be talking about man's obligations to animals rather than animal rights? If man is to be given obligations in relation to animals what sort of animals are covered: pests or pets, mosquitoes or mammals? The more fundamental issue is the creation of rights and obligations. Rights and obligations cost money. More rights and obligations require a more and more developed State: to determine what the rights and obligations are; to enforce those rights and obligations; to pay for them. Thus the value of these rights must be set against the collective societal costs (taxes and the growth of the State) and the inevitable restrictions on individual freedom (the core value of post enlightenment man).

The issue of GMOs raises another consideration. Plant breeding and plant and animal varieties have been a staple of agriculture since before recorded history. GMOs are a technical development in plant and animal breeding. But like many technologies it is not benign. It can do harm. So there is a necessity to regulate its use or in other words to define the market and the entry into the market. However the debate is not in these terms. It is black and white. Should we allow GMOs at all or we should not. This polarizes the debate considerably. If there are risks in the technology should they not be identified and ring fenced? Consideration could be given to banning antibiotic marker genes, inter species breeding, terminator genes etc. In other words, when values collide history shows us that the outcome is rarely a complete ban on a market but a more regulated market instead.

The Fair Trade issue is part of an ongoing struggle between operators of different size in any market. In the context of this workshop it is a struggle in all countries between agricultural and artisanal production and accumulators of goods or traders. The 'newness' of Fair Trade in this struggle is the cross border element. It has become an active political issue in developed economies because of communications. In essence Fair Trade is about rebalancing the economic imbalance between smaller and larger market players. In Europe one of the main ways of addressing this issue is through cooperatives and producer associations. In the US the approach was to abandon small holdings and small scale production. But at the same time both Europe and the US used subsidies as a major tool in this rebalancing. In terms of values, there has been the acceptance that capitalism entails economic inequalities up to a limit. What is now being seen, and what brings this issue into this workshop is the trade element. How do we mitigate some of the extremities of capitalism across borders. But in the issue in and of itself there is nothing new. In fact the whole Bretton Woods system was designed to address it. Bretton Woods has not worked in this respect and thus we need to find new tools.

Biodiversity and sustainable agriculture raise a number of considerations. At what level must decisions be taken: nationally or internationally. And if there is the need to close down markets or curtail them how should this be done.

The national/international debate reveals the perceived problems of fairness or democracy in decision making. Some sectors of society are concerned that the decision making is not 'democratic' and the international decision making processes do not reflect the interests of the common man, and only reflect the rapacious greed of multinationals. This is particularly so when science dominates a debate and not all players are able to play fully in the game of science. Added to the complexity of the science debate, is the level at which decisions are being made. International organisations are considered to be the playground of an elite. Yet representative democracy is at the heart of national democratic systems. At the national level a parliamentarian, once elected, is free to decide in a way different from indicated during an election campaign. He or she is a representative only. In this sense, then it is clear that international decision making is representative. People elect representatives, who in turn chose representatives to act at the international level. Nothing new or strange in this! So what is happening? Are we undertaking a fundamental reexamination of the value that is representative democracy? It seems clear that there is a growing desire for more direct democracy when matters reach the international level. And maybe the increased incidence of referenda reflects this desire at the national level. Yet at the same time the national systems of representative democracy retain the overall confidence of people in a way that the international do not.

A second issue is the management of the development or the closure of markets. How should this be done? The creation of carbon quotas, for example, creates a market. Taxation would merely stimulate the development of existing markets. The idea of quotas is based on the value known as established property rights. These are not mere economic issues. They raise concerns as to the role of the state, the value of property, and fundamental rights and obligations.

What role has international law to play in relation to these four issues

International rules are capable of dealing with both technical issues and values. The vast majority of international rules are technical. They determine how to share the costs of a letter traveling from London to Paris. They determine how telephones can talk to each other. On the setting of values we have the International Convention of Human Rights and very recently we have the phenomenal development of the international criminal court for crimes against Humanity.

We are however facing great difficulty in determining how best to make rules internationally, what institutions do we need, and how do we enforce the rules that we are created. We haven't really worked out how to move from a class of

law that addresses sovereign states rather than individuals. In this situation how can we create law with impinges on individual behaviour? And how do we ensure that the body of law which we are creating is perceived to be made fairly or democratically such that it attracts the support of global citizens.

And then there is the issue of what comes first. We have already established an impressive international institution that codifies in law the value known as trade. This is the WTO. Its sets out the rights and obligations of states which, in turn, *de facto* give rights to individuals. The basic rules are well established and well supported. Each of the four issues discussed in this workshop impinge on this established value. Trade came first. So how do these other values get recognition in law without in some way affecting the value of trade? There must be the weighing of the value and its balancing with values already established in codified law. And it seems clear that if the value that has to be constrained because of the giving of value to these four issues is international, then the four issues must also be raised to the international level.

We are in the very early stages of this balancing process at the international level. For the issue of Fair Trade a review of the literature does not show any international treaties that have been signed or implemented or even that there are any under discussion. There are a number of private initiatives such as FLO in Europe and the World Fair Trade Organisation (now recognized by the EU) and both the WTO and FAO have been conducting workshops but very little more.

The same can be said for animal welfare and/or animal rights. There are no formal treaties other than CITES which restricts trade in certain endangered species rather than promoting animal welfare *per se*. On the private level there is the Universal Declaration on Animal Welfare that is being proposed by various NGOs to the UN, the Universal Declaration of Animal Rights from 1977 or the People for the Ethical Treatment of Animals. None of these private initiatives have as yet met with widespread acceptance.

On the issue of sustainable development there is the Rio Declaration on Environment and Development which is a series of legally non binding principles. Principle 9 concerns technical and scientific cooperation to strengthen capacity building for sustainable development but does not set out any binding standards.

For GMOs there is the Cartagena Protocol on Biosafety which has been endorsed by 157 countries and it entered into force in 2003. This treaty is concerned with the transboundary movement, transit, handling and use of all living modified organisms or LMOs which are broadly equivalent to GMOs. Enforcement under the Protocol is subject to all the weaknesses in international law. The Codex Alimentarius Commission has the 2001 standards on safety assessments of GMOs and the 2003 principles on Risk Analysis. The

significance of the Codex standards is that, in the context of the WTO's SPS Agreement, deviation from the standard must be scientifically based in order to avoid the possibility of trade sanctions. Thus it can be considered that the standards are enforceable in a way that the Protocol is not.

This quick overview of international law in relation to these four specific issues shows that consideration of the values that these issues represent is at a very early stage compared to the value given to the established values of trade and science in resolving certain types of trade disputes.

Conclusions

In the light of these general considerations on the nature of law at the domestic and the international level as well as the considerations on the development of law and legal institutions in general, what are the special characteristics of societal concerns which can be identified. However, whether the identification of these characteristics will help the policy maker or not is another issue.

- Each of the four issues represents the promotion of a 'new' value in relation to values already established in binding rules. The values are 'new' only in the sense that they have not been specifically recognized in binding law.
- The new values operate at both the domestic and the international level. To the extent that they clash with the internationally recognized value of trade, any regulation giving legal effect to the value must be established at the international level.
- As trade is the dominant value most touched by these four issues at the international level, consideration should be given to introducing the new values into the WTO framework.
- A comprehensive costing, in the widest sense of the cost of rights and the state, as well as the more traditional evaluation of the cost to consumers or business, of the four values needs to be undertaken so as to guide the policy maker in weighting the value to be protected *vis a vis* other established values.
- The four values at issue raise wider considerations as to the quality of international decision making and address concerns about representative democracy and the need to evaluate the introduction of more direct democracy.

For further information on this topic please contact Legalink's contact