Legislative Studies No. 7

AN OUTLINE OF FOOD LAW

(STRUCTURE, PRINCIPLES, MAIN PROVISIONS)

FOOD AND AGRICULTURE ORGANIZATION OF THE UNITED NATIONS

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AN OUTLINE OF FOOD LAW
- structure, principles, main provisions -

prepared by
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for

the Animal Plant and Food Legislation Section

LEGISLATION BRANCH, LEGAL OFFICE

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FOREWORD

This study on food law seeks to serve essentially practical ends. In the main, these are:

(a) to promote a greater awareness, at all levels concerned, of the increasingly complex and specific legal problems arising in connection with the production, processing and marketing of food intended for human consumption;

(b) to draw up a realistic list of these problems, for their consideration by lawyers responsible for both drafting legislation and its applicationj

(c) to emphasize the interdependence of, and the need for a unity of conception among, laws and regulations in this field, and to show how it is important that these should keep pace with the developments in social and economic conditions, as well as in science and technology, at both the national and international levels;

(d) to contribute to the functional efficacy of legislative work by helping to identify the fundamental principles that ought to govern food law and by suggesting rational lines of approach which relate to it.

As regards these lines of approach, due account has been taken of the work done by the Codex Alimentarius Commission through its subsidiary bodies to secure a measure of agreement among Member Countries in aligning their respective food laws. However, in view of the fact that one of the objectives pursued by this study is to propose a rationally conceived legislative edifice, based on a homogeneous and coordinated set of principles considered as ideal by themselves, it is possible that certain opinions diverge from those now accepted by international decision-making bodies where they represent the result of hard-won compromises.

The opinions in the way of legal theory expressed here are the author's own and in no way commit FAO. By publishing them as they are the Organisation wishes simply to contribute to that effort of reflexion and imagination whioh is demanded of the legislator in deciding between the options open to him in this particular field.

The author, a lawyer, is the Secretary General of the European Food Law Association and a specialist in the study of comparative food law. By asking him to write this work we wanted to associate the practical experience of the FAO with the academic knowledge of a university researcher. Mr. Gérard, as lecturer and joint director of legal research at the Institute for European Studies at the Université Libre de Bruxelles and as Research Fellow at the Food Law Research Centre at the same Institute, has been for a long time the collaborator of Prof. E.J. Bigwood, the Director of this Centre and a pioneer in this field.

The preparation of this study took place mainly at FAO Headquarters where the author had the benefit of the advice and opinions of the Animal Plant and Food Legislation Section of the Legislation Branch, Legal Office. The possibility nevertheless exists that the twelve chapters making up this study - perforce summary, given the scope and complexity of the subjects treated there - may contain involuntary omissions or certain Statements which are based on such incomplete information as was available. The Legislation Branch would accordingly be grateful to anyone who would point out any such matters, so that they can if neceesary be taken into account in future editions.

Dante A. Caponera
Chief, Legislation Branch
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1. NATURE AND DEVELOPMENT OF FOOD LAW

1.1. The distinctiveness of food law

1.1.1. Identity of food law

The legal provisions relating to food regulate specific activities,namely the production, processing and sale of food 1/. Such provisions are designed with specific ends in view, which are the protection of health and the promotion of fair dealing in food commodities 2/. They have a particular form, most usually based on a general law covering all food products 3/. They apply principles and methods of control corresponding to specific aspects of the matters regulated - food standards 4/, use of additives 5/, prevention of food contamination 6/, labelling of food put on the market 7/, and food control 8/. Provisions such as these, themselves in a continual state of development, accordingly, go to make up what the lawyer understands by "food law".

1.1.2. Food law and law in general

Since it is designed to provide for the policing of the food trade and the protection of the consumer, food law is concerned chiefly with relations between public authorities and private individuals or firms and not between such private individuals and/or firms as such. It belongs therefore to public and not to private law. Considerations of private law - the common or civil law and/or commercial law - may equally arise where food is concerned. This is particularly so when questions of liability are involved 9/. Nevertheless, to the extent that such questions of private law are not governed by special legislation relating to food, they cannot be said to come under food law.

With that proviso, it may be said that food law is a composite entity, linking it to one or more fields of public law.

Thus, if disregard of the rules of food law entails the infliction of penalties 10/, then it is reasonable to look on such rules as forming a branch of criminal law. This, in fact, is the principle underlying the food laws of many countries. In France 11/ and Italy 12/, for example, the basic enactment bears the title "Law on the prevention of fraudulent practices" which indicates quite clearly the aim of these statutes. In Canada, the statutory control of foods is a federal responsiblity for the precise reason that this control is deemed to come under criminal law 13/.

1/ See below, 2.1.

2/ See below, 2.3.

3/ See below, 3.2.1.

4/ See below, Chapter 4.

5/ See below, Chapter 5.

6/ See below, Chapter 6.

7/ See below, Chapter 8.

8/ See below, Chapter 10.

9/ See below, Chapter 12.

10/ See below, Chapter 11.

11/ See below, Bibl. IV-B, France: Toubeau, op.cit., Vivez, op.oit.

12/ See below, Bibl. IV-B, Italy: Piccinino, op.cit.

13/ See below, Bibl. IV-B, Canada: Curran, op.cit.

Food law also has affinities with other sectors of public law because:

a) the powers of rule making and control conferred, and the enforcement procedures adopted by it, establish an affinity between it and administrative law l/;

b) the essential aim of food law is the promotion of public health and this gives it a character of social law;

c) the effects of food law on the production and marketing of foods, and the direct influence which these activities have on the economic life of a country permit one to consider it in a broad sense as forming part of economic law 2/.

Given then the composite nature of food law, it would be pointless to assign it to a rigidly circumscribed branch of legal science, particularly since the form of the law will depend on the legislative traditions of each country concerned.

1.1.3. Interdisciplinary implications of food law; the lawyer's role

The problems to which food intended for human consumption gives rise involve the respective skills of chemists, toxicologists, biologists, nutritionists, doctors, technicians, economists, sociologists and, last but not least, lawyers. For the ultimate aim is to make effective legal regulations which are based on these differing technical or scientific skills and to secure their application to each case as it arises.

For this reason, the lawyer cannot operate in isolation. He must take into account the factual data, supplied by the scientist, when drafting legislation on such matters as food composition or the prevention of harmful effects. He must work in collaboration with others engaged in food science and technology 3/. He must, also, very often base the implementation on technical findings obtained from analytical laboratories or from findings of inspectors in the field 4/.

However, it must not be thought that the role of the lawyer in drafting food legislation is one of simply transposing technical requirements worked out by the.specialist into legal language and adding, perhaps, certain considerations of his own showing how these connect up with other branches of the law. If that were so, then the lawyer would be little more than a registrar or, at the most, a legal "rubber stamp" for attaining technical standards which, are normally assumed to lie beyond this comprehension. The role of the lawyer concerned with this particular branch is by no means merely a formal one. It is also — in the main - creative. It is principally for the lawyer to ensure that the rules embodied in food law are suitably adapted to their purpose. He must harmonise all the relevant new rules with existing legislation and ensure that certainty of law exists for the benefit of all those who are required to abide by it.

Lastly, it is for the lawyer to see that a judge or magistrate before whom a case is being heard can look to these rules for a precise answer to the matter at issue.

1/ See below, Chapters 9 and 10.

2/ See below, Bibl. IV-B: France, Fourgoux & Jumel, op.cit., Ch. 1: the authors consider food law as being quite distinct from the other branches of law here referred to.

3/ See below, 9.2.1.

4/ See below, 10.2.3.

That being so, it is all the more important that, in view of the growing complexity of food production and control, particularly in the industrialized countries, the person called in to deal with the problems which concern food law should be a food expert who, in addition to his legal training, has a broad general knowledge and an adequate experience of the many aspects involved in this field.

1.2. The context of food law

1 .2.1. Social and economic development 1/

The most characteristic feature of the present era is the spread and the ever-gathering momentum of technology, affecting all aspects of modern life. In the economic sphere, one is a witness to an unprecedented increase of output in all domains, particularly in food production. This increase is due to a concentration of technical and financial facilities, to its corollary an expanding market and finally to the development of means of distribution, bringing an ever greater volume of products to the growing number of consumers in conditions offering a regular supply, and in a satisfactory state of preservation subject to an adequate margin of profit.

The social factors determining all this development are not less significant than the Purely economic ones. In the first place, there is the overall growth in population, coupled with ah increasing density of population especially in the major urban centres, a higher standard of living in the industrialized countries, and the evolution in the way of life. The chief components of this evolution in the industrialized countries are the wider range of food items, the growing number of women working outside the home, the fact that the family nucleus has become less a unit of production than of consumption, the expansion in leisure activities and mass tourism, and a relentless conditioning of the consumer by modern advertising techniques. There have resulted from this a considerable change of needs and habits, and consequently in food techniques, as may be seen in such developments as the standardization of products, the diffusion of prepackaged and precooked foods and the wider resort to catering establishments, such as cafés, restaurants and snack bars.

The problems generated by all these developments are many and varied whether concerning problems of organisation of production and consumption on an intercontinental scale; problems of diversification, consequent upon the evolution in needs and the wall-high unlimited possibilities of industrial processing of natural products; or problems of storage, preservation, transport, distribution, packaging and presentation. In the developing countries and, mora especially, in those countries lagging behind in the development proceas, the most urgent need, of course, is for the expansion and diversification of staple food resources, balanced dieta, food hygiene and the preservation and dispatch of perishable foods in good condition to the consumer. These problems are connected with the rapid rise in population figures and the lack of organisation and of facilities for production, communications and marketing.

1.2.2. Developments in scienoe and technology

The rapid development of the food sciences (chemistry, nutrition, toxicology and food hygiene) has done much to provide man with an understanding of what a given food contains and what affecta it may have on him. The same is true for progress in food technology, whether it concerns the manufacture and industrial processing of food or the identification of additives or contaminating substances in food.

1/ See below, Bibl. I, Bigwood & Gérard, op.oit., Vol. 2, Chapter 6.

All these developments have by now assumed such proportions that it is essential for a country introducing regulations on food to nave at least a minimum of technical equipment and qualified staff to: a) determine what a food must contain for it to be considered sound and of reasonable quality and what substance may be incorporated in it without risk to human health; and b) maintain adequate control over the composition and wholesomeness of food put on the market.

One can readily appreciate that this problem is particularly acute in the developing countries.

1.2.3. International implications of food law

The economic, social and technical evolution just described has taken on worldwide dimensions so far as food production and consumption are concerned. An ever larger proportion of foods is being consumed elsewhere than in the country of production or manufacture. Such a development brings in its train the need for worldwide action to secure the standardization of technical requirements and the harmonization of national laws whereby obstacles to international trade in food may be removed.

A major step in this direction has been taken with the United Nations Specialized Agencies and other international organizations. For example, the Joint FAO/WHO Codex Alimentarius Commission has undertaken the huge task of building-up a corpus of food standards of worldwide validity 1/. Similar efforts are being made by groups of countries or at regional levels (for example, the European Economic Community, the Council of Europe and the Latin-American Food Code Council) and among nongovernmental organizations such as the International Standards Organization (ISO).

Despite the many technical and legal difficulties engendered by this evolution, food law shows a marked trend towards some sort of international harmonization, to the benefit alike of producers, for the larger markets opened up to them, and of consumers, with the wider variety of choice thus made available.

1.3. The basic requirements which food law must satisfy

1.3.1. Protection

The primary purpose 2/ of food regulations is the protection of the consumer. With the growing complexity of production and processing techniques and the psychological conditioning of the consumer through advertising when goods are put on the market, it is necessary to provide the public with legal safeguards against anything that may adversely affect its health or abuse its trust. To be sure, fraud and food poisoning have always existed, and ancient history provides examples of severe penalties against food adulterators. Bat technology ham at the same time multiplied the possibilities of fraud and the means of detection and control.

The intervention of the public authorities, however, must take account of actual developments in the life of the community and not simply take their origin in abstract considerations. To-day more than ever the public interest is the resultant of a host of socio-economic factors which it would be dangerous to attempt to consider in isolation. Certain statutory provisions might, in the event, militate against the public interest, in a misguided attempt on the part of the legislator to protect that interest under too restricted an aspect or with a

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1/ See below, Chapter 4.

2/ See below, 2.3.

desire for immediate effect that disregards the longer-term implications. Thus, to prohibit the use of certain chemical preservatives with a view to eliminating all risk to the health of the consumer is in itself justified but might have catastrophic consequences in certain countries or in certain circumstances particularly when there is a serious lack of facilities for the preservation, storage or transport of perishable foods, thereby placing the population's food supply in jeopardy 1/.

It is pertinent to note, in this connection, that the protection afforded by the law where food is concerned extends to the producer as well as the consumer. The producer rightly expects to find a reasonable degree of certainty in the law in return for the legal requirements placed upon him,

1.3.2. Efficacy

Certainly if the consumer of food is to be protected at all such protection must be effective. The effectiveness of the rules of food law, however, is not always a foregone conclusion, because it depends upon various technical or juridical factors.

At the technical level, effectiveness depends in large measure on the professional skill of staff employed and on the scientific and technical equipment available for their use. It is therefore directly linked to the financial resources that can be set aside for the solution of these problems.

The example of the U.S.A. demonstrates to what extent the concentration of available resources enables the development of the technical rules governing the diverse products 2/. Other countries without such economic resources may, however, find a satisfactory answer to this problem either by resorting to international cooperation based on more or less homogeneous regions or may themselves adopt the technical standards worked out by other countries through international expert committees 3/ or even by non-governmental bodies of scientists and technologists. Nevertheless, a country must have a minimum of technical facilities for enforcement purposes, without which the most perfect regulations will remain a dead letter.

At the juridical level the effectiveness of regulations depends on the extent to which they can be applied to specific cases. Nothing is worse, socially and psychologically, than the existence of statutoy provisions that are inapplicable in practice because they are too rigid, inadequately worked out or conceived in terms that are too abstract or doctrinaire. In such cases, regulations that may be excellent in principle may in the end afford inadequate protection for the consumer. They undermine the certainty of law to which producers are entitled. The public authorities are faced with the dangerous choice of resorting to arbitrary and repression measures or adopting a latitude that defeats the purposes of the law.

To obviate this dilemma, food regulations must be readily adaptable to changes in needs and in the technical aspects of their application.

1/ See below, 7.4.1.

2/ See below, Bibl. IV-B, United States of America: Kleinfeld & Kaplan, op.oit.

3/ Typical examples are the scientific findings established and updated by FAO/WHO expert committees and by the Codex Alimentarius Commission.

1.3.3. Adaptability

That a rule of law must be relatively fixed might seem incompatible with .the need for constant and easy adaptation of food law. The more detailed a regulation the more frequently it will need amending. The authorities should be in a position to update technical provisions without having to call in question every time the permanent underlying principles of the law itself 1/.

However, the regular updating of food law also depends on the concerted international formulation of these rules. Only by regular comparison of methods, concepts and scientific data is it possible to prevent the law becoming obsolete and to avoid a wastage of effort and resources. Accordingly, the rules regarding the formulation and enforcement of food law must be so conceived as to permit the ready incorporation into a national law of technical and scientific requirements adopted at the international level, whenever appropriate.

1/ See below, Chapters 3 and 9.

2. THE DOMAIN OP FOOD LAW

2.1. The objective domain of food law

2.1.1. The proper domain of food law; the concept of food

a) The general meaning of food

In its most commonly accepted sense, food is any substance, solid or liquid, that may be ingested and digested by a living organism (i.e. by man when food for human consumption is referred to - which is what this study is about).

This definition, however simple, is too broad and imprecise. In particular it does not specify the following details (as will be done hereinafter):

- why the substance is consumed;
- by what route it enters the organism;
- to what extent it is ingested, i.e. completely or less than completely;
- for whom the substance is intended, e.g. whether for the population at large or for a particular kind of consumer.

The main reason why a substance is absorbed by the human organism is clearly to satisfy man's physiological or nutritional needs. The substance may equally be ingested to satisfy a certain pleasure in tasting, i.e. an organoleptic purpose; which may be sought quite apart from purposes of nutrition. Lastly, it may be ingested for therapeutic reasons.

The nutritional function is generally considered by nutritionists to be the characteristic of food in the objective sense of the term. One might deduce from this that all substances ingested solely to satisfy organoleptic needs and which are devoid of any nutritional value do not constitute food 1/. Nevertheless, one should add that such substances are rarely ingested alone, but are added to a food (or therapeutic substance) in order to improve its taste and to render it more acceptable or palatable. It will be seen later in this study 2/ that such substances as condiments and spices should be considered objectively as "food additives", the notion of which while quite distinct from that of "ingredient", is not necessarily distinct from that of food in the strict sense.

A clearcut distinction must be made between food and substances taken into the organism for therapeutic purposes. Such substances are referred to variously as "drugs", "pharmaceuticals" or "medicines" 3/. The distinction between pharmaceutical products and foods is not however always easy to make. Certain medicines may also have a certain food value and, conversely, the composition of certain foods may have been modified - by the incorporation or removal of substances with a view to securing preventive or curative effects for certain ailments as, for example, with dietary foods or dietetic foods 4/. The most convenient criterion (for making the distinction) is to consider the purpose which the consumer has in mind and which is held out to him s i.e. a nutritional purpose for food, a therapeutic purpose for medicines.

1/ However, in the legislation of the Föderal German Republic, tobacco and related products are also considered to be foods (see below, Bibl. IV-B, Germany: Schulze, op. cit., 1.1); in Sweden are included under food all substances intended for human consumption (see below, Bibl. IV-B, Sweden: Augustinsson, op.cit.). Similar examples may be found in other countries.

2/ See below, 5.2.1.

3/ The following definition of "drug" is contained in No. .341 of the World Health Organization's Technical Report Series, Geneva 1966: "A drug is any substance or product that is used or intended to be used to modify or explore physiological systems or pathological states for the benefit of the recipient".

4/ See next page, penultimate paragraph of 2.1.1.a).

Coming, now, to the route by which a substance may enter the human organism. This can be oral or non-oral. The latter case implies a "medical" intervention, which takes away from the substance its character as a food in the strict sense, even though it is ingested for nutritional purposes.

The next question, that of knowing whether a food, if it is to be so described, must be susceptible of total absorption into the organism may be considered in two aspects. On the one hand, there are products of which only a part is consumed, the purpose being to produce nutritive and/or organoleptic effects. A typical example is chewing gum, where the base is disposed of once the food part is consumed. This is usually considered to be food. But on the other hand, there are substances which may obtain partial access to the human organism without their being intended any nutritive effect - whether inhaled (.e.g. tobacco smoke) or applied to the skin (e.g. cosmetics). Such substances have no direct connection with human food.

Lastly, if the nutritive function is considered to be one of the criteria for the qualification of food products, then the term must be applicable also to those products which are not intended for consumption by the population in general, but by certain categories of individuals only. This is the case, particularly, with dietetic products or foods intended for certain kinds of sick persons, very young children, the aged, and expectant mothers. The particular nature of these foods and the specific problems that arise in their regard are such as to assign to them to a separate sector.

Accordingly, there are certain matters or substances ingested by man which are not considered as food (e.g. pharmaceuticals), while others, although so considered, must be treated separately (e.g. dietetic products). "fliere exists even today a fairly wide diversity of opinion as to what should be included under "food" in the objective and prime sense of the term.

b) The Codex Alimentarius definition of food

As its session in November 1966, the Joint FAO/WHO Codex Alimentarius Commission proposed a definition of food as being necessary for an understanding of the "General Principles of the Codex Alimentarius" and not with the intention of its possible adoption by governments in their national legislation. Axis definition is as follows: "Food" means any substance, whether processed, semi-processed or raw, which is intended for human consumption, and includes drink, chewing gum and any substance which has been used in the manufacture, preparation or treatment of food but does not include cosmetics or tobacco or substances used only as drugs 1/.

c) The legal definition of food; the sphere of application of food law.

Statutory definitions, where these exist (and it is not always the case 2/) bring out certain differences between what nutritionists and lawyers respectively consider to be food. Likewise, the sphere of application of food law frequently includes products or substances which are not, on objective criteria, food. Contrariwise, there may be a deliberate exclusion of certain food substances which the legislator has preferred for practical or administrative reasons to bring under entirely different regulations.

1/ See below, Bibl. II t Codex Alimentarius Commission: Report of the Fourth Session (Ref. ALINORM 66/30).

2/ See below, Bibl. I t Bigwood & Gérard (Vol. I, Ch. 4) and Bibl. II: FAO 1967 (Doc SP 10/30 - GPFL), op.cit.

However, the utmost care should be taken to avoid confusion between the legal notion of food and the sphere of application of food law. The legal notion is based on the definition of food contained in an enactment of general application. That this notion should be included in food law is often desirable, provided that its content is not unduly different from the objective connotation of the term as employed by the nutritionist. If the law includes nonfood products under the definition of food, then those products should be presented in the law not as a contrived extension of the definition itself but as so many matters additional to its field of application.

d) Conclusions

One can therefore consider that there exists a proper domain for food law characterized by the objective notion of what constitutes food, whether or not such notion finds expression in a legal definition. Within this domain which is proper to food law there is to be included everything that, directly affects the composition, quality, presentation and control of food so defined (such as use of additives, contaminants, treatment or preservative processes, and labelling).

2.1.2. Fields of law marginal or related to the proper domain of food law

a) Marginal areas

Since the effective field of application of food law does not entirely coincide with its proper domain, which is defined as that which directly relates to food in its objective sense, it is only to be expected that there should be a number of secondary areas, which we shall call "marginal areas".

These marginal areas include, in the first place, those provisions which, while contained within the broad framework of food law, concern articles or materials other than food properly so called or which regulate their composition, quality or presentation. Thus, in countries where drugs and cosmetics come under the same general legislation as food, these constitute marginal areas of food law. The same is true of dietetic foods if one agrees to exclude from the definition of food substances or products intended for feeding special categories of consumers. The same may also be said of products or articles designed to come into direct contact with food (such as containers, packaging and cooking utensils).

b) Related fields of law

There are certain rules of law which may affect, directly or indirectly, the production, processing, marketing or control of food or certain types of food yet do not stem from general food legislation. It follows that these rules lie outside the domain of food legislation in the strict sense but make up an area of laws connected with., it in some way.

The connection may be of two kinds. It may be substantial and necessary where, by reason of their object, such rules necessarily affect the composition or quality of food or its trade. It is the case, for example with regulations governing animal feedstuffs. the use of pesticides, the protection of the environment (pollution of the air or water) and also, legal provisions affecting economic aspects of food products (e.g. price control). Equally, the connection may only be accidental where the rules have been made for specific juridical situations, capable of, but not necessarily, affecting the production, processing or marketing of food, as in the case of certain provisions of criminal, economic or administrative law or regulations governing such matters as trade marks, advertising and unfair competition.

2.1.3. Operations affected by food law

The objective domain of food law should include in principle all operations occurring in the chain of food production.

A number of countries, however, exclude operations concerning the production of raw materials for manufacture of food, which are dealt with under different laws, notwithstanding their "objective" relevance to food legislation t agricultural legislation, in the case of primary products (cereals, fruits, vegetables); legislation dealing with the resources and products of animal husbandry, for the slaughter of animals or barnyard animals; legislation on hunting, where this affects the production of game; or fisheries legislation, for food products obtained from the sea.

On the other hand, it should be remembered that while processing and related operations must be carried out in conformity with the food laws, the enforcement of the relevant provisions is a question that usually arises only at the different stages of the marketing chain (i.e. import/export, transport, wholesale or retailing). Departures from this principle are made only where the food laws themselves expressly so provide by introducing an inspection at the production stage.

2.2. Persons coming within the domain of food law

2.2.1. A distinction proposed

Food laws whose special character we have shown above apply to persons according to certain acts performed by them or to certain situations in which they are involved.

A practical distinction may be made between categories of persons whose compliance with the provisions of food law is required. Such law imposes upon certain persons positive obligations or prohibitions, the disregard of which renders them liable to criminal penalties. We shall call such persons persons "actively" involved under food law. These are those who are engaged in the production, treatment or sale of food. In contrast to them one may consider other persons as "passively" affected under food law, i.e., those who look to the law for effective legal protection against possible offences.

2.2.2. Persons "actively" affected by food law

A person is "actively" affected by food law if he participates at any point in the chain of production, from the use of the raw products whether of crops or animal husbandry, hunting or fishing up to and including the realisation of the final product. Persons are also "actively" affected by food law if they are engaged in any phase of the sale or distribution of food, i.e. its transfer to the consumer whether as a raw commodity or a finished product. Similarly, persons handling food in the catering trades or engaging in, advertising publicity for food products should be included under the classification of persons "actively" concerned under food laws.

Not so included are those whose task it is to make and administer regulations and apply possible sanctions. For, although these persons are subject to the laws in force, they participate in carrying out the jurisdiction of public authority and assure to "active" and "passive" subjects of the law the application of the protective, preventive and punitive functions of that authority.

In practice, those persons "actively" involved, whether as producers or tradesmen are for the most part not private individuals but firms or companies. It will be seen later how it is possible to invoke civil liability of firms or companies in order to obtain a redress for grievances arising out of their activities1/. Responsibility in such cases under criminal law

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1/ See below, 12.2.4.

can only lie with an individual or individuals (and then only on the grounds of the specific managerial or supervisory duties incumbent upon him or them in the position he or they occupy within the firm) save where the sanctions entailed are largely of a commercial nature 1/.

2.2.3. Persons "passively" affected by food law

Consumers, as a class, come under food law in the passive sense. It is as consumers that the generality of human beings must be able to look to the legislation governing the products consumed for effective protection against risk or for redress against any wrongdoing they may suffer 2/.

In the biological sense, a consumer is a person who ingests a product intended to be so ingested. According to this point of view, the act of consumption brings about effects which are of essential interest to the physician, the nutritionist, the chemist or.the toxico-logist.

But, as commonly understood, the concept of consumer is an economic one. In general, the consumer is someone who participates in the act of consumption, which means the use or absorption of goods emerging from the production process. One may consider these goods under two aspects. They can be referred to as food products when they form the object of a sale or as consumer goods or products when they are used in accordance with the purpose for which they are intended.

Again, the concept of consumer includes, but is not coterminous with, that of purchaser, for, if consumption involves traded wares, it finds material expression in a commercial transaction, usually the sale of a product. Such a transaction, in the eves of the law, constitutes a contract creating legal relationships between buyer and seller, the same persons capable of being alternatively buyer and seller of the same product if a middleman is involved. But legal relations between buyer and seller are governed by the law of contract, which is part of the civil or common law. Only indirectly will they impinge on food law, since it is of no consequence whether or not the object of the contract of sale is a food product as such.

2.3. The functional or sociological domain of food law

2.3.1. The function of food law in social life

Notwithstanding its composite nature, discussed earlier 3/, food law fulfills an evident function in the life of society, namely that of protecting the consumer of food and organising the intervention of the public authorities where possible, to prevent as soon as possible and in any case to punish any wrongdoing committed in the production, treatment or marketing of food.

More often than not, the basic laws empowering governments or local authorities to make regulations or to exercise control where food is concerned do not fail to state that the exercise of the powers so conferred is conditional upon the existence of this protective purpose. There are regulations which, although they affect food products and impose obligations on those producing or selling these products, lie outside the scope of food law, because they are not intended to ensure consumer protection. Examples of such regulations are those concerning customs and excise on food commodities.

1/ See below, 11.5.2.

2/ See below, 2.3.

3/ See above, 1.1.2.

It is because this principle of protection is truly a function of food law, as well as something that underlies its constituent rules, that one can discern in it a criteria for defining its field of application.

It should however be borne in mind that the protective function of food law has importance, and is organized, in two distinct spheres which differ in their nature and in the problems to which they give rise, namely, concern for the health of the consumer and the guarantee of fair trading.

2.3.2. Health protection

All modern food law, whatever the national system, places the protection of the consumer's health in the forefront of the law maker's concern. Most systems in fact, consider this protective function as the dominant one.

The diversity and progressive refinement of food processing operations conspire to make consumer health protection a highly complex undertaking. The authorities are calledupon to define, with a reasonable degree of precision, the conditions governing the composition and processing of food to reduce to a minimum the risk of deleterious effects on the human body. What makes the task a difficult one are the inherent problems of identification, measurement and evaluation, more particularly in the use of additives 1/ and contaminants 2/.

The legislator has to allow for the potential toxicity of various substances contained in, or which may be added to, food. Toxicity will be governed not only by the nature of the substance in question but also by its level of concentration in the human body and the combined effect of several such substances in the same product. Research needs to be done not only on immediate toxic effects (acute poisoning) but also on its long term effects (carcinogenic poisoning) on the human metabolism and on genetic and other effects.

The evaluation of potential toxic effects is made before the food or substance is released for use, by means of laboratory tests carried out on experimental animals such as rats and mice. The findings, extrapolated in terms valid for a human being, provide a means of establishing the safety of the food or substance in question provided that an acceptable daily intake (ADI) is not exceeded. The conclusions drawn from these toxicological tests need not only to be reviewed from time to time both in the light of advances made in science but also in the light of experience regarding the consumption of the tested substances over a fairly long period of time. This experimental approach must take into account sufficiently wide safety margins in order to reduce to a minimum the probabilities of harmful effects on the consumer.

Such tests, on account of their technical, time and cost factors cannot easily be undertaken by all countries. However, much is to be hoped for from the achievements in recent years of the Joint FAO/WHO Committees of experts who have undertaken to collect, coordinate and disseminate toxicological data obtained from all over the world so as to serve as a basis for the limits laid down in international standards (particularly those of the Codex Alimentarius Commission) as well as the regulations of individual countries.

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1/ See below, Chapter 5.

2/ See below, Chapter 6.

2.3.3. Promotion of fair trading

As a general rule, any attempt to induce a consumer to accept a product the composition or quality of which does not correspond to that which he has a right to expect constitutes an offence, the prevention and punishment of which is another major purpose of food law, i.e. the guarantee of fair dealing. This purpose should be considered apart from the protection of public health, even if it often happens that one and the same act, for example, the sale of a product that is harmful or otherwise unfit for human consumption, constitutes at the same time a fraud against the consumer, and a risk to his health. In other cases, defrauding the consumer may take the form simply of selling adulterated food 1/ - or not complying with the law without constituting a danger to his health (e.g. sale of watered down milk). Farther, as has been pointed out 2/, food law protects the consumer as such and not as purchaser, whose juridical position is governed by the law of contract.

There is a fundamental difference between the two imperatives of protecting public health and ensuring fair dealing, for the latter depends in no small measure on sociological conditions, themselves varying from one country or region to another, and which relate to the level of economic and intellectual development of a community and, inter alia, to its eating habits. At the very time when the complexity and diversity of finished products placed on the market and the development of modern methods of marketing and of advertising techniques make it increasingly more difficult for the consumer to exercise an effective freedom of choice, the regulations aimed at protecting him against possible fraud ought to be conceived not only in terms of the nature and quality of the foods so marketed but also in terms of what the consumer may normally expect to receive from his retailer. Later in this study we shall see how two types of statutory provision are used to achieve this purpose; the first kind, those which have as their object the legal definition of the products ("food standards" 3/) and the other those which regulate the labelling and presentation of food 4/.

1/ On the question of the criminal implications of deceit and adulteration see below, 11.2.1.

2/ See above, 2.2.3.

3/ See below, Chapter 4.

4/ See below, Chapter 8.

3. THE GENERAL FORM OF FOOD LAW

3.1. Classification and scope of provisions

3.1.1. Legislative and regulatory provisions

a) Legislative level

Whatever the form of Government or political system of a country all statutory provisions making up food law are nowadays to be found enacted as written law.

The law, i.e. the Act, is something that proceeds from the legislative authority. Its adoption often requires the majority consent of a parliament. But in countries with a federal form of government there are two legislative bodies existing side by side: the federal parliament and the various state parliaments, province, canton, land, as the case may be, with their own well-defined lawmaking powers under the federal constitution. Federal powers are sometimes also vested in respective states, so that Federal and state powers are then exercised concurrently. Thus, in the U.S.A., most articles of food come under state law when marketed within the state of origin and under federal regulations when marketed outside that state. In other countries with a federal constitution legislative jurisdiction is distributed between the central parliament and the parliaments of the federated territories on a sector by sector basis, so that food legislation may be a matter for the former, as' in the case of the Federal German Republic or the Swiss Confederation, or for the latter, as with Australia, where the Commonwealth has a purely coordinating role in this particular field.

b) Executive level

Usually the law limits itself to laying down principles and entrusts the authorities appointed by it with the task of applying it through the appropriate regulations. These authorities are only empowered to act by virtue of a delegated jurisdiction, the terms and conditions of which are expressly or impliedly determined by the legislator. These powers may be exercised at several levels according to the importance of the matter and depending on the administrative and territorial organization in question. Executive measures may be enacted by the Head of State or head of government, by the cabinet of ministers, by a particular government authority (minister) by an administrative body to which powers have been subdelegated (for example, a head of department within a ministry), or by local authorities enjoying autonomy of action under decentralized arrangements but exercizing powers under the admimistrative authority of the central government 1/.

One frequently encounters basic legislation which, having laid down general principles applicable to food products as a whole, delegates to an organ of the government - usually a ministerial department - powers to fix the technical means of carrying them out and to local authorities the responsibility for their enforcement within their respective areas of jurisdiction with further implied powers in some cases for their making regulations necessary for the realisation of such enforcement.

1/ See below, 9.1.2.

3.1.2. Other statutory provisions having an indirect or parallel binding effect

So far as production, processing, marketing or control of food is concerned, there are several kinds of provisions which are indirect or in parallel to that of the law properly so called.

a) Food codes

Technical regulations in regard to the composition or purity of food are to be found not only in legal enactments but in a food code or "codex", to use a term now gaining currency. Codices do not themselves have the force of law. However, the countries which make use of them usually accord to them an implied binding force, particularly to the extent that the courts systematically use them for determining what is good manufacturing practice or fair dealing 1/.

b) Case law

In Common Law countries judge-made has a binding force and is a fundamental source of law. In many countries not of the Common Law system, in particular those of the European continent, court rulings are binding only on the parties though they have the force of precedent in the sense that they may be decisive in aiding in the interpretation of the law.

c) Practice

In order to supplement the positive rules contained in the law or to achieve the desired degree of precision in their regard, for the solution of particular cases, appeal is frequently made to professional or trade practice. Practice is accorded this level of recognition only where there is an abiding character about it and a certain notoriety. It is normally taken into account at the drafting state of regulations affecting the sector concerned.

Practice is sometimes adopted into administrative acts and becomes positive law in the process 2/, while the legislator himself may also refer to it in order to resolve procedures and to supplement the statutory provisions.

d) Religious codes

Certain religions call for very definite prescriptions or prohibitions regarding the consumption or preparation of food.

These religious prescriptions have by their nature a legal character in certain, for example, Muslim countries. In other countries where religious rules do not enjoy mandatory force the food authorities are likely nevertheless to take them into account where a large proportion of the population wishes to submit to them.

e) International or foreign regulations

Regulations coming into existence as a result of conventions between two or more states are deemed to form part of the positive law of those states, either through their reproduction in their respective municipal legislations or because their constitutions attribute to such conventions the same legal force as national laws. The same principle applies when the provisions of "model laws" are adopted in a country's legislation.

1/ As regards the role of a Codex where additives are concerned, see below, 5.1.2.

2/ For the case of France, see below, Bibl. IV-B, France: Dehove, op.cit.

There also provisions, international in character, which apply to the countries which participated in their formulation without it being necessary to enact explicit legislation for the purpose. A case in point is the regulations of the European Economic Community, which are of direct application in each Member State by virtue of the Treaty establishing that Community. A particular example of this is the quality standards laid down for fruit and vegetables by the E.E.C. agricultural regulations 1/.

Further, the case may arise that technical data prepared in another country or by an international organization are referred to by the food authorities of a particular country responsible for control at its national level, even though there may be no statutory provision making it mandatory. Examples of this are the technical standards established by the FAO/WHO expert committees (acceptable daily intakes, toxicological evaluation of additives or residues) or the chemical analysis methods prescribed by the scientific bodies endowed with statutory authority of another country. One can compare this situation with that in which a quasi-mandatory force is attributed to the provisions of a Food Codex.

3.2. Form and content of positive national law

3.2.1. Basic Acts

All modern food legislation consists of a basic Act or Statute reference to which is made in all other regulatory enactments. However, a number of countries have side by side with this basic Act, concerning food products generally, made other laws governing either a distinct sector of food law (e.g. water, meat and meat products, dietetic foods), certain types of food processing (e.g. irradiation or deep-freezing), or specific legal aspects of production of or trade in foodstuffs (for example, the general rules for the control of penal offences and the control over commercial and advertising practices). Such matters are to use the classification adopted earlier 2/, marginal to food law whenever the enactments passed in their regard themselves refer back to the general principles contained in the basic Act, and are matters connected with food law when the general principles are not stated in such Act.

The general form of the basic Act depends on the legislative traditions of the country in question. The established practice in some countries is to enact highly comprehensive and detailed texts in which are brought together practically all general provisions which may concern food. In such cases there is little left for the administrative authorities to do beyond prescribing the technical procedures for enforcement and the provisions in respect of the particular food in question. There are advantages in this approach, provided that the general principles contained in the basic law are conceived in sufficiently flexible terms for them to be adaptable to future developments in science, in social and economic needs and in technology. In this case it will not be necessary in order to cater for every such development to resort to lengthy parliamentary procedures - which are not always of certain outcome - to amend the law. It is no coincidence that this approach is to be found principally in Common law countries, in which the courts are given wide discretionary powers to adapt the law to individual cases. Where food is concerned, a high degree of precision is needed in the technical terms used to ensure certainty of the law.

1/ See below, Bibl. IV-A: Gérard 1972, op.cit.

2/ See above, 2.1.2.

The opposite approach is to limit the contents in the basic Act to the enabling provisions together with a few very general principles. This approach is to be found in many of the countries where Roman, Dutch or Scandinavian law prevails. The system has an inherent flexibility in that the necessary powers are delegated to the appropriate authority to make rules governing all food products or certain types of substances, for example additives, within the general framework as laid down by the law, and to prescribe technical regulations for specific foods as food standards. Certain countries maintain a systematic parliamentary control over government-made regulations, as distinct from the more general political control over governments, to enable parliaments to debate any necessary matters arising from such questions 1/.

In principle, there are four types of provision to be found in a basic enactment on food law:

a) the definition of the domains of the law, which we have previously discussed 2/, must clearly precede all other provisions. It is desirable that this definition should make a clearcut distinction between what the law considers as a food in the strict sense and other objects, matters or substances coming within the scope of that law 3/. By tradition, enactments of general scope made in the Common Law countries often contain a list of definitions of the main terms employed. This approach has decided advantages, whilst emphasing that the definitions apply only for the purpose of application and interpretation of the enactment in question. The terms and expressions employed may also be defined not in the opening sections of the Act but in the section of the Act to which they relate;

b) permanent general principles. Reference has already been made 4/ to the fact that some of these principles can be looked upon as defining the functional domain of food law. It is both logical and usual, therefore, that they should form part of the basic Act. As for the multiplicity of rules of general applicability to be observed by all persons engaged in the production, processing or sale of food, it must be emphasized once again that there exists many differences between countries, some countries preferring to have a detailed statement of principles in the basic Act, whilst others leave these principles to be laid down in general enforcement regulations;

c) enabling clauses. Every basic Act should define the nature and the limits of the powers to be exercised under it and should designate the public authorities in whom those powers are to be vested, in accordance with the procedures for their exercise. The powers so vested in the government or executive authority relate to the drawing up of rules for the implementation of the law 5/ and for the intervention of the authority for the purpose of checking that the laws and regulations are observed, so as to report possible offences and refer them to the appropriate court 6/. Thus, there are two categories of powers, namely formulation and control, which we shall see are usually not delegated to the same authority and which are not necessarily exercized at the same level. Next the procedures governing the exercise of these powers need to be defined with the utmost precision. Adherence to them is a necessary condition of the legality of the enforcement rules made by an executive authority and, also, of the protection of private persons against that authority's arbitrary or excessive use of its powers;

1/ The legislation of the United Kingdom and of the Commonwealth countries that have modelled their own laws on it reflect both approaches.

2/ See above, Chapter 2.

3/ See above, 2.1.

4/ See above, 2.3.

5/ See below, Chapter 9.

6/ See below, Chapter 10.

d) penal provisions. Another essential principle is that no penalty may be inflicted save by virtue of the law. The delegation to an executive authority of the power to sanction as well as to take preventive measures required in the public interest and for its security, implies that the limits of such powers and the conditions governing their exercise must be laid down with precision in the basic Act. Offences must be defined, and the nature and limits of the penalties that may be imposed, together with the procedures for such imposition once the commission of an offence has been duly' established, must be determined 1/. In the ordinary way basic Acts on food law do no more than define specific offences and, where appropriate, fix the limits of the penalties which may apply, as well as the nature of and the conditions for exercising any necessary measures for the protection of the consumer as, for example, the seizure of suspect food. Otherwise they refer to the general provisions of the Criminal Code and the Code of Criminal Procedure.

3.2.2. Administrative regulations

The content of the regulations made by the executive authority pursuant to the basic Act is determined by the enabling clauses contained in that Act. Thus, three types of enforcement regulations may obtain:

a) Enactments affecting food products generally. Usually the purpose of these enactments is to establish general rules. They are of particular importance in countries which do not lay down in detail in a basic Act principles governing the manufacture, processing and sale of food but leave it to the government to introduce such general regulations. Thus, Switzerland and the Scandinavian countries have detailed general regulations applicable to all food products. But whether or not these general principles are laid down in the basic Act it is always necessary that their implementation at the technical level and their adaptation to the various types of substances or food products is entrusted to a government authority. In the United States and Canada, for example, the Federal authorities are required to establish and maintain up to date a comprehensive code, known as "Food and Drug Regulations", comprising technical provisions applying to the whole range of foods. A very few countries, among them Belgium, Finland and Italy, have overall regulations governing the use of additives, whereas in other countries the statutory tolerances in the use of additives are part of the provisions contained in food standards 2/.

b) Enactments affecting specific food products. These are the food standards which will be discussed at length later 3/. In many countries, the provisions peculiar to each food, including its legal definition, constitute specific and distinct regulations. The practice has developed in other countries, however, of grouping such provisions (under different headings) in a comprehensive set of regulations governing food. Here, equally, the legislative traditions may vary appreciably from one country to another.

c) Administrative rules for organizational or coordinating purposes. While the main body of rules making up food law must be determined by the provisions of the basic Act, there are a great number of internal regulations or "house" rules that are of no direct concern to the public but which are required for the good ordering of the executive services and the co-ordination of their action in the interests of efficiency. Provisions of the kind, although they come under food law, have only a subordinate character and are mentioned in this context simply for the sake of completeness.

1/ See below, Chapter 11.

2/ For the structure of food additive regulations, see below, 5.4.

3/ See below, Chapter 4.

4. FOOD STANDARDIZATION

4.1. Standards in general and food standards in particular

If a product has readily identifiable characteristics and is susceptible of exact description then it is possible to lay down in clear terms the requirements which that product must satisfy. If these requirements are themselves susceptible to verification, i.e. either objective verification where this is done in terms of the quantity of the product or by reference to all other measurable elements of the product, or subjective verification where the product is graded on a quality basis it is possible to "standardize" the product, "standardization" being the laying down, by a legal instrument, of precise requirements again.which product conformity can be checked. The sum of these requirements constitutes the "standard".

By definition, and because their elaboration is hedged in by stringent conditions, standard imply stability and certainty. Where food is concerned, standardization offers an effective means of consumer protection and one to which the modern food legislator cannot but attach more and more importance. This is reflected in the ever increasing number and variety of food standards incorporated into enactments or brought into their purview, chiefly in the industrialized countries.

4.1.1. The different types of standards

a) Compulsory *[*or legal*]* standards; and optional *[*or recommended*]* standards

Where the minimum requirements making up a standard derive their compelling force from a law or regulation, this is said to be a legal standard, by definition enjoying the force of law. The special characteristic of a legal standard is the system of legal sanctions to which it is subject. These sanctions are contained either in the provisions relating to or making up the standard, in the general law governing the products in question or even in the general criminal law of the country.

Side by side with these compulsory standards there are also standards of a purely optional kind, as their name "recommended standards" implies. They are indirect in their effect and accordingly it would be untrue to say that they have no effect whatever within the field of law. For in most countries, once a standard of this kind is sufficiently well known, anyone who refers to it explicitly or implicitly, by using a specific description corresponding to that of a standardised product to describe such product runs the risk of misleading the consumer, with all the legal consequences that this entails, if the product does not conform with the standard. Not infrequently a reference value is assigned to a recommended standard by the courts when dealing with cases concerning the characteristics or the qualities of a product.

Thus, compulsory or not, standards have repercussions in law which justify their inclusion in this study.

b) General standards and specific standards

A further distinction may be made between standards in accordance with the extent of their application, i.e. whether they apply to all products in general or a single product or type of product or to all those aspects under which a product is susceptible of standardization or to only one such aspect.

One could so distinguish between general standards and specific standards. A general standard is one which applies to all products or to very large groups of products (e.g. prepackaged foods) and relates to matters common to all of them, as for example the principles governing the use of food additives, the labelling of prepackaged foods and food hygiene). By contrast a specific standard is one which applies to a single product or type of product or deals with a specific characteristic of a product (for example, its origin, where the standard lays down the conditions governing the use of an appellation-of origin).

The implications of this distinction where food standardization is concerned will be examined later 1/.

4.1.2. The standard as a principle of food law

a) At the national level

The concept of food standards usually corresponds, at least in origin, to that of the definition of a food brought into the trade. The purpose of this definition is to guarantee that the product covered by it contains specified amounts of ingredients whereby it may be sold under a given description and may be so identified by the consumer. When it is limited to this purpose, food standardization means no more than determining the identity and composition of the product and finds expression in a simple "standard of identity and composition".

But, if the intention is to secure complete protection of the consumer, by the use of food standards exclusively, standardization must take into account many other matters, such as tolerances relating to user of additives or presence of contaminants, statements as to quality, where appropriate, label statements designed to provide the consumer with the information he needs and statements which are prohibited in commercial presentation. The inevitable result is that food standards become highly detailed by reason of the inclusion of all specific elements likely to be conducive to consumer protection, including certain general rules of principle applicable to all other food products and which are repeated in each standard.

The trend in many countries is towards food standards which, while remaining peculiar to the respective products, are becoming increasingly more general both as regards the number and range of the matters covered. In extreme cases, where regulations governing the composition, quality and presentation of food products are essentially in the form of food standards (as for example in Denmark),one has in effect a product-by-product codification of current requirements .

b) At the international level

It is only natural that the intergovernmental organizations, having themselves undertaken the elaboration of food standards, are directly influenced by their member countries. The above mentioned trend towards generalized standards is, therefore, reflected at the international level 2/.

In addition there have been considerable developments in the international trade in foodstuffs with the consequent need to remove at the manufacturing and packing stages technical barriers to that trade. To achieve this the nations must endeavour not only to reach agreement on international definitions for the composition of food products intended for export but also to harmonize the rules governing, inter alia, the presentation, quality use of additives and levels of contaminants. The more the rules are harmonized the more complete and effective will be the elimination of technical barriers.

The point of convergence of all these approaches is to be seen in the detailed and almost exhaustive model international food standard as developed by the Joint FAO/WHD Codex Alimentarius Commission. This is to be seen in the General Principles adopted by the Commission as the basis of its deliberations where one may read "requirements for food aimed at ensuring the consumer a sound, wholesome food product free from adulteration, correctly labelled and presented" 3/. Furthermore, Codex standards for a given product or group of products should normally be presented in a format containing the following headings: name of the standard, scope, description, essential composition and quality factors, food additives, contaminants, hygiene, weights and measures, labelling and methods of analysis and sampling. 4/. This list is evidence that a Codex Standard aims at governing as much as possible all those aspects of the various products which are covered by a wide variety of provisions in the most detailed national laws.

1/ See below, 4.2.2.

2/ See below, 4.1.2.a).

3/ See below, Bibl. II.: Codex Alimentarius Commission 1973, op.cit., pp. 19 ff.

4/ See below, Bibl. II.: ibid., pp. 45 ff.

That the task the Commission has set iself should be so wide in its scope is undoubtedly dictated by the need to achieve something concrete, comprehensive, enduring and effective. But this also creates difficulties for reaching harmonization on account of the many and significant divergencies between the regulations in respect of which all interested countries have been asked to find a solution. Such difficulties are even greater where food standardization is more developed, i.e. in the industrialized countries. It is significant, in this connection, that the industrialized countries are absent from the list of those members of the Codex Commission who have so far fully accepted the Codex Standards for certain food products 1/.

In the case of intergovernmental regional organizations, whose composition is more homogeneous and where the number of Member Nations is smaller than the Codex Alimentarius Commission itself, the difficulty is less serious at first sight. Thus the European Economic Community has normally been able to achieve its purpose of removing non-tariff obstacles to trade without the search for harmonization having to cover such a wide range of items as in the case of the Codex Alimentarius Standards. Nevertheless, the various draft European food standards currently under discussion in the European Community concern much more than the mere definition (i.e. composition and description) of a food and contain provisions governing labelling, permitted amounts of food additives and maximum levels for contaminants.

4.1.3. Simplified food standards - a tentative proposal

The view which may be taken of food standards depends to a large extent on the legislative forms and traditions of each country. This study is, therefore, no place for arbitrary and, still less, controversial opinions in their regard. However, a brief review of the criticisms that have been made of the present trend towards a very wide extension of the food standard concept will not be without interest. These criticisms are to be found particularly in the publications of the Food Law Research Centre of the University of Brussels under the direction of Professor Bigwood 2/.

The theory in question proposes to limit the content of a food standard to reflect its original function as standard, namely, the definition of the composition of a food product and, where the composition conforms with the definition so given, its identification. In other words, there should be certain specific food standards which should:

1. determine the contents of the food in terms of its characteristic ingredients and the purity criteria to which it should be subject, in such a way that the consumer will be able to identify the food by means of the description made official by the standard and be informed, where this is necessary, of its basic ingredients by means of a list of ingredients and as to the best use which can be made of it.

2. exclude any provisons which (a) provide for aspects of any product that are alien to the properties of that product, e.g. tolerances for user of additives 3/ or for residues of contaminants and (b) are not specific to each food but concern matters, such as hygiene and labelling, common to all foods.

1/ See below, Bibl. IV-A: Kermode and McNally, op.cit., Annexe IV.

2/ See below, Bibl. I: Bigwood and Gérard, op.cit., Vol. 4.

3/ Of the theory developed by the same authors on food additive regulation (See below, 5.1.2.)

The advantage of the simplified standard lies in the flexibility it offers. The exclusion of all that is irrelevant to the identification of the standardised product and to the definition of its characteristic composition should facilitate the whole standardization process. The approach should also help to bring existing standards into line with development in science, the social situation and consumer demands. At the international level, moreover, the adoption of simplified standards by an important number of countries, particularly in regional groups of countries with similar living conditions at a comparable stage of development, would become a less laborious process.

These claims, however, are often countered by reference to experience. Producers, no less than consumers, take the initiative in soliciting the establishment of detailed regulations bringing together in a single enactment all the statutory requirements governing a given type of food. Internationally, moreover, the current practice of most governments - including those of the developing countries - is to prefer to deal with draft standards of considerable detail so that they can measure with a greater degree of precision the discrepancy between these and their own legislation. Finally, while there is no doubt that the acceptance by states of detailed international standards raises more complex problems than does their acceptance of simplified standards it must be recognized that simplified standards cannot by themselves remove the technical barriers to trade. Such barriers may also be created by divergent legislation on matters excluded as a matter of principle from the simplified standard - as, for example, the rules concerning additives, contaminants, general labelling or hygiene provisions.

For the various reasons cited here, the proposals of the Brussels Food Law Research Centre, which have not been adopted in practice, have only a theoretical interest 1/.

4.2. Positive law of food standardization at the national level

4.2.1. Contents of a food standard

As pointed out earlier 2/, many countries use food standards which cover much more than the constituent elements and the description of the product, and provide for such matters as presentation, quality and quantity. One such country is the United States of America where the Federal Food and Drugs Administration (FDA) is empowered to establish reasonable standards of identity. The FDA takes a very wide view of its mandate and is able to go into great detail in defining foods. Many other countries, among them Canada, Denmark, France and the United Kingdom, have special regulations for defining foods or groups of foods. The regulations in question, while less detailed than those of the U.S.A., cover a considerable number of products.

But standardization extends to additives as well. It frequently happens that food standards themselves prescribe the maximum levels at which the respective substances may be present in the standardized food. Belgium and Italy, on the other hand, prefer to deal with maximum use levels for additives in a single comprehensive text indicating, as well as the substances whose use is authorized, their use limitations and the types of foods in which they may be incorporated. In the United Kingdom the regulations are issued in separate statutory instruments for the various types of additives, e.g. preservatives, antioxidants, and colouring matters.

1/ The theory was discussed by the Executive Committee of the Codex Alimentarius Commission but was not adopted for the purposes of elaborating standards. Cf. Report of the eighteenth Session of the Executive Committee, paras.74-75 ALINORM 72/3. FAO, Rome, 1972.

2/ See above, 4.1.2.a).

4.2.2. Form of food standardization

a) Vertical or horizontal standardization

According to whether the standards it is proposed to bring together in an organized arrangement are specific standards or general standards 1/ one may distinguish here between "Vertical" and "horizontal" systems. Standardization is said to be vertical when all provisions applying to the various activities or situations to which the respective products give rise are brought together on a product-by-product basis. Horizontal standardization is when it deals with one subject-matter thereby affecting all products or broad categories of products.

It is the latter type of standardization that raises the greatest number of difficulties. There are two principal kinds of food regulations to be found in the horizontal system of standardization which are as follows:

1) regulations containing general provisions that may be applied to all kinds of products in respect of such matters as food hygiene and labelling. In this connection it may be objected that, if these provisions have little left in common with provisions limited to defining or characterizing the respective products (for their essential purpose is to lay down permanent principles for their application to secure consumer protection) it is a misnomer to refer to these provisions, as it is often done, as "general standards" because they do not correspond to what is usually understood by standards 2/;

2) regulations governing the use of additives. Here again, the purely horizontal structure is open to criticism, for these regulations could be presented to greater advantage in a table of provisions showing horizontally the different additives permitted and, vertically, the foods in which these may be incorporated (with or without maximum levels of use).

b) The appropriate jurisdictive level for laying down food standards (legislative or executive)

Whether the provisions containing or constituting food standards should be a matter for basic legislation or for executive regulations will of course depend on how permanent those provisions are and or how broad are the principles which they embody 3/. In the case of general rules not subject in the normal way to periodic revision there is little or no reason why they should not be embodied in a Food Act. On the other hand rules that go into greater detail and establish the technical characteristics of foods and maximum levels of use for additives or tolerances for residues of contaminants are inappropriate to basic statutes. The latter entail laborious parliamentary procedures for their amendment and would unbalance the development of food law and render it less readily adaptable to advances in science and technology. All modern legislation accordingly vests the necessary regulatory powers in the executive 4/ so that action can be taken effectively and expeditiously to secure the legal protection of the consumer.

1/ See above, 4.1.1.b)

2/ See above, 4.1.

3/ See above, 3.2.

4/ Regarding the drafting of regulations and administrative jurisdiction, see below, 9.1.

4.2.3. Legal force of food standards

Usually the same legally binding force attaches to food standards as to regulations generally. Infringement of a standard entails the food being considered adulterated or, at least, put on the market in such conditions as to mislead the consumer. These remarks hold good not only where the standard has been established by the appropriate authority but also where the food industry has proposed a standard and this has subsequently been confirmed by the Authority 1/.

As it has been previously pointed out 2/, in such matters as the composition of foods and the purity of their ingredients, there are to be found provisions with the character of standards, having an indirect binding force in that they are not regulations in the strict sense but are referred to, at least by implication, in food law. In Austria, for example, technical specifications for the composition and purity of foodstuffs are contained in a Food Codex 3/. In other countries, food standards refer to fair trading practices (e.g. in France : "usages constants et loyaux de commerce" 4/) or to "good manufacturing practice" (e.g. Canada and the U.S.A. in the field of food additives use).

4.3. International food standards

4.3.1. Purpose of international food standards

At the international level 5/ the wide measure of preference for the highly detailed model food standards correspond to the two main purposes of food standardization in national law described earlier, namely:

(a) the economic purpose, on the one hand, is to bring about the fullest possible degree of unification of the minimum technical requirements embodied in national laws in respect of each type of food to ensure its free circulation and accordingly extend the market and increase the level of consumption internationally;

(b) the social purpose, on the other hand, is to secure, at the international level as at the national level, the protection of the consumer as regards those characteristics of composition, presentation and quality that he may legitimately expect of food products for which his custom is sought.

4.3.2. Methods of elaboration of international food standards

In all branches of the economy and not only the food sector, international standardization has emerged as one of the most striking aspecte of the unification or harmonization of laws between countries. But what do these two words mean in the present context ? Unification means the replacement of divergent regulations in several countries by a single set of regulations governing an entire subject matter which it is proposed to regulate in an identical manner. Harmonization of different national regulations on a given subject consists in rationalizing the regulations only to the extent necessary in order to remove those divergences that hinder the attainment of a specific end (e.g. the free circulation of a product between countries).

1/ See below, Chapter 9.

2/ See above, 4.1.1.a).

3/ See above, 3.1.2.a).

4/ See above, 3.1.2.c).

5/ See above, 4.1.2.b).

The question then arises as to how standardization can make use for its purposes of the methods provided by international law. In traditional international law the only way, directly or indirectly, to establish international rules which are also standards is that of conventions or agreements between the states concerned. In more recent times, however, the development of international trade has resulted in a quest for novel and more flexible methods of elaborating standards. Here the most original method is that adopted by the Joint FAO/WHO Codex Alimentarius Commission 1/. In what follows, therefore, the international law procedures, whether or not entailing a convention or agreement, and the Codex Alimentarius approach will be examined each in turn.

a) Procedures in international law entailing resort to conventions or agreements

Where the unification or harmonization of national laws which an international standard is designed to bring about is made through means of an agreement between countries the matter falls within the normal confines of international law. There the law traditionally derives its validity from a formal engagement taken by the countries concerned to abide by it and ensure its conformity in their respective territories. Depending on whether the link between the international standard and the convention or agreement which provides its basis in law 2/ is direct or indirect one or other of two methods of international standardization will be used. Thus:

1. Direct application of an international agreement

The essential element in this first method is that the international standard is the very object (or one of the objects) of the international agreement in question. The standard elaborated by an expert intergovernmental committee may, as with any international treaty, lay down a number of requirements which the signatory states undertake to implement in the manner they judge best. Equally the international agreement may take the form of a "uniform law" to be included in each municipal law.

This method is adopted not so much to make food standards applicable internationally as to create the legal machinery for reciprocal recognition by the contracting parties. This sort of approach may be seen in, for example, international agreements for the protection of appellations of origin of wines and types of cheese.

2. Indirect applications of an international agreement

"Indirect" applications presuppose the existence of a framework under the terms of which an international organization is empowered to elaborate and make mandatory certain rules common to several countries. These rules are prepared by an executive body or by the secretariat of the Organization and in the normal way are approved by a decision-making body consisting of the representatives of Member States and not by a conference of diplomats as in the case of drawing up a treaty.

An example of the indirect method is to be seen in the European Economic Community. The Treaty of Rome enables Community institutions to legislate on certain matters. Thus there is the Council, consisting of representatives of Governments of Member States, with power to enact regulations proposed by a Commission, independent of those Governments. Under the Treaty of Rome, the Council is empowered to require the removal of divergencies between the law of one Member State and the others, where these stand in the way of creating a common market for the product concerned. In other words, the Council may issue European food standards which the members are required, as signatories of the Treaty setting up the Community, to apply.

1/ See below, Bibl. IV-A: Dobbert, op.cit.

2/ See below, Bibl. IV-A: Malintoppi, op.cit.

b) Methods in international law not entailing resort to conventions or agreements

International practice has developed certain novel methods of unification or harmonization of laws under which neither direct resort to an international convention nor the existence of the enabling clauses embodied in a treaty are required, Such is the case with the elaboration of technical standards for products traded between several countries. The methods in question are far less rigid than those previously described because they do not of themselves call for an undertaking between nations. Bach participating State will be bound only when it executes a further instrument unilaterally to bring the rule into its own law 1/. However, if these nontreaty-type methods are to be practicable, there must first be a specialized international organization providing the framework for the elaboration of the standard along the lines hereinafter described.:

1. Where the organization is an intergovernmental body, the task of elaborating the standard is assigned to experts. These will be delegated by their Governments but are in no way to be likened to plenipotentiaries with a mandate to negotiate an international agreement. Rather, the goal towards which they are working is the preparation, within a well-defined field, of a draft international standard likely to command, allowance being made for differences in practice and the exigencies of the respective laws, the widest acceptance among governments.

There are many intergovernmental organizations today applying these nonconventional or non-treaty methods for establishing technical rules or standards. The principal organizations having a worldwide character are the specialized agencies of the United Nations such as FAO and WHO, and particularly in the case of agricultural products and foods, the Joint FAO/WHO Codex Alimentarius Commission (see below). Among the worldwide intergovernmental organizations there are also those dealing with a specific type of product, such as the International Dairy Federation (IDF). Other organizations are regional, particularly the Council of Europe for flavourings and pesticides, the Organization for Economic Cooperation and Development (OECD) for size grading of agricultural products and the UN Economic Commission for Europe.

2. At the same time, there are several nongovernmental organizations dealing at the international level with the elaboration of technical rules or standards which they recommend for adoption by the intergovernmental bodies and by States. The influence of provisions of this kind, far from being diminished by the nonofficial status of the experts that drafted them may be considerable. For they effectively reflect the "state of the art" or "good manufacturing or commercial practice" as recognized in a certain number of countries. Among such nongovernmental organization, the International Standards Organization (ISO) deserves special mention. It is a worldwide federation of national expert bodies whose specialized Technical Committee (SIO/TC.34) has been given the task of preparing international standards for agricultural and food products. Moreover, many international associations of industrial producers have been formed for specific sectors of production in order to effect uniformity, at the international level, of the technical or commercial aspects of the products for which they are concerned. These associations have an important role as consultants in the process of harmonizing or unifying regulations.

1/ Regarding this question particularly see below Bibl. IV-4.: David, op.cit.

Thus the nontreaty approach to the elaboration of international standards normally results in a recommendation being made to the governments to adopt and enforce a set of provisions drawn up by an expert group in their respective territories. In an extreme case, the recommendation may concern the acceptance, by the various States, of a model enactment which should preferably be entirely taken over as it stands into each national legislation. In this way a truly uniform law is brought into being governing a specific matter among the accepting states. However, where food is concerned, the model law approach is only rarely used. This is because unification is needed only as regards the technical specifications proposed and as regards the enactments to make these specifications mandatory.

An entirely different case is that of international rules whose adoption is simply recommended and which are not endorsed with any legally binding force. This situation obtains where the purpose of the standardization is to secure the generalization of commercial practices or uniform trade classification in the international field and not to lay down a number of limitations or minimum requirements, with a view to consumer protection and by that token mandatory for all transactions. Here one enters the field of trade classification law, which will be discussed subsequently 1/. It may also be the case with general rules of trade practices developed by either international governmental organizations, e.g. the United Nations Commission for International Trade Law (UNCITRAL) or nongovernmental organizations such as the International Chamber of Commerce 2/.

c) The Codex Alimentarius method

For its unprecedented breadth and interest the work of the Joint FAO/WHO Codex Alimentarius Commission represents the most striking example of international food standardization achieved by means other than those of formal treaties. The work in question has its origin in the recommendations of the Joint FAO/WHO Conference on Food Standards, held in Geneva in 1962, as a result of which the two Specialized Agencies set up the joint institutional framework within which worldwide food standardization might be pursued 3/.

At the centre is the body advising the Director-General of FAO and WHO, namely, the Codex Alimentarius Commission. Composing the Commission are Member Governments and Associate Members of FAO and/or WHO which have notified the Directors-General of their desire to participate, while other countries may be admitted on request as observers. The Commission has jurisdiction for all matters concerning the implementation of the Joint FAO/WHO Food Standards Programme 4/.

One purpose of the Joint Programme is the preparation of the Codex Alimentarius, defined in the General Principles as "a collection of internationally adopted food standards presented in a uniform manner". The Codex also includes provisions of an advisory nature in the form of codes of practices, guidelines and other recommended measures 5/.

Draft standards are elaborated by subsidiary bodies which the Commission may establish, Codex Commodity Committees and General Subject Codex Committees, whose chairmen are appointed by the Member Nations undertaking to coordinate the work and defray the costs. Uniformity is facilitated by observance of a Format of Codex Standards 6/ for the Commodity Committees and through guidelines issued by the Commission. The Commission elaborates world Codex Standards and regional Codex Standards and may establish subsidiary bodies in the form of Coordinating Committees for regions or groups of countries.

1/ See below, 4.4.

2/ See below, Bibl. IV-A: Schmitthof, op.cit.

3/ For the structure and work of the Codex Alimentarius Commission, see inter alia, below, Bibl. IV, Dobbert, op.cit. and Weill, op.cit.

4/ See below, Bibl. II: Codex Alimentarius Commission, 1973, op.oit. p. 3 ff ("Statutes of the Codex Alimentarius Commission").

5/ See below, Bibl. II: Codex Alimentarius Commission, 1973, op.cit. p. 19 ff ("General Principles of the Codex Alimentarius").

6/ See above, 4.1.2.b).

At the time of writing (1974), the Codex Alimentarius Commission has over 100 Member Nations. It has established a score or so of subsidiary bodies, among them two coordinating committees one for Europe and the other for Africa.

4.3.3. The reception of international standards by the national laws

The reception of an international regulation by the national law of a state is a legal process whose aims is to make such regulation apply to the territory of that state. This process concerns international law in so far as it results in an act of "acceptance" by such state, thereby affecting relations between states and international organizations, or simply between states. But it also concerns the internal law of such state (i.e. relations between the State and its subjects or simply between its subjects) and as such should be referred to as "integration". Whether the question of acceptance or integration is involved it is of prime importance to food law bearing in mind the importance of food standardization.

a) Acceptance of international regulations

If there exists an unequivocal official instrument issued by a State in accordance with its own legislative or constitutional procedures, from which it appears that that State accepts an international regulation and undertakes to comply with it, then such instrument constitutes acceptance. Any violation of this undertaking, for such is the principal effect of the instrument, may be deemed to be an unlawful act involving the international responsibility of the State in question.

The instrument of acceptance may be of several kinds:

1. Acceptance by Treaty (or similar act). This obtains where the provisions governing acceptance are embodied in an international agreement. Such an agreement may, according to a traditional distinction, be concluded in so-called "solemn form" if preceded by complex procedure of negotiation, signature and ratification or "in simplified form" (i.e., where its undertakings have immediate effect), usually by the Minister for Foreign Affairs and not higher. The conditions governing the validity of undertakings thus entered into (competent authorities, procedures, etc.) are determined by the municipal law of each party;

2. Acceptance through an institution, where the provisions to which the instrument refers are established by an international organization exercizing rule-making powers by virtue of some treaty. In this case the simple adoption of the international rule under the procedure laid down in the treaty is itself tantamount to an undertaking by all the States parties to it;

3. Unilateral acceptance. This is where the undertaking is founded on the mere fact that a State declares that it accepts. The scope of the acceptance and its practical limits will be governed by the tenor of the declaration.

Acceptance, moreover, may be made subject to reservations limiting the undertaking of States vis-à-vis one another. In the case of multilateral treaties these, reservations are introduced at the time of signature or accession by the parties whereas, in the case of international rules agreed to by non-treaty methods, the States declare their reservations at the time of acceptance. In either case, however, reservations may be ruled out either by specific provision in the text of the treaty, convention or agreement, or in the instrument laying down the elaboration procedure in the non-treaty type of acceptance.

An acceptance may be withdrawn or modified. In the case of an international treaty the procedure for such action is usually written into the treaty which contains or provides the legal basis for the international rule. However, in the case of a rule elaborated elsewhere than in a treaty and accepted by unilateral declaration the withdrawal of acceptance or the modification of it normally requires prior notification to the other States concerned or, as the case may be, to the international organization that has elaborated the rule.

b) How international rules become part of national law

The acceptance of an international rule by a State implies the latter's undertaking to provide or to maintain the legal conditions under which compliance with the rule may be secured within its territory. The applicability of an international rule in municipal law may be direct or indirect according to whether or not the latter requires some intermediate instrument before the former may take effect there. Also, the rule may become part of municipal law more or less completely depending on the extent to which its effects are felt. These two points merit further clarification.

1. Direct/indirect applicability

An international rule or standard is said to be directly applicable when it has in the municipal law the same or greater force than the national law, to the extent that it is not necessary to include it by way of enactment in the national law. In this connection the fact that greater value is accorded to the international rule means, among other things, that the judge will follow it rather than a conflicting national rule. On the other hand, when legislative or regulatory procedures have to be introduced in order to render the international rule enforceable in the accepting country, the rule in question is not applicable directly. In the main one or other of three situations may be encountered:

(a) in the case of provisions embodied in international treaties the question whether or not they will be directly applicable usually depends on the respective national constitutions or constitutional practices;

(b) whether rules or standards elaborated under the aegis of an international organization pursuant to the treaty setting up that organization will or will not be directly applicable will be governed by the enabling provisions of the treaty and by the type of instrument containing them. (it should be remembered that one is here dealing with the treaty method for formulating standards by indirect use being made of an international agreement). For example the European Economic Community Standards, being established in the form of "Regulations" of the Council of the Community, are directly applicable in all Member States, by virtue of the Treaty of Rome, whereas similar standards promulgated by a "directive" are not directly applicable but need to be introduced first into the laws of the respective Member States 1/;

(c) unilateral declarations whereby States announce their acceptance of international rules established by nontreaty means. These are never applicable directly but require lawmaking procedures peculiar to the state concerned.

2. Complete or partial integration

The integration of a rule or standard into national law is complete when the result is that all products marketed under a given description, whether home-produced or imported, must conform to it. The rule thus becomes part and parcel of such national law so that product conformity is controlled by the public authorities and can be enforced in the courts there, which is something more than a simple de facto acceptance within the national territory of products that conform to a standard.

Integration into the national law is partial when it reveals the absence, or results in the removal, of any provision in that law prohibiting the free circulation within the territory of the accepting state of products complying with the standard. The integration is less than total in that it stops short of making the provisions of the standard binding upon all producers.

1/ For a different opinion see, however, judgment of 6 October 1970 of the European Court of Justice (Recueil XVI, S 38(5), Case 9-79.

In practice, too, it is sometimes necessary in order to determine whether a standard enjoys complete or partial integration in the respective States to bear in mind the provisions contained in the standard itself and also the rules of procedures governing the scope of the acceptance.

c) Acceptance of Codex Alimentarius Standards

The procedure followed by the Codex Alimentarius Commission in elaborating standards is a complex one, entailing the assignment of the actual task to a "subsidiary body", e.g., a Codex Committee, and the consultation of the governments of member states of the Commission. At the end of this procedure, which consists of several stages 1/, a "recommended standard" is sent to the governments for acceptance.

The "General Principles of the Codex Alimentarius" 2/ provide for three types of acceptance by countries: full acceptance, target acceptance and acceptance with specified deviations 3/. They define in detail the scope of and the conditions governing acceptance, thus:

1. Pull acceptance means that all the relevant requirements of the standard and not only commodities conforming with the standard are accepted. It normally implies that the standard will become an integral part of the law of the country, since the latter undertakes to secure compliance with the standard and not to allow within in its territorial jurisdiction products not complying with the standard to be marketed under the description laid down in the standard.

2. Target acceptance is limited, for an initial period, to products conforming with the standard and not to the standard itself. The country in question indicates its intention to accept the standard after a stated number of years and not to hinder the distribution of products conforming with it. Target acceptance accordingly entails a partial incorporation of the standard into the law of the State concerned.

3. Acceptance with specified deviations has the same scope as full acceptance except for certain requirements of the standard which the accepting country declares that it cannot comply with. The accepting country will further include in its declaration of acceptance a statement of the reasons for these deviations and also indicate: (a) whether products fully conforming to the standard may be distributed freely within its territorial jurisdiction and (b) whether it expects to be able to give full acceptance to the standard and if so, when. Certain authors, however, point out the somewhat paradoxical situation of a product conforming with an "accepted" standard when, on the grounds of "specified deviations" it is barred admission to the distributive channels in the territory of the accepting State 4/.

Member Nations which cannot accept Codex Standards in one or other of the ways described are expected to inform the Commission of the reasons why they cannot accept them and whether products conforming with the standard may be distributed freely within their territorial jurisdiction.

1/ Codex Standards pass through ten stages in all before the Commission determines, in the light of the acceptance received, that it is appropriate to publish this in the Codex Alimentarius as a Codex Standard.

2/ See below, Bibl. II: Codex Alimentarius Commission, 1973, op.cit. and Report of the Tenth Session 1974.

3/ For the analysis from a legal standpoint, of the different types of acceptance of Codex Standards; see below, Bibl. IV-A.: J.P. Dobbert, op.cit., p. 690 ff.

4/ See below, Bibl. I: Bigwood and Gérard, op.oit., Vol. 4.

4.4. Commercial grades

4.4.1. At the national level

Sven where the fact of its conforming with an identity, composition or other standard is sufficient of itself to guarantee that a food meets various minimum requirements made necessary in the interests of consumer protection, it may still be insufficiently standardized to satisfy the quality grading standpoint - namely the regulations whose purpose is to secure fair trading. This is true of many agricultural products intended for human consumption, for example, fruits, vegetables, eggs, butter, milk, cheese, meat, poultry, game and fish, especially when one considers the number of varieties involved and the quality grading thereby rendered necessary.

Quality grading cannot be left to the private judgement of the producer, for, in order to be effective, it must be:

a) objective - it is not for the interested party to decide how his goods shall be classified; and

b) uniform - the grading must be based on uniform criteria and apply to the entire market for the type of product concerned.

Many countries, therefore, especially the industrialized ones, have introduced regulations calling for classification, into grades, of all or nearly all the products mentioned earlier. The end results of this grading are usually referred to as commercial grades -Handelsklasse (Federal Republic of Germany), food grades (United Kingdom), USDA grades 1/ (U.S.A.), normes de qualité (Prance).

The object of these regulations is threefold:

a) protection of the consumer, informing him of the different levels of quality offerred for him to choose from;

b) trade promotion, exalting the value of national produce through a policy of quality;

c) economic policy, making for a national price system for food and agricultural products.

Commercial grades in many cases operate in effect as mandatory food standards. Following development by technical bodies they are approved by the competent authorities as representing fair and normal trade practice (e.g. in Prance and the Federal Republic of Germany). At the same time they may constitute optional standards devoid of any power to bind all concerned, in which case manufacturers and tradesmen are free to adopt or not to adopt the proposed grading system, whereas any reference to commercial grades contained in the law implies that they are obliged to see that their products conform,' at the risk of incurring penalties for knowingly deceiving the purchaser and consumer (e.g. in the United Kingdom, and the United States of America).

Whether a standard is obligatory or optional, the government department concerned must make provision for quality control, where necessary, at the production stage 2/. Quality control may call for the official marking of the product, showing that such control exists or for the affixing of labels approved by the food control authorities 3/.

1/ USDA United States Department of Agriculture.

2/ See below, 10.3.

3/ See below, 8.2.3 a).

4.4.2. At the international level

Again with consumer protection and the commercial promotion of foods in view, various international organizations have begun standardizing products in commercial grades 1/. The standards are usually established by other than treaty procedures 2/ by economic or commodity organizations, both intergovernmental, e.g., UN Eoonomic Commission for Europe, OECD, international commodity (e.g. sugar, coffee and cocoa) councils, and nongovernmental, e.g. ISO.

Thus, the UN Economic Commission for Europe has established quality standards for perishable foods. Another example is fruit and vegetables, the general provisions of which are embodied in a Protocol, adopted at Geneva in 1954» and since expanded and revised 3/, while there are European Commercial Standards for several individual fruits and vegetables.

The main advantage of these commercial classes for international use is that they do not necessarily have to be adopted by governments in order to be applied. They may form part of the general conditions of sales to which international traders in agricultural or food commodities conform. In this way it is possible to rationalize and develop trade on the basis of a uniform system of reference known to all. This is particularly true of Codex Standards. In addition to their adoption by governments and their becoming part of the law of the accepting countries, they might also serve as a model for standard forms of contract in the international food trade 4/.

1/ The classes established under tariff agreements such as GATT are not considered here since they lie outside the domain of food law, even if they overlap, as they often do, with national or international quality grades.

2/ See above, 4.3.2.b).

3/ See below, Bibl. II t United Nations, 1966, op.cit.

4/ Cf. the oonclusions of the study by J.P. Dobbert, op.cit., below, pp. 716-717.

5. FOOD ADDITIVES

5.1. Systems of control for food additives

5.1.1. Negative lists and positive lists

Regulations governing the use of additives in food entail the establishment of lists which may be "negative lists" or "positive lists" depending on the system prevailing in the country concerned.

Lists of additives are called "negative" when the regulations are confined to prohibiting the use of substances mentioned in such lists, such prohibition being absolute, or relating to amounts going beyond a fixed level of incorporation, or subject to specified conditions of use. By inference, all other substances or uses are authorized and may be considered (at least in theory) as being safe for the health of the consumer. This implicit authorization, however, in no way affects the general principles underlying food law which make it an offence to tamper with a food in such a way as to deceive the consumer or to cause harm to his health 1/.

Lists are called "positive" when the regulations prohibit the use of all additives other than those which are or will be mentioned in such lists, provided that they are used within the established tolerances or subject to the conditions of use which are or shall be stated in such lists. Two legal consequences follow. First, the mere fact of using any substance not included in the list or using a substance so included but without respecting the use limitations constitutes an offence. Secondly, the system requires that additives be officially defined in order to prevent the contravening party from trying to escape the effects of the law by claiming that the substance used is indeed an additive. If the definition is not given in the text of the regulations then it must be looked for in court rulings themselves based on expert assessments.

Of the two systems the negative list is of longer standing and was adequate as long as food processing was limited to well-tried practices entailing only occasional resort to chemistry. It does, however, have three major drawbacks: a) the protective control of the legislator is more often than not afforded only after experience has shown that the incorporation of a substance used within or beyond certain limits presents with it a certain hazard for the health of the consumer; b) the food control authority must itself assemble the data in the light of which it may decide that the use of a given substance is dangerous under certain conditions; o) it is not possible to penalize the use of harmful substances (save where these are specifically included in a negative list) except to the extent that one can prove that such use was the direct cause of the harm done to the consumer's health. For all these reasons there is an ever decreasing number of countries which prefer to base their control of additives on a simple negative list system.

1/ See below, 11.2.1.

The positive list system seems, at least in theory, to offer an almost complete guarantee of protection for the consumer and it comes as no surprise that it has found favour with a large number of Governments concerned with the expansion in applications of chemical technology to food. The advantages to be derived are precisely those which the negative list system cannot offer. These are that a) the law intervenes before any damage is done since the use of an additive subject to specified conditions and within specified limits must have received prior authorization; b) this authorization is based on toxicological and other technical data which must be supplied by the manufacturer in support of his application and not by the Government department; c) during the legal proceedings it is sufficient to establish that a prohibited additive is being used, or is being used contrary to the prescribed conditions, for law to be invoked.

However experience in recent years has shown that there are disadvantages in introducing the positive list system without further refinement. Particular disadvantages are as follows: a) the excessive rigidity of the system is ill adapted to incessant developments in scientific knowledge and, food technology, particularly where revision of the lists entails lengthy elaboration procedures 1/; b) the practical difficulties implied in administering a system under which all user of-additives is prohibited unless specifically exempted is that the authorities must be able to exercise sufficient control. When the infrastructure in personnel and analytical laboratories is insufficient for this purpose 1b/ the authorities are often obliged to accept de facto tolerances which can only undermine the authority of the law; c) the need under such a system to lay down an official definition of an additive. The legal definition of an additive may not be easy to reconcile with the definition of nutritionist always assuming that such agreement on a definition is capable of being reached by nutritionists. Thus the legal definition of an additive will be more conditioned by practical considerations such as the existing control facilities rather than by considerations of a purely scientific nature. This constitutes therefore a complex problem which will be taken up again later 2/.

5.1.2. Combined systems

In order to overcome the gaps in or the difficulties of either; a negative list or of a positive list system in their purest and simplest forms, some countries have introduced various formulas combining or supplementing elements of one system with those of the other. The principal examples of such combined systems are mentioned below.

a) System complementary to the negative list system - the Food Codex approach

This system applies in Austria, when it was first introduced 3/. Its promoter, the then Federal Minister of Public Health, Dr. H. Frenzel, defined it'as "a sort of treatise, an undertaking fully entered into by the parties concerned - tradespeople, manufacturers, consumers". Its character, as a Food Codex, is that it does not constitute a body of statutorily enforceable rules. Drawn up and kept up to date by an expert committee, its object is to describe in a simple manner the standards of composition, processing and presentation to which the various types of food should conform if the consumer's legitimate expectations are to be satisfied, due regard being taken of the general rules of food law and trade practice. These, then, are detailed food standards of a sort but they do not form part of the law in the strict sense 4/.

1/ See below, Chapter 9.

1b/ See below, Chapter 10.

2/ See below, 5.2.

3/ The Codex Alimentarius Austriacus served as a model for the Codex Alimentarius Europaeus, itself at the origin of the Codex Alimentarius proposed by the Joint FAO/WHO Commission.

4/ See below, Bibl. I; Université de Bruxelles, op.cit., Frenzel, H., Basic Principles of Food Legislation.

This approach has much to recommend it by reason of its flexibility in facilitating the speedy adaptation of food law to the realities of daily life. Moreover, it reduces the insecurity which would result from a system of rules based exclusively on the principle of negative lists, which defines offences in general terms. For a codex can serve not only as a guide for producers and tradespeople in ascertaining what is and is not permitted but also as a reference source for the courts in providing a-basis for their decisions in cases of adulteration and fraud. On the other hand there is the danger that where a positive list of additives is clearly essential for the protection of the consumer the purely descriptive and nonmandatory character conferred on it by reason of its incorporation in a Food Codex does not offer a sufficient guarantee.

b) System supplementing positive list system - deviations from system of positive list

Under the legislation of certain countries 1/ the food control authority is empowered to impose limitations on the use of additives by reference to classes of substances and not simply in respect of individual additives. Where the law so provides it is an easy matter to attenuate the inflexibility of the positive list system by directing that groups of additives, e.g. certain classes of flavourings, may be used in food save where specific prohibitions or use limitations appear in the regulations in their regard. This amounts to introducing within a group of additives which cannot all be controlled by a positive list, a limited sector subject to the opposite principle, namely, that of the negative list.

The federal legislation of the United States of America which has, since the Food Additives Amendment Act of 1958 2/, based food additives control on the positive list principle, has introduced certain categories of substances which are exempted from the severity of this principle, and which enjoy a general authorization for use, subject to prohibitions or subsequent specific limitations. These categories relate to the following classes of substances, namely:

1. Those substances authorized for use prior to the 1956 Amendment Act which are enumerated in a list referred to as the "prior sanction list". On grounds of sheer impracticability, one could not subject overnight all additives then in use in the food industry to the detailed procedure of testing for safety as the new Act now requires}

2. Those substances which are "Generally Recognized as Safe" (GRAS) - i.e. so recognized by the appropriate experts under specified conditions of use.

These derogating regulations have enabled a very large number of substances to escape from the effects of the general food additive regulations - in this case the positive lists. The flexibility afforded by this provision has-exposed it to critioism. One disadvantage is that the substances are not all listed and appear in the lists which are purely indicative and not exhaustive in charaoter, with the result that producers are not always certain of how they stand before the law. The Federal Food Drug and Cosmetic Administration, aware of the provisional nature of the GRAS status, has for several years been engaged in a systematic review of substances benefitting therefrom, the ultimate purpose being gradually to include in positive lists all substances which, in the light of the requisite testing, are shown to represent no danger to the consumer under stated conditions of use.

1/ E.g. Canada and certain countries of Soandinavia. For Canada, see below, Bibl. IV-B, Canada, Curran op.cit.

2/ The text of this Act appears in FAO Food and Agricultural Legislation, Vol. VII No. 3, fasc. 3 (See below, Bibl. II: FAO, 1952).

c) Proposal for a combined positive and negative list system

Since the aim is to reduce the disadvantages of the positive list without thereby incurring those of the negative list system certain schools of thought favour combining the two approaches. It is pertinent to note from the start that, by reason of the principles on which they are based the two systems are mutually exclusive. Accordingly it would be self-stultifying to attempt to establish in law a positive and a negative list in respect of one and the same group of substances. For the mere fact of an additive not being mentioned in a positive list entails, in theory, a prohibition of its use, no matter if it is included in, or omitted from, a negative list of prohibited substances.

The combining of the two systems as contemplated here is meaningless in law unless the negative and the positive lists are to provide for distinct groups of substances - a principle implemented in the exempted classes referred to earlier.

Yet another approach, advocated by Prof. E.J. Bigwood, Director of food Law Research at the Université Libre de Bruxelles 1/, distinguishes two fundamental categories of additives and applies to them different systems of regulation. The categories proposed are: 1) natural substances i.e. those to be found in the raw materials from which food is made, or in the human body, including those having a chemical structure identical with that of a natural substance, and 2) artificial substances produced exclusively by synthesis in the chemist's laboratory. Under the combined or "mixed" system thus advocated only artificial substances are to be governed by positive lists of permitted additives, the respective authorizations being issued by the food control authority at the sponsor's request accompanied by comprehensive documentation demonstrating, on the one hand, that the substance is safe under the intended conditions of use and, on the other, that such use is technologically necessary. Natural substances, it is proposed, are to be governed by the negative list system. Whether a substance is natural or artificial, when not otherwise clearly defined one way or the other, will be settled by a panel of high-level experts offering every guarantee of competence and independent judgment. But as the natural origin of a substance does not of itself constitute a guarantee of its innocuity, consumer protection, which is inadequately afforded under the simple negative list system, would be increased by the installation of a previous notice procedure. The amount of the natural substance and the conditions for its use would be stated within such a notice, to be given by the manufacturer to the control authority.. The authority would be given an adequate time limit to enable it to check its innocuity in case of doubt. Upon the expiration of the time limit the substance would be considered as not giving rise to any objection on the part of the authority.

In support of the combined system described, its advocates adduce the following considerations: 1) it offers the flexibility sought by the GRAS formula in the United States of America but without its disadvantage of lack of certainty in law; 2) while according a certain' priority to artificial substances for subjection to innocuily testing, it does not thereby endow natural substances automatically with a reputation of being safe, sinoe the prior notification requirement has the precise purpose of enabling the control' authority to exercise its powers in this respect; 3) lastly, and most important, this approach makes for considerable simplification of the legal concept of food additive 2/.

The "mixed system" proposed by the Brussels Centre is not applied as it stands in any country at the present time, though the principles it invokes may be discerned in legal provisions relating to certain classes of additives. Thus, regulations recently introduced in the Federal Republic of Germany for flavouring substances, for example, apply the negative list principle to flavouring matters of natural origin, and the general system of positive lists to artificial flavourings.

1/ See below, Bibl. I; Bigwood and Gérard, op.cit., Vol. 4, Chapter 22, A.2, and B.1.d.

2/ See below, 5.2.

5.2. The legal definition of additives

5.2.1. Traditional concepts of food additives

The fact that the meaning of additives varies from country to country is not the least of the difficulties standing in the way of the harmonization of national food additive regulations. In the laws of some countries additives are referred to as "foreign matter" - which notion does not correspond with "additive". Generally legal definitions of additives or "foreign matter" are based on the nature of the substance added rather than on its function in food. In other words, the legislator has more often than not considered certain food substances of a given chemical composition as being additives by their very nature in every case and other substances as not being additives. The latter, accordingly, are lumped together with the ingredients of the food in question.

The definition of food additive adopted by the Codex Alimentarius Commission in 1972 is very broad and exhaustive but has the additional refinement of emphasizing the role that is intentionally assigned to the additive in food. The definition reads t "Food additive" means any substance not normally consumed as food by itself and not normally used as a typical ingredient of the food, whether or not it has nutritive value, the intentional addition of which to food for a technological (including organoleptic) purpose in the manufacture, processing, preparation, treatment, packing, packaging, transport or holding of such food results, or may be reasonably expected to result (directly or indirectly) in it or its by-products becoming a component of or otherwise affecting the characteristics of such foods. The term does not include "contaminants" or substances added to food for maintaining or improving nutritional qualities 1/.

This definition was adopted by the Codex Alimentarius Commission, however, not so much as a proposed legal definition of food additives but with a view to determine those substances which are to be referred to as food additives in Codex standards, entailing by that token the need to justify the use of such substances on technological grounds and to demonstrate their safety.

5.2.2. A proposal to simplify the definition of a food additive

The Food Law Research Centre of the Université Libre de Bruxelles has proposed in one of its publications 2/ a simplified functional definition of a food additive to be used with the "mixed system" of food additive regulation 3/ also and with the simplified conception 4/ of a food standard which it advocates. According to this simplified conception no substanoe, whether natural or artificial, should be considered by its nature as an additive, its character as additive should be determined by its being intentionally incorporated in a food in the composition of which it would not normally .nier, either for organoleptic nutritional or processing purposes. By this premise, nutritive natural substances may become additives in some oases while they will be ordinary ingredients of .a food in others. Thus, sugar added to canned peas to modify the flavour should be considered as an additive since sugar is not normally an ingredient of canned peas.

1/ See below, Bibl. II: Codex Alimentarius Commission, Procedural Manual. Rome, PAO 1973t - op.cit., p. 24.

2/ See below, Bibl. I: Bigwood and Gérard, op.cit., Vol. III. Chap. 14-B.

3/ See above, 5.1.2.c).

4/ See above, Chapter 4.

Clearly this conception of food additives could not be taken over into a regulatory system based on the positive-list principle. It would be impossible and in any case irrelevant to catalogue in lists of permitted substances the innumerable natural substances (e.g. spices) which can be incorporated into food yet are not among their usual ingredients. However,: this approach could be easily combined with the "mixed system" described earlier, one feature of which is precisely that it seeks to regulate natural substances simply by means of negative lists together with the prior notification procedure.

A further result is that this type of approach excludes from the definition of additive any substance, even when incorporated intentionally in the food during the manufacturing process, which is not intended to remain in that food and have an organoleptic, nutritional or technological function to perform in the finished product. It follows that substances used in the course of processing but which are normally eliminated by the end of it are not deemed to be additives but contaminants 1/. In fact, any possible residue in the product can only be evaluated and controlled as such 2/.

5.3. Function, criteria for use., and identification of additives

5.3.1. Their intended effects

The traditional concept of additives, based on their chemical nature, excludes those substances used for nutritional or organoleptic purposes. Thus a substance is not considered as an additive when it is itself a food, even if it is incorporated in order to affect the nutritional or organoleptic properties of the product and, as a consequence, modifies its compositional character. Similarly spices and condiments and, in many countries, natural flavouring constituents which affect the taste or odour of a food without being characteristics of the food in question, are not considered as additives. Ihey are treated as foods with organoleptic properties. Finally, nutritive elements, among them vitamins, are not generally considered to be additives, even though they are sometimes incorporated in food to increase its calorie content 3/.

The technological purposes served by the use of additives are many and varied including the following examples: food preservation, colouring, ripening, sweetening (where the purpose is organoleptic only), glazing and firming. In addition to their predominant, i.e. technical purpose, some additives may have secondary properties as well, so that one substance; may be used as a preserving agent in some cases and as an antioxidant in others 4/.

5.3.2. Criteria for the use of additives

The Codex Alimentarius Commission adopted at its 9th Session a series of principles governing the use of additives in foods. These may be summarized as follows 5/:

1/ These are often referred to as processing aids (adjuvants technologiques, technische - HiIfstoffe) and are generally considered to be additives or "foreign matter".

2/ See below, Chapter 6.

3/ See below, Bibl. I: Bigwood and Gérard, op.cit., Vol. I, (Chapter 5, as regards the - concept of food additive) and Vol. II, (Chapter 8, as regards the vitaminization of food).

4/ However, the traditional distinction between preservatives and antioxidants is somewhat contrived, the latter being a special sort of the former.

5/ See below, Bibl. II: Codex Alimentarius Commission 1973, op.cit., p. 69

(a) Appropriate toxicological testing and evaluation is required in respect of all food additives whether actually in use or being proposed for use.

(b) All food additives should be re-evaluated whenever necessary in the light of changing conditions of use and new scientific information.

(c) Food additives should at all times conform with their approval specification.

(d) The use of food additives is justified only when there is no other appropriate means of achieving, subject to certain conditions, one or more of the following purposes: to preserve the nutritional quality of the food; to satisfy special dietary needs in certain groups of consumers; to enhance the keeping quality or stability of a food or to improve its organoleptic properties; to provide aids in manufacture, processing, preparation, treatment, packing, transport or storage of food.

(e) Approval for the use of a food additive should be limited to specific foods, for specific purposes and under specific conditions and as far as possible take into account scientific data such as the Acceptable Daily Intake and the probable daily intake of the additive.

At the same time the need to obviate any hazard to the health of consumers or any deviation from fair trading entails certain consequences, which may be enumerated as follows:

(a) the use. of additives may not be authorized, or must be prohibited, whenever it may result in concealing quality defects from the consumer;

(b) even where it is lawful, it may not be used to deceive the consumer as to the nature, attributes or quality of the product. While they do not by themselves constitute a sufficient guarantee appropriate labelling provisions often go a long way towards attenuating the risk.

As regards the objective justification for using an additive, it may be stated that t

(a) it is not necessarily satisfied because there exist other additives permitted for this use or other technological processes offering similar results;

(b) it is, in any case, limited to the level of incorporation necessary for achieving the desired effect even if higher concentrations apparently constitute no hazard for the consumer;

(c) different evaluations will be made (at least for certain types of substances) in the light of climatic, economic and social factors. Preservatives will be more obviously needed in hot climates or for perishable foods having a long producer-to-consumer cycle, particularly due to conditions of transport or storage arrangements;

(d) economic considerations such as the cost prices or market acceptability of a product or consumer attitudes may be taken into consideration to justify the use of additives tested for innocuity under the intended conditions of use. If this were not the case colouring matters could never be used.

5.3.3. Identification of additives

The identification of additives authorized for food use requires the application of technical identity and purity standards laid down by expert committees or high-level scientific institutions 1/. Identity standards are simply chemical descriptions of the substances in question. Purity criteria consist of specifications, whether general (general purity criteria),

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1/ See below, Bibl. II: Joint FAO/WHO Expert Committee on Food Additives, op.cit.

where they cover an entire class of additives (for instance t preservatives), or limited where they relate to a particular class of additives (specific purity criteria), the purpose of which is to limit the content of an additive in substances which are not normally included in its chemical composition.

As a consequence of the establishment of purity criteria specific methods of analysis will need to be elaborated in order to provide a constant and adequate procedure for the measurement and control of the levels of the respective components permitted under those criteria.

5.4. Form and content of food additive regulations

5.4.1. General form

In many countries the legal provisions governing additives are embodied in the regulations for the respective types of food in which they may be used. This approach makes limitations on the use of additives part and parcel of the respective food standards. It has been criticized in particular by the Brussels Food Law Research Centre as may be expected in view of the simplified definition of food additive proposed by the latter 1/.

In other countries food additives are governed by separate regulations, sometimes subdivided in accordance with the various classes of additives, in which case one finds separate regulations for colouring matters and flavourings respectively. Other countries again have comprehensive tables for tolerances or limitations, concerning all additives with divisions into subclasses as required 2/. This last-mentioned regulatory system provides a comprehensive grouping together of all statutory limitations on use and facilitates consultation in respect of the different uses authorized for a given substance.

5.4.2. General provision!

It need hardly be said that the basic Food Act must contain the necessary enabling provisions determining the government authorities competent to make regulations in respect of additives and to fix use limitations or tolerances in their regard. It will also provide for appeal procedures.

The government department responsible for establishing use limitations should if possible be the same as that responsible for public health. The Act, however, may also prescribe which panels of experts or scientific institutions shall be called in to pronounce on the admissibility or otherwise of additives subject to prior approval and to lay down purity criteria in their regard.

Criteria for permission or prohibition for use may likewise be included in the basic Act provided they are expressed in general terms to serve as general guidelines for determining what may be authorized by the Regulations. However, a more flexible method is available for this purpose, which consisté of assigning to the Government department in question the responsibility of defining in a general regulation for additives the criteria and procedures governing the authorization for their use 3/.

1/ See above, Chapter 4.

2/ Belgium, Finland, Italy, Norway and Sweden have a general positive list for all legal limitations on the use of additives, the latter being subjected thereby to a system of generalized prohibition.

3/ For the advantages of this method, see above Chapter 3.2.1.

One final consideration here is that where (as is usually the case) enactments include a legal definition of food additives, the definition in question may be embodied in the basic Act or, where these exist, in general regulations for additives.

5.4.3. Procedural provisions

Procedural provisions will be more appropriately laid down under general regulations for additives, being more in the nature of administrative provisions. Among such provisions, special reference needs to be made here to:

(a) those which concern applications for permission to use an additive which is subject to a previous approval requirement;

(b) those which specify the characteristics and toxicological data necessary for determining whether the additive in question is safe;

(c) those providing for consulting scientific organizations or trade or consumer associations;

(d) those providing for individual appeals (administrative or judicial) against decisions of the food control authority.

6. PREVENTION AND CONTROL OF FOOD CONTAMINATION

6.1. Nature and purpose of provisions in this field

6.1.1. Types of food contamination

As generally understood, contamination of a food consists of residues or other foreign matter being present in it and rendering it a hasard or a potential hazard for human health. The residues referred to may have their origin in, inter alia, pesticides, fertilizers, packaging materials, hormones and antibiotics. Other foreign matter may consist of microorganisms, toxic seed and substances or products associated with insalubrious conditions or bad workmanship of any sort.

The types of contamination are determined by the nature of the contaminant. The latter will belong to one or other of the following categories: biological, chemical and radiological 1/.

A description of the characteristics of these various categories of contaminants and their effects is outside the scope of this study. It should be noted, however, that a distinction is usually made between chemical additives and chemical contaminants. The latter, as already-pointed out, constitute residues deriving from substances which have no specific role to fulfill in the food and are not normally intented to be found in the finished product 2/.

6.1.2. Kinds of regulations designed for the prevention and control of food contamination

(a) Regulations designed to prevent food contamination

Regulations intended as a means of preventing food contamination are of two main kinds.

The first kind comprises those embodying general principles relative to measures of cleanliness to be observed for the proper keeping of primary products used for food purposes; rules of hygiene in food production or processing plant, means of transport or storage premises; rules of hygiene relative to the materials used in food production and, also, the hygiene of staff whose duties involve the handling of food.

The second kind of regulations determine what substances and raw or other materials must not be brought into contact with food - certain metals and alloys for equipment or receptacles and chemicals used in packaging materials. Regulations of this kind are based on technical data which establish and measure the risk that these substances will be transferred as residues to the food when brought into contact with it.

(b) Regulations for the control of contamination in the finished product

These regulations establish tolerances for the various types of contaminants which may be encountered in the finished product. Whatever the source of the contamination the application of these regulations makes it necessary to take samples of products brought into trade for laboratory analysis.

6.1.3. General or particular rules of hygiene

Whether they take the form of general principles or of regulations governing materials brought into contact with food the rules of hygiene discussed here are for the most part very general in character. They apply to the production, handling, transport and packaging of all foods or

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1/ See below, Bibl. II: FAO/WHO 1972, op.cit., pp. 6 and 7.

2/ See above, 5.2.2. Several contaminants are exceptions to this rule, viz., diphenyl used in the surface treatment of citrus and tin in fruit juices.

entire classes of foods and not to specific products. However, certain types of food, particularly animal products such as milk and meat must be handled under appropriate conditions of hygiene by reason of the special risks of contamination involved. Conditions of hygiene in these cases are usually governed by special regulations 1/.

As for rules which lay down the maximum limits of contaminants in the finished product, some cover all food products without distinction but many are specific such as, for example, bacteriological standards for milk, tolerances for residues of processing aids in certain foods and maximum doses of irradiation for potatoes.

The general principles of hygiene applicable to unprocessed animal or plant products are difficult to dissociate from the regulations governing agricultural production, themselves lying outside food law in most countries. This is notably the case as regards limitations on the use of pesticides in agriculture and for rules of veterinary hygiene and also explains why the rules of hygiene applying to meat, poultry, milk, butter and egg production are then to be found elsewhere than in enactments governing the production and sale of food in general 2/.

Whatever the situation with regard to these exceptions justified by the legislative practice of certain countries as well as by these matters being assigned to different government departments, it is clearly desirable that provisions relating to the prevention and control of food contamination are brought together under a general set of regulations. The first section of such regulations should contain general principles of hygiene applicable to the production and handling of food in general, whilst a second section would lay down for each type of food considered the maximum permitted limits of contaminants so far as these can be determined, where likely to produce adverse effects.

6.2. General principles of food hygiene

The joint FAO/WHO Codex Alimentarius Commission adopted at its Fifth Session a "Recommended International Code of Practice-General Principles of Food Hygiene" 3/. One Commission emphasised that this document was advisory in nature and could be used by individual governments together with other codes of practice dealing with specific categories of foods as a useful checklist of requirements for national enforcement authorities concerned with questions of food hygiene.

Section IV of those General Principles of Food hygiene is of particular interest in the present connection as it concerns "Plant facilities and operating requirements". The general principles deal with, inter alia:

1/ An example is the Code of Principles concerning milk and milk products, established by a joint FAO/WHO Committee (see below, Bibl. II: 1969-1973, op.cit.)

2/ In the U.S.A., for example the Meat Inspection Act and the Poultry Inspection Act are both quite distinct from the general food legislation.

3/ See below, Bibl. II: Codex Alimentarius Commission, 1969, op.cit.

A. Plant Construction and Layout

1. Location, size and sanitary design
2. Sanitary facilities and controls
   (a) Separation of processes
   (b) Water supply 1/
   (c) Ice
   (d) Auxiliary water supply
   (e) Plumbing and waste disposal
   (f) Lighting and ventilation
   (g) Toilet rooms and facilities
   (h) Hand-washing facilities

B. Equipment and Utensils

1. Materials (food contact surfaces)
2. Sanitary design, construction and installation
3. Equipment and utensils (if used for inedible or contaminating materials, they should be so identified and not used for handling edible products)

C. Hygiene Operating Requirements

1. Sanitary maintenance of plant, facilities and premises
2. Vermin control
3. Exclusion of domestic animals
4. Personnel health
5. Toxic substances
6. Personnel hygiene and food handling practices

D. Operating Practices and Production Requirements

1. Raw material handling
   (a) Acceptance criteria
   (b) Storage
   (c) Water
2. Inspection and sorting
3. Washing or other preparation
4. Preparation and processing
5. Packaging of finished product
   (a) Materials should be used in clean and sanitary manner; limits of objectionable substances should not exceed limits acceptable to official agency
   (b) Techniques: packaging should be carried out in conditions precluding contamination
6. Preservation of finished product
7. Storage and transport of finished product

E. Sanitation Control Programme (to be adopted by each plant)

F. laboratory Control Procedures

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1/ See below, Bibl. II: WHO, 1971, op.cit.

The above-described approach fits in with the tradition, to be found in most of the English-speaking countries, of highly detailed regulations, enumerating every case where the rules laid down are applicable. Other countries generally find it sufficient to have a limited number of principles that are very general in scope, in respect of which the executive authorities - at the national but often also at the regional or local level - are left with the task of implementing their means of application .

6.3. Materials which may come into contact with food

Generally two groups of provisions are to be found in food legislation as regards the content of materials or substances likely to come into contact with food.

One group concerns the metals or alloys of which containers, cooking utensils, dishes or packaging materials are made. General rules prohibiting or restricting to within a maximum percentage certain substances or metals (e.g. lead, sinc, arsenic) are laid down for utensils or containers irrespective of the sort of food for which they are intended or with which they may come into contact. These requirements therefore usually consist of particular prohibitions for specific metals or alloys.

The other group of provisions concerns packaging materials. The importance of these, formerly limited, is developing rapidly and considerably because of widespread use of pre-packaged foods and the even wider variety of the materials used for wrapping or as components for containers such as plastics and disposable cans and bottles. The diversity of chemicals used by the manufacturers in their food packaging materials has led the industrialized countries gradually to adopt a positive list approach in their legislation in these matters so that only those components may be used which are permitted by law,following scientific testing concerned chiefly with substances which may wholly or partly migrate into food 1/. A trend of this kind is that which affects coatings, lacquers and colours applied to containers, food-contact objects or packaging materials.

6.4. Control of residues and contaminants in the finished product

6.4.1. Control of microbiological contamination

It is chiefly with animal products, particularly milk, meat and fish that technical standards laying down acceptable levels of biological, including bacteriological, contamination have been established. These standards apply independently of hygiene measures relating to production and processing operations.

These technical standards call for the services of qualified microbiologists and for properly equipped analytical laboratories. They are required to indicate those substances whose presence in food placed on the market (e.g. milk) cannot be .permitted or must be subject to maximum bacteriological limits per unit measures. In the case of meat and fish microorganisms that are harmful to man above a given level (the best-known example is that of salmonsllae) may not exceed a determined concentration in the final product without causing it to be unfit for consumption.

1/ See, on this question, J.H. De Wilde: Basic principles of food packaging regulations in Bigwood & Gérard, Bibl. I: below, op.cit. (Vol. 4-Appendix I)

6.4.2. Control of chemical contamination

Where contamination is due to the migration of chemical substances from food-contact materials, the control usually takes the form of fixing a maximum content for those substances which ustensils, various objects and packaging materials may possess 1/. Such regulations, designed to secure control over the presence of chemical contaminants in finished foods, mainly concern the following:

a) residues of cultivation requisites, such as pesticides or fertilizers (e.g. nitrites or nitrates). Such products have increased in variety and concentration making a correspondingly greater degree of precision necessary in the technical regulations introduced in their regard. The regulations aim basically at identifying and establishing tolerances for residues of every kind 2/;

b) residues of substances used intentionally, for purely technological reasons, in the course of manufacturing, transforming and processing food products. These substances, which normally have no function to perform in the finished product and which are not intended to be found in it,nevertheless often leave unavoidable residues 3/. Here again, the regulations lay down maximum levels for such residues in or on specific foods or types of foods;

c) residues of detergents used for cleansing containers of food-contact materials;

d) contaminants entering food from polluted atmosphere or water. In the case of water active micro-organisms may be involved, causing microbiological contamination.

6.4.3. Control of radiation contamination

The control of this type of contamination, resulting from the physical modification of the environment by exposure to radiation, has been undergoing continuous development in recent years. This is due both to the use of nuclear energy in general and to the application of radiation for, among other things, the preservation of food or the destruction of pathogens that may be present in it 4/.

Most countries at the present time place an absolute prohibition on the treatment of food by means of ionizing radiations. In very few of them a severely limited tolerance is contemplated 5/ in order to allow for the need to establish an absorbed radiation threshold below which it is technically impossible to state with certainty that the food has been subjected to ionizing radiations. Induced or natural radiation exists quite apart from technological processing. A tolerance of this kind is therefore in effect a total prohibition on treatment by means of ionizing radiations. One should, nevertheless, bear in mind the development in understanding of irradiation and of the benefits which may be expected from its use for the preservation' or sterilization of certain foods. Accordingly a likely development is that the example of countries most advanced in this field 6/ will be followed by other countries, provided the legislator there has at his disposal the requisite control facilities in order to permit a limited use of irradiation techniques, in conditions guaranteeing the complete absence of risk for the consumer of irradiated foods.

1/ See above, 6.3.

2/ For regulations governing these matters in the U.S.A. see below, Bibl. IV-B: United States of America, Corrigan, op.cit.

3/ The Codex Committee on Pesticide Residues, as well as joint meetings of the FAO Working Party and the WHO Expert Committee on Pesticide Residues, recommended tolerances for such residues in terms of specific foods.

4/ See below, Bibl. I: Bigwood & Gérard, op.cit.: Voí. 2, Chapter 12.

5/ See below, Bibl. II: FAO/IAEA/WHO, 1973, op.cit.

6/ Chiefly, the U.S.A. and, to a lesser degree, Canada, Israel, the Netherlands, Norway and the U.S.S.R.

7. PERISHABLE FOOD REGULATIONS

All food is of course perishable. It is none the less usual to find the description "perishable" reserved in the law for those foods whose period of preservation under normal conditions of use is particularly limited. Food of this kind. as well as food that is not immediately perishable, is accordingly the subject of special regulations, which will be discussed briefly.

7.1. Food preservation methods 1/

7.1.1. Traditional methods

From time immemorial man has employed various methods separately or conjointly for preserving food.

Smoking and/or salting: These methods have the advantage, in addition to their preserving effects, of modifying the organoleptic properties of the product. Special regulations may be necessary in their respect.

Drying t Drying, either with or without special treatment to stop enzyme action and decomposition, has been used for centuries to improve the keeping qualities of foods. Regulations to limit certain treatment chemicals such as sulphur dioxide are necessary. These should also take into account that drying is often done under primitive conditions and can lead to serious sanitary problems with regard to the finished food.

Fermentation t This specific type of processing is associated with the definition of the product and is, by that token, included among the relevant provisions of the food standard whenever a standardized food is involved.

Cold storage: The preservation of foods by cold storage has a long history. Modern technology has immeasurably enhanced its efficacy, to the extent of giving rise to novel types of preparation of highly perishable foods namely freezing and quick-freezing. Several countries have laid down regulations effecting frosen and quick-frozen foods 2/.

7.1.2. Heat treatment of food

The purpose of treating food by means of heat is to destroy or render harmless pathogenic micro-organisms and thermolabile toxins and to inactivate as far as possible enzymes whose presence may render the food unfit for human consumption.

Rules governing sterilisation or pasteurisation for a given product are usually prescribed in the provisions establishing identity standards under which it may be sold for human consumption. The same applies to the microorganism count following heat treatment.

The following two matters may be the subject of mandatory provisions in respect of a preserved product:

(a) its packing in hermetically sealed containers, and

(b) its treatment by heat.

1/ Among other references see below, Bibl. IV-Bi France s Fourgeux & Jumel, op.cit., (Chapter 9).

2/ See below, 7.1.5.

7.1.3. Mechanical aids to food preservation

Certainoeperations, when carried out in the processing of feed, may have an effect of preserving these feeds.For example, centrifugation and refining enable the preservation of feeds to be prolonged. Likewise,the blanching of fruits and vegetables prior to canning or freezing may be cited, This is often done to ensure an even and uniform colour, partly to precook a food and to make the packing of certain products easier. The process consists in passing the food through hot or boiling water for a few minutes. Food additives if used should be regulated. The technique does not in itself preserve the foods so treated but is an important step in the freezing and canning process.

The conditions under which these various operations must or may be carried out are sometimes laid down in food standards when they are a contributory element in establishing, in the eyes of the consumer, the identity of the standardized product or some of its varieties.

7.1.4. Chemical preserving

One of the chief purposes in using certain additives in food for human consumption consists in the capacity which certain chemicals possess to prolong the keeping properties of the products in which 'they are incorporated. It should be noted, however, that similar effects are produced by substances that are not considered chemical additives, such as salt, sugar, alcohol, vinegar and certain fats. This question has been discussed in the chapter on the legal status of food additives 1/.

7.1.5. Frozen and quick-frozen foods

A major factor in the use of cold storage techniques where food is concerned is the "cold chain" 2/, whereby the product is kept at strictly circumscribed and controlled temperatures from the time of production to the moment it reaches the consumer. Special regulations are also needed to lay down conditions of cooling to the various types of products and the temperature range acceptable throughout the cold chain, as well as the transport of frozen and deep-frozen products and the hygienic and sanitary standards necessary for the premises in which they are sold.

7.1.6. Food preservation by irradiation techniques

Mention has previously been made of the fact that by exposure to ionizing radiations certain foods can be preserved 3/.

7.2. Arrangements in respect of food transport, storage and marketing facilities

There should be no underrating the importance of these aspecte for the preservation of perishable foods. The customer should be given every chance of purchasing products with a quality similar to that which they had at the completion of the production process.

Legal provisions governing the keeping of foods free from air, heat, damp and from polluting, contaminating or undesirable agents of whatever kind, relate in part to the general principles of food hygiene, discussed above 4/.

1/ See above, 5.3.1.

2/ See below, Bibl. IV-B, France: Fourgoux & Jumel, op.cit. (9.5.)

3/ See above, 6.4.3.

4/ See above, 6.2.

The maintenance of certain foods in a certain state of freshness nevertheless calls for special provisions, which fix, for example, temperature limits for the warehousing and transport of fresh produce such as meat, fish and milk products.and to maintain at certain temperatures frozen or quick-frozen products, throughout the cold chain, in the case of frozen and quick-frozen foods.

7.3. Label statement of date beyond which perishable foods should not be consumed.

There exists a general problem concerning the possible liability of mentioning a date of manufacture or of processing on the label of pre-packaged foods. This matter will be discussed in detail later 1/. More specifically, however, the question arises as to whether a person consuming food that has extremely limited keeping properties is entitled to be informed as to the period during which he may safely consume such food in the desired condition and state of freshness.

Many countries have specific regulations on this subject. The actual rules, however, vary as to the procedure followed for informing the purchaser. The statements required may relate to either the date of manufacture or packaging, or the date beyond which food kept under normal conditions (conditions which may themselves be specified on the label) should not be consumed, or both such items of information. Whatever the broad objections which may be raised as to the value of information on the period of preservation, it is beyond question that in the case of foods where the durable life is very short the indication of a date represents a significant item of information for the consumer.

7.4. Provisions governing special circumstances

7.4.1. Legal derogations in case of food shortage

When the supply of certain food products, particularly perishable foods, are clearly insufficient to cover the needs of the population, the appropriate government department should have powers to suspend the application of certain provisions of law so that the fullest use can be made of available stocks. By this means consumers may be assured their food supply under conditions of health protection which are compatible with such emergency situations as may arise.

This is the case, particularly, for waiver of tolerances for the use of preservatives or rules in respect of warehousing, transport and presentation of certain foods when immediate needs in times of short supply are the most important factor. Such problems are prevalent in some developing countries particularly when famine or natural disasters occur.

Temporary derogations may equally be made in respect of hygiene prescriptions.

7.4.2. Legal derogations made in respect of surplus food

Equally, derogations from certain legal provisions concerning the preservation or packaging of perishable- foods, subject to appropriate labelling and provided no risk for consumer health is involved may be necessary to avoid loss of surplus food stocks, for example, in the case of a bumper fruit crop.

1/ See below, 8.2.2.

7.4.3. Legal provisions concerning seized food

When it is suspected that certain foods do not conform to legal standards yet do not constitute a danger to human health it is desirable that the law should permit the use of stocks seized. The conditions of such use must in any event be made clear, either in the law itself or by a magistrate, including the repacking of the product, its reexportation if it has been imported and its distribution without charge to charitable or philanthropic institutions.

The problem concerns all stocks of seized foods but is particularly acute in the case of perishable commodities, because of the urgency of determining the question of authorization for their reuse 1/ and establishing the conditions attached thereto.

1/ See below, 11.4.

8. THE REGULATION OF FOOD IABELLING AND PRESENTATION

8.1. General provisions concerning the commercial presentation of food

The art of presenting a marketable product is the means used by the producer or distributor to bring the product to the knowledge of potential consumers and to influence their choice 1/.

The labelling of goods offered for sale is clearly the most usual and traditional means of commercial presentation. It is not, however, the only such means in an age in which various methods of sales promotion are being used. Trade advertising, in particular, has greatly developed the techniques of influencing consumer choice. It is pertinent to food law to the extent that it is based on the affirmation of the specific qualities of the product, by advertising, and not on the attraction of accessory advantages accruing from the purchase of a given brand by, inter alia, bonus sales, "package deals", trading stamps and competitions all of which come under the law of commercial practices and not under food law.

Labelling, as defined by the Codex Committee on Food Labelling at its second meeting in Ottawa, in July 1966, "includes the label and any written, printed or graphic matter relating to and accompanying the food", while the label, itself "includes any tag, brand, mark, pictorial or other descriptive matter, written, printed, stencilled, marked, embossed or impressed on, or attached to, a container of food". Two elements in these extensive définitions, subsequently adopted by the Codex Alimentarius Commission 2/, are worth noting. One is the descriptive character of labelling, which must enable persons at the very least to identify the article offered for sale. The other is the fact that labelling necessarily accompanies the article described, even when/written or printed matter can be physically separated from that article.

It is this latter element which distinguishes labelling from advertising. The impact of the label on the public only takes place when the product is effectively presented to the consumer or purchaser. Advertising on the contrary influences him before the product is made available to him.

Cemmercial presentation, however, has a dual purpose: namely te infera the public as te the charaoteristios and qualities of ill. product offered, and te préñete its sale. Since this dual purpose can characterise beth labelling and advertising, it is important that the cenditiens governing the exercise of these functions - information and sales promotion - and the limits within which they may be so exercised shall be clearly defined by the legislator for the protection of the consumer. Although certain information included en the label is of an advertising nature and, cenveraely, there are advertisements which have real informative value, it remains broadly true that the purpose of laballing is information, while advertising techniques ara governed by the idea of salee promotion. Each of these two matters will new be discussed in turn.

8.1.1. Labelling far purposes of information

Before considering the informative content whioh labelling must contain, it will be appropriate to determine the kind of person or persons to whom the information is addressed, its scope and its efficacy.

1/ We recall that the tarn "consumer" is here used in i ts general economic sense and covers, without being cotermineue with, that of "purchaser". Accordingly the "consumer" is a person coming under feed law in the passive sense referred to earlier (2.2.3.).

2/ see below, Bibl. II. Cedex Alimentarius commission, 1969: Recommended International General Standard far the Labelling of Prepackaged Foods, op.cit.

(a) Food labelling is addressed to three groups of persons namely: 1) those responsible for food control; 2) dealers in the wholesale and retail food trade and 3) consumers. As regards the first-mentioned, labelling conforming with the law has very often only a token value in that it aids in identifying the product but is no criterion for ascertaining whether its composition is in conformity with the requirements prescribed by law. The food trade can make use of labelling to guide consumer choice when offering products for sale. Consumers are entitled to expect from it enough information as to the nature and effective qualities of the various products offered to them.

(b) With regard to its effective scope, one may note that labelling has, from this standpoint, greatly increased in importance. This is the result of three factors: the complexity of most food products, which makes it difficult to appreciate their content; their extreme diversity, which makes the consumer's choice more difficult and finally, recourse to modern methods of distribution, the result of which is that the consumer's "freedom of choice" is often exclusively based on the information contained in the labelling of the product.

(c) As regards the efficacy of the information, it is necessary that the information furnished be genuinely accessible to the consumer. The information contained in labelling must be not only readily discernible and written in a language known to the public but also intelligible to the average consumer. The efficacy of labelling depends, therefore, ultimately not so much on the actual content of the information supplied to the consumer but on what he is normally able to understand from it.

The level of understanding of the average consumer varies from one period or place to another. The evolution in food patterns and their adaptation as a result of consumer education, where this applies 1/, tend to modify the reactions that a given labelling may create while the same labelling may-be interpreted in different ways according to the local custom and the degree of sophistication of the population of any given country or region. Such variability may present difficulties when one attempts to standardize label prescriptions for a given type of product with a view to "internationalizing" the market. Excessive precision in labelling information, for example a complete listing of ingredients and additives in terms of their chemical composition may well render the labelling incomprehensible to the average consumer, who is usually without any speoial knowledge of such matters as chemistry, nutrition and toxicology and may arouse in him an attitude of unwarranted mistrust. Also it will be more effective in many oases to give information less precise but more likely to be understood by the public.

Finally, if it is true that "the development of self-service retailing has left the label as the sole means of communication between vendor and purchaser" 2/, making it even more necessary that labelling should be all the more precise and detailed care should nevertheless be taken that the consumer's attention is not lost in a plethora of items of information. This means if not to ignore that which is not essential at least to bring out the most important information by formulating minimal dimensions for their presentation.

(d) The kind of information which the consumer should be able to find on the label of food products is that which is derived from a consideration of the fundamental purposes of food legislation and the promotion of fair trading 3/. For it is very often by moans of incerrect or false labelling that the consumer is mislead as to the identity or real qualities of a product. Sven when there is no wilful attempt to deceive on the part of the manufacturer labelling may still be fraudulent if it fails to give the consumer sufficient or exact information regarding the various matters which the law requires should be brought to his notice.

1/ For the situation in the U.S.A. as regards this matter, see in food Drug Cosmotic Law Journal (see below, Bibl. III: op.cit.), articles by H.R. Dentz, M. Silverman and M. Dana. respectively, in the issues for January 1971 (p. 18), September 1971 (p. 443) and March 1972 (p. 161).

2/ See below, Bibl. IV-B, France: Fourgoux & Jumel, op.cit, p. 133.

3/ See above, 2.3.3.

Among such matters, there are some which are also connected with consumer health protection, in particular those relating to the nature of the food, its composition and wholesomeness. Other matters meed only be included if specifically required by provisions which constitute simple measures for the control of trade, for example, statements relating to quantity or weight of product, its origin and the identification of a person legally accountable.

Most legal provisions relating to labelling concern prepackaged foods because these necessitate particular measures for the protection of the consumer against deceptions. Other foods, i.e. those not retailed in packages or containers, are usually only subjected to general provisions for trade control, for example, weight and measures, pricing and trade classification. For these other foods, often consisting of unprocessed commodities such as meat, poultry. vegetables and fruit the purchaser runs less risk of being misled as he can see the merchandise, judge of its state of freshness or quality and, if necessary, ascertain other details from the retailer.

Accordingly only the legal requirements in respect of prepackaged foods will be considered in this chapter 1/.

8.1.2. Labelling and Sales Promotion

In order to effect the promotion of sales of products placed on the market it is necessary to point out to the consumer their characteristics and qualities. This is the primary purpose of publicity which aims at persuading the purchaser in advance to direct his attention to the product advertised and at conditioning him psychologically to choosing it even before it is made immediately available to him.

The means of publicity are many and varied, among which are press advertisements, placards and film shorts. Even product labelling can lend itself to the advertiser message when it contains statements and illustrations which, besides informing the consumer, are meant to highlight certain advantages which the product is supposed to offer.

The phenomenal development in advertising techniques connected with the development of the mass media and the psychological conditioning with this can exert upon the public require that the legislator devotes increased attention to them as means of sales promotion. This is especially so as the great variety of goods placed on the market would not enable the purchaser to correct an erroneous impression which he may have obtained from advertisements by examining the information contained on the label.

The test of an advertisement is its respect for the general principle of fair trading - the same principle which governs the content of labelling. It is necessary to ensure that the information given by the advertisement is consistent with the facts but is free from distortion caused by excessive eulogy or by the illustrations or allusions acompanying the product description. In other words it is not sufficient that the advertisement does not contain a direct lie as, for example, the affirmation that a non-existing ingredient is present. In addition the advertisement should not be such as to give rise, through deceptive or tendentious statements, to confusion or error of judgement in the mind of the public.

1/ See below, 8.2.

8.2. Labelling of prepackaged foods

The laws of most countries contain in a provision of general application a prohibition on the use of statements on the package or label of a kind likely to create confusion in the mind of the purchaser as to the nature. amount, origin or specific qualities of the product.

In addition, the executive authority is in most cases specially empowered to make rules prescribing or prohibiting label statements as required in order to secure conformity with this principle. at least .here powers are not already delegated by virtue of a general enabling clause in the basic Act 1/.

However. among the specific labelling provisions there are usually some that apply to all food. namely, those relating to the identity of the product. to its composition and origin. to the person legally responsible. to the unit quantity and. where appropriate. the unit price. Other provisions concern only certain classes of products: indication of durable life, official control mark, quality level, specific characteristics or special processing to which the food has been subjected.

Legal limitations should also be imposed for the use of optional label statements regarding such matters as quality, appellations of origin and trademarks.

One final matter requiring regulation concerns certain questions of form relating to the language and presentation in labelling so that the information given shall be really understood by the average consumer.

8.2.1. Purpose and content of labelling provisions applicable to foods in general

(a) Name

The identity of a food product is expressed by means of a name. Where several types of names exist, the lawyer must make a basic distinction between legal descriptions, such as those embodied in food standards and thus corresponding to the legal definition of the product 2/ and descriptions which are not established by any mandatory provision.

In the former case the legal description will need to appear in the labelling if the composition of the food complies with that as defined by law.

In the latter case (i-e. where the food standard regulations are silent on the matter) the name may be qualified in various ways according to the country concerned 3/. Thus the question may be one of a common, commercial. scientific. generic, specific, traditional or a coined or fanciful name. All this may prove a source of confusion as soon as one attempts to establish objectively what in principle should be the typo of name to use when labelling a food product so that it may be clearly identifiable by the average consumer. It is therefore desirable that any regulation which imposes a particular system for identifying foods shall at least ensure that such identification shall be precise through the laying down of appropriate definitions.

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1/ See above, 3.2.1.(c).

2/ See above, 4.2.1.

3/ See below, Bibl. II: FAO 1963-1966, op.oit. pp. 1-4. (This is a survey of food labelling provisions in 28 countries).

In any event, the name employed ought therefore to be specific and not generic or applicable to an entire class of foods. Where no name is "reserved" under some food standard or other this specific name should be the current, usual or traditional name for the product in question or, in default of such, an appropriate descriptive name

Besides, whenever a product is of a kind not readily identifiable by the consumer some, countries require the use of a qualification such as "fancy" or "imitation". One drawback of the term "imitation" is the pejorative connotation it inevitably has in the eyes of the public, even if the product it describes is of excellent quality and meets every legal requirement. Where possible, therefore, recourse should be had to some common designation, known to the consumer, which avoids implicit reference or resemblance to any reserved name.

(b) Composition

Where a food is made up of several ingredients of such a kind as to be its distinguishing features in the eyes of the consumer, it may be necessary, in order to ensure that the latter is correctly informed, to have the ingredients listed in the labelling. And where this procedure is mandatory, it is generally required that the ingredients shall be listed in decreasing order of their proportions or amounts. However, this systematic approach is in use in only a limited number of countries 1/.

Listing of a food's constituent elements is sometimes required in the case of dietetic products by reason of the allergies to which some of their ingredients may give rise.

The enforcement of the compulsory listing principle raises several problems. In the first place, the distinction made earlier between legally defined foods and nonstandardised products must be borne in mind. In the case of legally defined foods, it is reasonable to suppose that the consumer can look to the law for all the information he needs as regards the constituent elements of the product. Indeed, certain countries where the label statement of ingredients is mandatory also provide for a general exemption in respect of standardised product 2/ by reason of the fact that the standard automatically implies the listing of the constituents that give a product its specific characteristic 3/. But to what extent can the average consumer be said to be aware of the standard, given the degree of publicity attaching to standards generally 4/?

At all events, whenever the composition of a food must be stated in the labelling, it is necessary to know (a) whether all or only some of the ingredients should be mentioned and (b) the form in which the statement should be made.

With regard to the former matter the legislator has the following alternatives t to require that all substances shall be mentioned, particularly raw materials which fora part of the composition of the finished product,or to require the listing of only those components which, by reason of their impórtanos in the food, are what really make the product what it is in the eyes of the consumer, whether for its nutritional value 5/ or its organoleptic properties.

1/ For example, Canada, Italy, U.K. and U.S.A., require as a general principle (waived, however, for certain types of foods) that all ingredients shall be listed.

2/ e.g., Canada and U.S.A.

3/ See above, 4.2.1.

4/ This difficulty is cited,by, among others, Fourgoux & Jumel (Bibl. IV-B, France, op.cit*. p. 136). The solution seems to lie in a systematic effort by the appropriate authorities to educate the consumer.

5/ In the U.S.A., a recently enacted Public Law requires labelling to indicate the nutritional value of the food in question. See the May 1972 issue of Food Drug Cosmatic Law Journal which is entirely devoted to this question (below, Bibl. III).

However, in the absence of a legal definition of a specific food, it is difficult to see by what criteria certain component items can be deemed to be secondary and therefore omitted from the requisite label statement. Logically, all materials forming part of the composition of a processed product should be listed. In this connection a problem arises with regard to the presence of water in a wide range of foods and beverages. While water is simply one ingredient among others, it is frequently left out of account where compulsory listing of components is concerned. This somewhat illogical procedure is due chiefly to the fact that in many countries water represents an area that is marginal to and merely connected with food law properly so called 1/.

As for the second matter previously raised, namely, the mode of identifying components in the labelling where their listing is prescribed, it is necessary to remark that if any ingredient itself constitutes a food defined by some standard,for example honey or chocolate, the description must be that used in the standard. Otherwise it may sometimes be sufficient in order to inform the consumer to give a generic name relating to a class of substances and not to a single substance only 2/.

The general standards for food labelling to be found in the Codex Alimentarius 3/ are based on. the following general principles: (a) that a complete list of ingredients shall be declared on the label in descending order of proportion; (b) where an ingredient of a food has more than one component the names of the components shall be included in the list of ingredients; (o) a specific name shall be used for ingredients; (d) added water shall be declared in the list of ingredients if such a declaration would result in a better understanding of the product's composition.

Each of the four principles listed is in practice subject to important exceptions. The text of the general standard expressly provides for them by specifying particular cases to which they apply, for example, dehydrated foods, as regards the principle indicated under (a), water forming part of an ingredient such as brine, syrup or broth, as regards the principle indicated under (b), or by reference to other Codex Standards or to specific provisions) in the municipal legislation designed to protect the consumer.

(c) The presence of additives

Except for a small number of countries where additives are considered by the law to be ingredients 4/ the effective scope of regulations requiring additives to be mentioned is not to guarantee to the consumer that the substances he normally expects to find in the food are in fact present. Rather it is to inform him as to the presence of other substances which, without contributing to the character of the finished product 5/, nevertheless have a nutritional, technological or organoleptic role in it 6/.

Whichever system is adopted for the restriction of the use of additives 7/, the mandatory; label statement regarding them can be considered as a counterpart of the grant of a general or specific authorization for such use.

1/ See above, 2.1.2.

2/ This procedure is advocated by Fourgoux & Jumel (See below, Bibl. IV-B: France, op.cit. p. 136) who cite the following as examples: animal fats, spices, vegetable gums and fish oils.

3/ See below, Bibl. II, Codex Alimentarius Commission, 1969, op.cit.

4/ The U.S.A. is a particular case in point.

5/ See above, Chapter 5.

6/ Nutritive substances are not deemed to be additives in the traditional sense (see above, 5.2.1.)

7/ See above Chapter 5.

The method of presentation of the label statement is itself part of the system of control of additives and the main object pursued. Thus where there is an authorized list of additives established by the government (positive list approach) or of artificial substances which may be added to food (combined system) it is easy to identify these substances by assigning to them a code number. In this case the label statement need only cite the code number corresponding to the additive whose presence must be declared. This procedure does not not, certainly, make the task of identification easy for the average consumer, requiring, . as it does, familiarity with the official nomenclature for additives the use of which is subject to prior authorization. It is only really useful for the inspection and control services and is of practical interest only to the extent that the mandatory code indications have been officially promulgated in all countries where the food in question is to be marketed. In the absence of such international promulgation the labelling is of no legal effect outside the territory of the state where the food has been prepared for the market.

Another procedure for providing a precise indication of the identity of additives is to employ their specific, i.e. scientific name. This sytem, however, has the disadvantage of being intelligible to only a very few consumers with the further result that many will mistrust the labelling and lose sight of the fact that conformity with the law constitutes a guarantee of innocuity 1/. It is better, therefore, that the use of scientific names should be mandatory only where absolutely necessary so that the consumer is not lead to misunderstand the nature or the quality of the product. Whenever there is no risk of misunderstanding, a generic indication, for example, "colouring added", "contains preservative" or "artificial sweetener" which is more easily understood by the average consumer may be considered sufficiently explicit, provided that it is used often and is manifestly known to the public. The General Labelling Standard of the Cedex Alimentarius Commission 2/ is again particularly instructive, in that it contemplates (paragraph 3.2.(c)(ii)) the use of the following class titles for substances appearing in Codex standards or Codex lists of feed additives permitted for use in foods generally: "anti-oaking agents", antioxidants", "bleaching agents", "colours", "emulsifiers", "flavours", "maturing agents", "preservatives", "stabilizers", "thiokening agents", "vegetable gums". This is equivalent to authorizing the use of generic names in the case of additives.

A logical approach, in the author's view, might consist of a compromise formula imposing on the one hand the use of generic indications for all classes of substances where their addition to food could give rise to possible reservations in the mind of the consumer and, on the other hand, a code identifying substances for which prior authorization would be required by law and drawing the attention of the controlling authorities to their presence in the food.

Where a label statement regarding additives is legally required the question arises as to whether it should indicate their amount or proportion in the food. This is required by some countries, usually in connection with special branches of the food sector such as dietetic foods. In effect many countries as a general rule prohibit the use of added substances beyond the amount necessary to achieve the desired effect, while the additives which may be harmful to health are subject to severe restrictions.

(d) Country of origin

The purpose of stating the country of origin is to enable the consumer and, even more so, the inspection and control services to distinguish between imported foods and those of national origin. The expression "imported" might thus be considered sufficient for food manufactured, processed or reprocessed in another country, food which furthermore, should conform to the legal requirements of the importing country. Nevertheless many countries consider that the proper information for the consumer must include a specific mention of the country of origin.

1/ See above, 8.1.1.

2/ See below, libl. II,Codex Alimentarius Commission, 1969, op.cit.

The mandatory naming of the country of origin is, of course, equally motivated by economic and customs considerations. The procedure also serves to identify third countries where these commodities are imported into countries forming part of an eoonomio or customs union.

The determination of the country of origin may give rise to difficulties where foods partially processed in one country but coming from another country are concerned. It may be noted, in this connection, that "where the effect of processing is to modify the nature of the product, one must consider the country of origin to be the country where the processing took place. On the other hand it is not the case, however, if the origin of the raw material has determined the consumer's choice" 1/. But as the actual extent of this choice ultimately depends on the respective practices of each country the legislator may have to intervene to establish the origin of foods every time conflicting conclusions are likely to arise on this subject.

By requiring the country of origin to be declared if its omission might deceive the consumer 2/ the "Recommended International General Standard for the Labelling of Prepackaged Foods" specifically provides for the case where a food undergoes processing in a second country such as, for example, reconstituted fruit juices. The standard is none the less applicable principally to food products of the same kind and appearance where their country of origin is a major factor for their identification in the eyes of the consumer as, for example, Brasil coffee and Colombia coffee or Spanish oranges and California oranges.

(e) The person legally responsible

The declaration on the label of the name or trade name and address of the person legally responsible for a food, for example, the food manufacturer or, in the case of imported food, the importer, is particularly a matter concerning commercial law. Such information facilitates the task of the control authorities to prosecute those who violate the regulations. It also offers the consumer some guarantee as it enables him to take legal proceedings against dishonest manufacturers and to obtain, where appropriate, damages in the civil courts 3/.

Where conventions exist providing for judicial cooperation between several states, it is sufficient to mention the name of a manufacturer or importer duly established in any one of them. Where no such conventions exist, one could apply the "Recommended International General Standard for the labelling of Prepackaged Foods", which proposes that the name and address of the manufacturer, packer, distributor, importer, exporter or vendor of the food be declared.

As regards trademarks these are not usually considered sufficient by themselves in a label statement, even when they are well known, if the are not accompanied by an indication of the trade, name and address of the manufacturer.

(f) Amount of the product present

The quantity of a food commodity is expressed in weight or volume or in so many units of measurement as the case may require. The units of measurement ought to be easily understood by the consumer and, consequently, to be based on the system of the country where the food is sold. Accordingly, if a label statement as to the amount on sale is mandatory, weight given in avoirdupois alone is not sufficient for countries where the decimal system prevails.

1/ See Bibl. IV-B, France: Fourgoux & Jumel, op.cit., p.140.

2/See below, Bibl. II, Codex Alimentarius Commission, op..it. 3/ See below, Chapter 12.

Moreover, the obligation to declare the quantity is, as already pointed out, more a matter of commercial law to protect the purchaser fron fraud. Accordingly there must be no possibility of confusion between the weight of the wrapping and that of the product itself. In addition the regulations requiring information as to weight or volume also require that the amount be given in net values. In such oases in order to make the net content more readily apparent to the consumer the law prescribes that certain foods may only be sold in standardized weights or volumes. Examples of this include bread and beverages sold in closed bottles such as mineral water, milk, wine and beer.

It is evident that the weight or volume appearing on the packing ought to refer to the finished product and to have been established within practically attainable limits of precision.. Usually, the regulations lay down acceptable margins of variation, which in the case of types of food may allow for a slight diminution in weight due to normal loss of moisture during storage or display for sale. Where there is a difference in weight or volume from the amount indicated, the control authorities usually verify, by sampling from similar products, whether the difference is accidental or systematic.

Net weights and volumes should consequently be considered in practice as average weights and volumes respectively with the proviso that they may be not less than the amount indicated on the label or show differences with respect to the latter which exceed the tolarances established by the regulations or, where these are silent, by trade practice.

(g) Price

The publication of the prices of goods or services offered constitutes one of the traditional means of promoting fair trading. In the case of products prepared for sale by retail the price need not be indicated on the actual packing but may be affixed thereto by the retailer by means of a separate label. This is what usually happens with food products, since frequent price changes, even where these are restricted by the regulations, would result in the factory-affixed price becoming obsolete.

This matter pertains, however, to commercial law and not food law as such.

8.2.2. Purpose and content of additional labelling provisions applying to certain classes of food

(a) Durable life

Mandatory label statements informing the consumer of the durable life of a food chiefly concern rapidly perishable foods or those at least whose original freshness cannot be guaranteed beyond a very limited period. There is a trend, however, towards the general adoption of such statements particularly in the United States of America. '

This information may consist of the statement on the label of either the date of manufacture or processing or the date beyond which the product cannot safely be consumed.

Although most countries under pressure from consumers' associations require date-marking to be in a manner compréhensible to the general public, there is a good deal of controversy as to the desirability of spelling out on the label the normal durable life of perishable foods. Obviously, such an approach might encourage the retailer to sell off, or the consumer to use, the least recent stock first. Equally the information, if it is in the form of a date beyond which the product should met be consumed, implies a guarantee on the part of the manufacturer that the quality of the product will be within the stated time limit. The fact remains, however, that for most products in this class, their maintenance in a good state of preservation is governed chiefly by the conditions under which they are transported and stored (temperature being foremost among such conditions) up to the moment they are sold retail. The mentioning of the date of manufacture may therefore sometimes offer little more than the illusion of a guarantee, while at other times it may unduly arouse the diffidence of the consumer towards a perfectly wholesome product.

In order to obviate these disadvantages and, at the same time, to facilitate control of the freshness of prepackaged foods with a limited durable life some countries require that the date of manufacture or packing be given not in terms clear to the general public but in a coded form, prescribed by the authorities, for the sake of the trade and the inspection services.

(b) Control marks

When control at the production stage is carried out by the government or a government appointed body, provision is made for the placing of an inspection mark in order to identify products that have been examined and passed as meeting the statutory requirements. Such a mark, stamped on the packaging or attached to the product, is clearly part of the labelling of this product.

(c) Quality or grade designations

The commercial classes contemplated in the law in order to distinguish the quality levels of foods apply mostly to raw agricultural commodities such as fruit and vegetables. But a number of prepackaged foods, canned milk, for example, are subject to quality standards under which particular label statements are required. Occasionally, too, the proportion in which certain ingredients are present, when these are required to be brought to the attention of the consumer, for example, the fat content or degrees of alcohol, should be mentioned.

(d) Special characteristics or special treatment of food

Of particular interest, here, are dietetic characteristics which make certain foods appropriate for certain categories of consumers. These properties usually have to be specifically mentioned in the labelling,referring to the envisaged dietetic purpose and the elements qualifying the food as suitable for that purpose 1/. The case may likewise be mentioned of food enrichment by the addition of vitamins or minerals. Where such addition is authorised it is mandatory in certain countries to state in the labelling that the food has thus been enriched 2/.

Various special processes may also be affected by statutory label statements including, for example, irradiation, dehydration, freezing and quick-freezing.

8.2.3. Optional labelling information

In order to identify a product and attract the attention of the public manufacturers and tradesmen are free to make use of a variety of label statements, the only restrictions on which are those deriving from the principie of fair trading 3/. Several such statements are also subject to certain generic prohibitions such as the one of attribution of médicinal properties to food.

1/ See below, Bibl. IV-A: Bigwood and Gérard, op. cit.

2/ See below, Bibl. I: Bigwood & Gérard, op.cit., Vol. 2, Chapter 8.

3/ See above, 8.1.

(a) Grade or quality designations 1/

In addition to reflecting an effective level of qualit1y, grade designations should be used in such a way that no confusion is created in the mind of the consumer.

In some countries, the legislator has seen fit to regulate some grade designations, which must take the form of marks or certificates, bestowed by the manufacturers'associations. The purpose of such certificates is to guarantee the purchaser a minimum quality, or number of qualities, in the product covered by them. It is clear that regulations established for systematically controlling that the conditions governing qualification for the award of these marks are effectively met, give the certificates and the commercial credit that goes with them a quasi-official character and an enhanced guarantee.

(b) Appellations of origin

As previously pointed out 2/ a label declaration of the country of origin is often mandatory in the case of prepackaged foods.

Beyond the simple statement, however, many national laws have come to attach to it a much broader concept, namely the "appellation of origin", which is defined by the 1958 Lisbon Agreement 3/ in the following terms s the appellation of origin is the "geographic name of a country, region or locality which serves to designate a product originating therein, the quality and characteristics of which are due exclusively or essentially to the geographical environment including natural and human factors" 4/.

The conformity of an appellation of origin with the facts is readily checked, since the question is simply one of reference to the place where the product was manufactured or packed. However, this is not always the case because certain appellations of origin have become identified in the eyes of the consumer public with a distinct complex of organoleptic properties or with a certain type of process now independent of its geographic origin. In this conneotion it may be noted that the appellation of origin tends in actual fact to take on the meaning of mark of quality in the mind of the consumer. This is particularly so with reputed regional products such as cheeses and wines.

Fo r the purpose of characterising certain types of product, regional practices have made certain geographic localities famous even where the place of origin is not really involved. The name referring to a specific origin may thus not be a true appellation of origin but simply a traditional or generic denomination like "Dijon" mustard, "Parma" ham or "Cheddar" cheese.

1/ The designations in question are of a purely commercial nature, and are not those discussed in 8.2.2.(c) above. However, in some countries (France, Federal Republic of Germany, United Kingdom and the Scandinavian countries) there are to be found standards institutes or consumer groups which have developed standards of presentation for "information labelling" based on collective agreements binding the manufacturers or distributors of the products covered. The purpose of this sort of labelling is to inform the consumer of the true characteristics of the product as presented in a standardised pack.

2/ See above, 8.2.1.(d).

3/ See below, Bibl. II: UIBPIP, op.cit.

4/ Art. 2 of the Lisbon Agreement for the protection of appellations of origin and their international registration, dated the 31 October 1958.

But for other products, however, especially wines, the true place of origin named is con-sidered to be an essential characteristic and it must always actually correspond to it 1/ An essential requirement regarding the existence of an appellation of origin is its official registration by the claiming country, whereby any possible confusion with a generic name is removed 2/.

Special regulations at the national level together with bilateral or multilateral agreements between countries have been made to define the areas covered by appellations of origin and to provide for their protection by preventing them acquiring the character of a generic or traditional name.

(c) Trade marks

Whereas a traditional name is something hallowed by use a trade mark is first and foremost a distinguishing sign for which exclusive property may be obtained by means of carrying out certain procedures for legal recognition 3/. This, inter alia, is the case for industrial and commercial property. This matter, however, concerns commercial law and not food law. As the trade mark is the symbol of a producing firm it will clearly be at pains to enhance its commercial reputation. The consumer also frequently comes to look on the trade mark as a guarantee of stable quality in particular where luxury goods are concerned 4/.

The protection which the law affords to the right to use and exploit a trade mark can in no case extend to cover possible fraud which might result from such use, as would be the case if the trade mark creates confusion in the mind of the consumer as to the nature, origin or quality of the product offered for sale.

(d) Illustrations

Illustrations forming part of the label are related to advertising whenever their purpose is to make the product more attractive to the prospective buyer. However, since they are insepa-rable from the product it is legitimate to consider them, under this aspect, as labelling.

Once again,to determine the lawful character of these illustrations, it is advisable to require that they shall be free not only from any deception but also from anything likely to cause confusion in the mind of the consumer. In particular, where the illustration purports to be a picture of the product it must be sufficiently precise to ensure that the consumer will not imagine that the product contains other ingredients than those which are in fact to be found in it.

8.2.4. Formal aspects of labelling

labelling must be readily understood by the average oonsuaer. This implies that it must be written in a language which he knows. It must besides be so presented as to engage his attention.

(a) The language

The language problem arises in those countries whose population is divided into two er more linguistic groups and, also, in connection with foods imported from countries where a different language is spoken.

1/ See below, Bibl. IV-B:France: Fourgoux & Jumel, op.oit., p. 150.

2/ Under Article 6 of the Lisbon Agreement. See above, 8.3.2. (b) 3rd paragraph.

3/ See below, Bibl. I: Bigwood and Gérard, op.olt., Vol. 4, Chapter 21, Section I-A.

4/ See below, Bibl. IV-B: France: Fourgoux & Jumel, op.oit., pp. 146-147.

It is a generally accepted principle that statutory label statements shall be made, if not in the common language of the territory where the product is marketed, at least in one of the national languages of the country if mere than one is spoken there. This obligation may necessitate, particularly in foods intended for export, either a different labelling bearing in mind the language of the importing country, an additional label with the required information written in the language of the importing country, or a multilingual label 1/.

(b) Presentation

The general labelling standard of the Codex Alimentarius Commission 2/ carefully points out that statements required to appear on the label should be clear, prominent and readily legible by the consumer under normal conditions of purchase and use. Such information should not be obscured by written, printed or graphic matter and should be in contrasting colour to that of the background. The letters in the name of the food should be in a size reasonably related to the other information on the label. The portion of the label normally intended to be presented to the consumer at the time of sale should bear the name and net contents of the food.

The laws of most countries have more precise provisions still on this matter. Thus, they may prescribe the size of the type and the position within the label relative to the principal mandatory statements carried by the latter, whether relating to the name or to the composition or amount of the prepackaged food. Occasionally such provisions are included under the specifications of food standards, although they are simply general rules governing presentation, quite distinct from standardization 3/.

In many countries there are regulations designed to facilitate the task of the consumer in checking the quantity of the product without having to refer to label statements en this subject. Thus, there are standard sizes for receptacles of certain liquid products (bottles of milk, wine and oil), standard shapes of certain packs such as bars of chocolate or packets of butter, unit weights (for loaves, coffee, butter and sugar). Such standards tend to become generalised for several types of food commodities.

8.3. Control over food advertising

8.3.1. General principles

It would be an illogical situation if the rules designed to ensure that the consumer is correctly informed at the time of sale could be disregarded with impunity when advertising these products. Control over food advertising is therefore an obvious and essential complementary procedure to that of labelling.

However, the two systems are applied differently. Many labelling regulations are useful in practice only when the information they require actually accompanies the food and is thus placed en the packaging. Per the same reason many detailed provisions requiring certain label statements are inapplicable as such to feed advertising.

There remain, nevertheless, the general regulations prohibiting deception of the consumer in any form which unquestionably apply to advertising 4/. Frequently the general rules for securing fair dealing in the presentation and labelling of food specifically mention advertising as falling within their scope, for example, by including the concept "advertisement" within that of "sale".

1/ There is a tend toward its wider adoption in Western Europe, notably in the Common Market countries.

2/ See below, Bibl. II, Codex Alimentarius Commission, op.oit.

3/ See above, Chapter 4.

4/ See below, Bibl. I: Bigwood & Gèrard, ep.oit. Vol. 4. Chapter 21, Section II.

Similarly, among the specific labelling provisions,there are some which also govern advertising in whatever form it may exist, such as the press, placards, commercial radio or television, particularly as regards the requirement to use the legal description of products covered by a standard and the prohibition on such use where the composition or other characteristics of the food depart from those rendered obligatory by the standard. Likewise, where a statutory provision prohibits ascribing to food preventive or curative properties vis-à-vis certain ailments,the prohibition applies no less to advertisements than to the labelling of the products in question. Lastly,as with the case of pictorial illustrations used with labelling,it is illegal for the product description in advertising to give a false impression as to the nature, quality 1/ or content of the wares. Even an intentional withholding of some information may sometimes result in the advertisement being judged equivocal if this causes confusion in the mind of the purchaser as to a characteristic of the product 2/.

8.3.2. Special provisions

The incessant growth of advertising as a technique of commercial promotion and its profound influence on the public have led to special provisions being introduced in several countries punishing dishonest or tendentious advertising 3/. There are also provisions in commercial law designed to prevent unfair trading, particularly for abusive advertising 4/, and to provide a legal remedy therefor.

In addition codes which establish fair practices in commercial publicity have been drawn up by many of the trade organizations concerned particularly by the Chambers of Commerce and by the association of practitioners in advertising. A well known example is the "International Code of Standards of Advertising Practices", adopted in 1966 by the Council of the International. Chamber of Commerce. These rules are applied in most European countries either as they stand or in the form of codes of practice based on them. Their implementation and interpretation may be confided to arbitration boards or the professional bodies concerned.

1/ In order to ensure that publicity contains a statement as to certain characteristics of a food, the manufacturer may be required by law to demonstrate that the food conforms to its description as claimed.

2/With this proviso one may say that the inclusion of anecdotal or imaginary matter in the copy in order to attract the attention of potential buyers has no bearing on the honesty or otherwise of the content of the advertisement.

3/ In the United Kingdom a body of rules governing television publicity has been drawn up by the Independent Television Authority. See below, Bibl. IV-B: United Kingdom: Woodhouse, op.cit.

4/ In the U.S.A., the Federal Trade Commission is responsible for control over commercial advertising. See below, Bibl. IV-B: United States of America t Charlton, op.cit., and Thain, op.cit.

9. REGULATORY MACHINERY

9.1. Competent authorities

9. 1.1. At the government level

The application of the law relating to the production and marketing of food is chiefly the concern of governments, which perform this particular task in various ways according to the form in which the authorities are organized in the different countries 1/.

A first distinction is to be made in this connection between countries with a federal structure, where the task of issuing food regulations may be entrusted either to the federal government, to the governments of the federated states or to both authorities under a concurrent jurisdiction. Examples of the first formula are Canada and Switzerland, of the second, Australia, and of the third, the U.S.A., where the Federal Regulations are enforceable, to the exclusion of those of the States, in respect of any food moving in interstate or international commerce. Whatever the formula, however, general supervisory or coordinating powers are usually retained by the federal government.

A further source of difference is the arrangement of powers within each respective State. It is to be seen most frequently in the fact that matters pertaining to food are the responsibility not of a specific ministry but of several ministries or departments such as, inter alia, those of public health, agriculture, home affairs, economic affairs, and trade and industry. In other countries, however, these matters are dealt with mainly by a single self-governing body. Thus, in the U.S.A. the Food and Drug Administration is a special federal body within the Department of Health, Education and Welfare. When the complementary jurisdiction is exercised by several government departments, sometimes even concurrently, a coordinating jurisdiction becomes necessary.

Whatever the division of powers in the respective countries it is desirable in view of the nature and special function of food law 2/ to require that the main responsibility for the elaboration of the rules making up this law be placed in the government department that has public health among its responsibilities. Such a department should be able at the very least to exercise the necessary control and protection to enable it to deal with any situation that places in jeopardy the health of the consumer.

Within the department concerned a distinction must be drawn between the administrative services, whose task it is, inter and, to keep the rules up-to-date, to prepare draft legislation and to have it adopted by the competent authority end the technical services responsible for research and formulation of technical data to serve as a basis for the regulations or to influence their orientation. Such technical services, either more or less important depending on the wealth and degree of industrialization of the country in question, normally consist of a central laboratory, to which may also be assigned the responsibility of controlling food obtained from trade channels 3/. Usually the tasks of such a laboratory concern only research and the formulation of the scientific aspect of regulations. In a number of countries the responsible government department may have recourse to independent or semi-autonomous recognised scientific institutions 4/.

1/ No reference is made here either to the way in which powers are organized or to legislative procedures, these being a matter of public institutional law and of no concern with food law.

2/ See above, 2.3.2.

3/ See below, 10.2.3.(b).

4/ See below, 9.2.1.

As a general rule the determination of the government department responsible for food matters and the demarcation of its rule-making powers are laid down in the general provisions of the basic Food Act 2/. The internal organization of its services, on the other hand, is contained in administrative regulations which have no direct link with food law.

9.1.2. Delegated or decentralized powers

Although some regulatory powers relating to the manufacture or marketing of food are sometimes exercised by regional or local authorities the central services usually reserve to themselves exclusive jurisdiction to formulate rules for carrying out the principles laid down in the basic Act. Where powers are vested in local authorities the purpose usually is to secure the control of food products within a given jurisdiction. The powers are limited to establishing control procedures in such a way as to allow for local peculiarities 3/, and are then exercised not by delegation of the government but by virtue of a jurisdiction assigned to the local authority under the basic Act.

9.1.3. Enforcement through the courte

Court rulings have no more than an effect limited to the case concerned. The scope of a regulation or legal provision is often clarified and more accurately defined by the courts. So much that case law helps to supplement the positive law by establishing in which way it should be interpreted. The creative effect of judge-made law is of particular importance, of course, in the Common Law countries 4/.

9.2. Cooperation between institutions, or experts, not part of the government administration

9.2.1. Recognized scientific institutions

Where the government or government department does not have the necessary specialist services it may call in independent scientific bodies, duly recognized for the purpose, to supply the technical basis for regulations issued by it. Moreover, even where the government has these technical facilities, enabling it to evaluate the effect of the measures it introduces, it usually first consults high-level experts such as panels of university professors or higher scientific institutes, like an Academy of Medicine, a Public Health Council or an Academy of Science. By so doing one avoids scientific appraisal of draft regulations being made exclusively from the Government's standpoint, however high the level of competence of the civil servants and however excellent their technical equipment.

This approach will be seen to be justified when one reflects that in a field such as that of food production, with the many disciplines that it calls upon, the consultation with scientific experts is all the more valuable if the persons consulted are capable of understanding the problems in their major aspects. One such aspect, sometimes insufficiently appreciated, is that of food technology 5/.

1/ See below, 9.2.1.

2/ See above, 3.1.1.(b).

3/ For example the bylaws of the United Kingdom, the réglementations communales in Belgium and the arrêtés préfectoraux in France.

4/ See below, 3.1.2.(b).

5/ See below, Bibl. I: Bigwood & Gérard, op.cit. (Vol. 3, Chap. 18).

For, if certain regulations prove unenforceable, it is often because insufficient thought has been given at the drafting stage to their technological implications. It is true that the technologists themselves are often also representatives of the food manufacturing interests, so that they are likely to be consulted with the arrière-pensée that these interests are systematically opposed to those of the consumers and are accordingly suspect. This appears, in practice, a more negative than positive approach. These experts should however be associated in every way possible with the technical drafting of regulations, a balanced hearing, of course, being accorded to the nutritionists, the public health specialists and the toxicologists.

9.2.2. Representatives of economic and social interests

Where governments invite the collaboration of representatives of social and economic interests in an advisory capacity in the drafting of food legislation, they do so in such a way as to have organised representation of trade interests, on the one hand, and of consumer interests is, on the other.

(a) Producers

The collaboration of food producers in the drafting of regulations may be effected individually or through institutional bodies.

Clearly, where the use of certain manufacturing techniques or of additives requires prior authorization (in the case of additives this will entail their inclusion in a positive list), the individual producer desirous of obtaining such an authorization is required to submit to the appropriate government department a file containing all the technical evidence in support of his application and proving that the proposed use cannot cause harm to consumers. It can therefore be said that the manufacturing firms each make their contribution to the regulations which they have caused to be amended. However, this individual "collaboration". has effect only at the stage of the official examination of the file. The opinions expressed by the applicant within the framework of his collaboration are not taken into consideration by the special advisory bodies concerned.

Institutional collaboration by the manufacturing sector has, however, quite a different effect. It may operate simply at a bilateral level when the government department informs the trade organizations concerned (that is,the manufactuers' associations organised by sector of production or activity) of the contents of the draft regulations in order to receive their observations in good time and eventually to take them into account at the final drafting stage. In other countries the organizations which represent certain sectors of production may be able to participate even more directly in the exercise of rule-making powers by establishing the fair commercial codes of practice for the industry concerned. These codes may gain the approval of the legislator and be made compulsory by a regulation or may serve as a point of reference when applying legal provisions.

There is a growing tendency among the industrialised countries to develop a permanent form of cooperation with the producers. The most frequently encountered formula is for the cooperation to take place within multilateral consultative bodies consisting for the most part of representatives of the ministry, industry, labour or consumers in proportions which vary according to whether the body in question is concerned with the economy of the nation in general, or the level of production or marketing for consumer goods. These institutions may be nationwide in competence, or organized on a regional or sectoral basis, constituting respectively geographical or functional decentralization.

(b) Consumers

The representation of consumers as such is a fairly recent phenomenon, but one that has developed quickly. In many countries, besides mass organizations (e.g. trade unions or political parties which can really only represent consumers of their own tendency), independent consumer associations have been set up 1/. Their leaders are by now well aware of

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1/ One examples may be oited of the United Kingdom, the U.S.A., and the Scandinavian countries (Sweden in particular).

the force that consumers represent in the economic life of a nation, thanks to their purchasing power, provided that they are organized. Consumer associations thus tend to become pressure groups countering pressure from similar groups among manufacturers or other sectors of the trade. "Consumerism" to employ a term that has gained currency in the U.S.A., opens up novel possibilities for the future development of regulations governing consumer goods, among them foods. This helps to keep the authorities alert as to consumer interests and as to the need for improving their education in this field, but it also acts as a spur to the government to ensure that the regulations thus shown to be necessary shall be based on a genuine collaboration between the representatives of the food manufacturing industry with; perhaps, the distributive trades and the consumers.

Representatives of the consumers, as also of the producers, may be consulted by the government either under bilateral arrangements, through requests for comments on proposed rule making, or under multilateral arrangements, by participation of the representatives of the consumers, along with those of the producers' associations, in the work of permanent consultation bodies. Countries wishing to institute a real consumer policy appoint, as one of their advisory bodies dealing with economic affairs, a national consumers' council or committee if not a technical institute, charged with the task of carrying out tests and of seeing that the consumer public is more fully informed and educated in matters affecting its interests. However, such bodies usually deal with problems relating to all aspects of food consumption.

9.3. Rule-making procedures

9.3.1. Preparation and decision

The preparation of draft regulations is governed by internal administrative rules which are not peculiar to food law and need not be dealt with here. These procedures frequently entail coordination between the various services concerned when these belong to different ministries. Two methods which may be followed to achieve this purpose are either the transmittal by the service principally concerned of draft regulations for comment by other services on the aspects affecting them more closely, or the discussion of the draft by joint ministerial or joint service committees purely administrative in character to achieve agreement on a final draft text.

Institutes or experts not connected with the government are usually consulted at this stage, the scientists and technologists first and thereafter those concerned with economic and social matters. Where the scientific organizations thus consulted are high-level independent bodies such as an Academy of Science or Medicine or a Public Health Council, their opinion is often decisive even if the minister has the final word.

The regulations should themselves specify the procedure to be followed in order to obtain authorizations for the use of additives in food. Under the positive list system 1/, this procedure sets out the various elements of proof which the applicant must produce in order to demonstrate to the Ministry that the substance in respect of which he requests inclusion in a list of permitted additives is safe for the health of consumers under the intended conditions of use and that its use is justified by the technological advantages or the improvement in organoleptic properties which it is hoped to achieve.

1/ See above, 5.1.1.

As a general rule government authorities scrutinize requests for authorization to use additives first of all from the toxicological standpoint and then go on to consider the necessity or desirability of using the substance if it has been shown to be safe. But the toxicological evaluation of food substances, chiefly those used as additives, often entails time-consuming and highly refined procedures in turn requiring resort to scientific research facilities of an ever greater degree of precision and, for that reason, greater cost. In this connection the international cooperation which has been set up among several Specialized Agencies, in particular the World Health Organization and the Food and Agriculture Organization of the United Nations, enables many countries to have access to technical and scientific data acquired by the research institutes of the world's most highly developed countries. This represents a major factor for progress in that the beneficiary countries can more readily bring their food law into line with progress made in research and with needs at both the national and international levels.

9.3.2. Consultation procedures

Scientific institutions and expert committees are often consulted through their representation on working parties set up by the appropriate authority. These working parties may be diversified according to the nature of the matter to be investigated, for example, food additives or food standards for the respective production sectors. With regard to scientific opinions which are of decisive importance concerning the use of additives it appears desirable that they should not be considered confidential to the extent that manufacturers and consumers have an interest to know, subject, of course, to the maintenance of anonymity, the scientific reasons for the approval or rejection of an application for additive use authorization.

Economic and social interests can be consulted by means of circulating directly preliminary drafts of regulations. Economic and Social interests can be consulted by means of circulating directly preliminary drafts of regulations 1/. Provided hearings are truly public, non-confidential and not unduly formal, this approach would have the advantage of enlightening both the public and the government as to the various interests involved and, at the same time, make for a broader confrontation between experts.

9.3.3. Appeals procedure

When the user of additives is subject to prior authorization by the government, issued pursuant to an application by the interested party, the refusal or withdrawal of such authorization may entitle the applicant to file an appeal with the relevant administrative authority. This recourse of a purely administrative character may be made without prejudice to any action in the courts available to an interested party to obtain the quashing or modification of any abusive act by the public authority in the exercise of its powers.

This administrative appeal when it is provided for in food legislation must be made within a statutory time limit running from the date of communication of the decision refusing the authorization or withdrawing an authorization already granted. Usually it is followed by a fresh examination of the application or even the consideration of new data in its support.

1/ Separate mention needs to be made of the public hearings system of the U.S.A., whereby proposed rule making is published by the Food and Drug Administration in order to afford interested persons an opportunity of presenting their views and for representatives of the food or other pertinent industry to appoint their own experts to challenge the findings of those of the Administration itself.

10. FOOD CONTROL

In the broad sense food control is often understood as comprising all those measures, of whatever kind, which the government sees fit to introduce with a view to protecting consumers of food. In the strict sense, however, food control consists of all those institutional and procedural arrangements whereby the effective observance of the food regulations by producers and tradesmen may be verified and enforced.

Inspection concerns only finished products at the marketing stage and in the state in which they are found when they are offered for sale to the consumer or, even, at the time of being imported 1/. In most countries, however, and for several types of food, the law provides for control from the production stage to that of final sale 2/.

10.1. Administrative organization

10.1.1. General structure of food control

As was pointed out earlier 3/, the basic Food Act normally contains enabling clauses assigning precise jurisdiction for food control, but the way in which this jurisdiction is shared among the controlling authorities differs widely from one country to another.

This diversity is doubtless due to the peculiarities of the overall administrative organization but this does not however constitute an absolute criterion for determining, for example, the degree of centralization or decentralization of the inspection services vis-à-vis the government. Thus, among States with a federal constitution one finds both decentralized control organizations (e.g. in Switzerland) and highly centralized systems (e.g. in Canada and the U.S.A.). On the other hand, there are nonfederal constitutions where jurisdiction in the matter of food control is assigned to decentralized authorities - such as the provinces (Netherlands) or even the local authorities (United Kingdom).

Another reason for the diversity described is to be found in the nature of the administrative services chiefly responsible for food control. Those countries which do not have highly developed food legislation may simply call in the ordinary police (or the customs officers in ¿he case of frontier inspection) for the purpose of collecting samples of suspect products. But the situation is quite otherwise in most of the highly developed countries today. With the growing technicality of problems relating to the composition of manufactured food and its official control, the trend is to set up corps of specialist control officers suitably trained for their task and authorized to invoke police support in the accomplishment of their duties. Occasionally certain inspection tasks, which are duly defined in the basic legislation,are carried out by specialized services (which are usually assigned an exclusive jurisdiction in the major urban centres)and by the nonspecialist local authorities or the police (particularly in rural areas and minor conurbations). In addition, certain specific types of food may require the intervention of specialized control services, as is the case with milk, meat and poultry to mention the most notable examples.

Lastly, the diversity referred to reflect consumer habits, commercial practice and, above all, the legislative traditions of the various countries and the degree of elaboration to be found in their food laws.

1/ See below, 10.4.

2/ See below, 10.3.

3/ See above, 3.2.1.

In view of all these sources of divergence, one can only conclude that it is neither possible nor desirable to prescribe a single model of food control organization. The fact remains, however, that the great development which has taken place in food science and technology calls for inspection services that are particularly well adapted to their tasks and have sufficient means at their disposal in the form of both technical equipment and personnel.

10.1.2. Infrastructure

It is therefore not difficult to see that the creation of a modern infrastructure of food control has become indispensable for the protection of consumer health. It would be to little purpose to enact detailed legislation, however remarkable it might be, if the appropriate means did not exist for imposing and controlling its application.

In the developing countries which are endowed with a modern food law, infrastructural problems concern first and foremost the training of analysts and specialist inspection staff, the tech-nical equipment needed for the control of marketed products and the economic and financial implications of the policy entailed in any effective control system. During the early years, at least, the solutions adopted are governed very often by the size and type of financial and technical assistance which the countries most in need can obtain from the industrialized countries either directly or through the means of international organizations such as FAO, WHO, the European Economic Community and similar bodies.

(a) Staff

If it is essential that food control be placed in the hands of suitably trained persons it is also essential that provision be made for two distinot but equally important services. In the first place there are the inspection services. These are staffed by inspectors whose task is to take samples which will later be analysed for their conformity with the regulations. Secondly there are the official chemists,whose task is to carry out this inspection in the laboratories specially equipped for that purpose.

In the case of the inspection services the officials are authorized to inspect the foods in the state in which they are offered for sale to the consumer i.e. the finished products stage. Where there exists a corps of inspectors with more specialized duties - for control of specifio types of food (meat, poultry, fish, game, milk and eggs) the inspection is carried out at the production stage. This in no way precludes control at later stages being effected by the ordinary inspection services when such foods are sold by the retailer. But, specialized or not, the various bodies of inspectors will be attached - as required by the general struc-ture of the servioes in which they are employed - either to a department of the central govern-ment (e.g. ministry of public health or ministry of agriculture) or to a decentralized autho-rity. In the latter case,as for example when they are put under the authority of a governor of a province, a prefect or of a municipal authority, they may be subject to the administrative supervision of the central authority in order to ensure that they possess the requisite tech-nical proficiency and especially to coordinate their activities throughout the national territory.

It is imperative, too, that laboratory staff shall have specialized training in food technology, as well as in chemistry, microbiology and possibly, in toxicology. Where laboratories are insufficient in number or inadequately equipped the law sometimes provides for the official approval of private laboratories or analysts, whether private or belonging to scientific institutions or colleges, with a view to entrusting them with some food control tasks. In such cases the approved laboratories and/or analysts act as if they are agents of the public authority; and their findings, arrived at in accordance with procedure laid down by the law, carry the same weight as if they emanated from the government services themselves.

(b) Technical facilities

Next to the human element the most important aspect for the infrastructure of control are the physical facilities.The analytical laboratories are essential for checking that the composition of food products is in conformity with the requirements of the law.

Especially in the case of countries extending over wide geographical areas these laboratories should be equipped to deal with the whole range of foods in their respective areas, .The reasons for this are both technical, so that the products sampled can be easily brought together for analysis before they spoil, and administrative. because of the geographical jurisdiction of the control services. In addition it is desirable that certain laboratories be assigned a special sector of research and analysis covering distinct categories of food, for example meat products and wines.

The central laboratory will usually be located in the same place as the government department responsible for food inspection and control. Since a central laboratory may be chiefly occupied with research, evaluation and analysis necessary for the formulation of regulations, the analysis of samples taken for inspection purposes are more appropriately dealt with in the regional laboratories l/. However in the developing countries the prime need is for food control laboratories and not research establishments,for which it is in any case difficult to find qualified staff.

10.2. Exercise of powers of inspection

The respect for individual liberties implies that powers of investigation and coercion vested in the public authorities shall be strictly defined by a legal enactment and shall be exercised in the manner and subject to the conditions therein laid down.

10.2.1. Powers of investigation

The consumer may be a victim of fraud without knowing it. Even if he is aware of it he may refrain from prosecuting. Accordingly it is necessary that there shall be systematic control comprising checks at all places where food intended for human consumption is manufactured, packed, stored, prepared or offered for sale as well as in vehicles used for the transport of such food. Usually trade premises or industrial installations only are affected to the exclusion of private premises.

The powers of inspection so vested in food control officers concern chiefly products which are intended for trade. But they have as a secondary object the effect of checking such matters as: (a) invoices and other papers which help to identify the composition or origin of products: (b) the weights and measures used; (c) the nature of their wrapping and containers; (d) their labelling; (e) the hygiene and cleanliness of premises where such food is found and of materials brought into contact with them.

1/ In spite of its highly centralized administrative structure the U.S.A. affords an example of a technical decentralization of analytical laboratories. The technical services of the Food and Drug Administration in Washington, D.C., are concerned mainly with research implicit in establishing the Food and Drug Regulations; whereas control analyses are done at the major laboratories to be found in the principal city of the respective control district.

The exercise of these powers of inspection is usually hedged in with restrictions of a general character. Thus inspections oust be carried out in the daytime and, in the case of trading premises, during the hours they remain open to the public. Inspectors are required to show their qualifications when so requested by the person holding products liable to inspection by showing the official document attesting their authority.

Should the person so holding the products refuse to allow the officer to proceed with the inspection the latter may call in the police after having noted this refusal in an official report.

10.2.2. Powers to take samples

The usual procedure for inspection of finished products presented for sale to the consumer is to take samples from the various batches exposed for sale.

The actual taking of these samples gives rise to a number of problems which have been referred to by various writers. The most delicate of these concerns the size of the sample to be made to permit adequate conclusions to be drawn from the examination of the individual batches as to the character of the lot 1/. Attention has similarly been called to the important difference encountered between several samples obtained from a homogeneous lot (e.g. wine from the same cask) and samples of products the full homogeneity of which cannot be achieved because physically distinct products have resulted from packaging. Such is the case, for example, of apparently identical canned products in respect of which more extensive sampling is needed to ascertain the approximate proportion of defective cans 2/.

Administrative directives such as ministry circulars addressed to enforcement officers in certain countries prescribe the average quantity and number of samples to be taken dependent on each category of product considered. However, experience has shown that it is better, for any standard established to secure a certain regularity in the sampling procedure,to refer more generally either to the number of inhabitants in the area for which a given service is responsible or to the number or size of the businesses liable to inspection 3/.

Sampling methods are laid down in detailed rules. These provide for the identification of both the sample and the batch from which it was obtained from their dispatch until they reach the analysis laboratory in an adequate state of preservation and the safe guarding of the right of appeal by the person in possession of the goods so sampled.

The identity of the sample is established by means of a report drawn up at the time of the sampling operation and containing the following information t the name and address of the person in possession of the food product} its nature and characteristics} the circumstances under which the sampling was carried out,i.e. date, hour, place; the number of samples taken from the same baton (this is usually laid down in the regulations)) the serial number of the report; any remarks or additional information supplied by the person holding the food) and the name and signature of the inspector.

The samples taken in this way are duly sealed and labelled, which formality is recorded in the sampling report. Subsequently, the samples must be forwarded to the laboratory for analysis within a stated time in order to prevent spoilage.

1/ See below, Bibl. IV-B: France: Fourgour & Jumel, op.cit., No. 44.

2/ Idem.

3/ Administrative directives issued on the criteria here described are the practice in the Federal Republic of Germany.

The safeguarding of the rights of persons subjected to control is assured by the requirement that the inspector shall take whenever feasible one or more additional samples, in principle identical with the original from the same batch, which he must duly seal and label. These additional samples are kept for any cross-checking which may later prove to be necessary in order to establish the accuracy of the findings of the officially required laboratory analysis,

The regulations in certain countries lay down that the control services must pay the cost price for samples taken. But such payment is generally only made after verifying that the samples conform to the legal requirements.

10.2.3. Powers to report offences

In those countries where it is considered a judicial prerogative, the reporting of offences is reserved to law enforcement officers 1/. Some of these officers exercise generic police powers ("policemen", whose task it is to investigate and report all breaches of the law), while others have specific powers, restricted to the investigation and reporting of certain kinds of offences, e.g. infringements of the customs or excise regulations, of the forest laws or of public health regulations. As these officers are sworn their reports and statements carry greater weight in the courts that the word of the ordinary citizen. To overcome the objective elements contained in the official's statement it is not sufficient to show proof to the contrary. It is necessary even to have recourse to a special procedure for contesting, not the accuracy of the facts reported,but the good faith of the official in question.

As a general rule agents of the inspection services answer to the description just given. There are very few countries where their reports and statements do not enjoy prima facie acceptance 2/. At the same time a distinction needs to be made between inspection officials responsible for investigation at the place where food is produced, stored or sold and the analysts in the laboratory, the latter being more in the nature of government experts, whether they are civil servants or simply officially recognized for the purpose.

(a) Reports of the inspection services

The circumstances in which inspection is carried out, the tenor of the documents seen or the information supplied and the immediately discernible characteristics of the products inspected are entered in an official report. The latter also contains all additional information which may emerge from an administrative enquiry prior to, or subsequent to, the inspection itself.

The importance of all these items of information is particularly apparent in the case of infringements of the regulations that may be detected by the inspector without it being necessary to go .through the sampling procedure (e.g. noncompliance with labelling rules where the product composition is not involved in any way). Moreover, the law provides that the inspector may condemn food that is manifestly spoiled or otherwise unfit for consumption provided the person in possession so agrees. In the various cases contemplated under such rules and in many other cases besides,all infringements or anomalies detected by the inspector together with the remarks of the person holding the goods and the measures decided upon must be recorded in the report, which serves as a basis for any prosecution which may follow.

(b) Laboratory tests

A very large number of samples are taken every day by the control services, which are subsequently analysed in the laboratory, without any anomaly coming to light. These are the routine samplings and analyses, the precise purpose of which is the rapid identification of any products whose composition or packaging is not in conformity with the statutory requirements.

1/ Belgium, France and Italy, are particular examples of countries which follow this system.

2/ See below, Bibl. IV-B: France: Vivez, op.cit., p. 86.

When, however, some anomaly is detected, the laboratory findings, which are also legally required to be established in the form of an official analyst's report,constitute evidence which, in the event of a prosecution are attached to the inspector's report. They cannot, however, be considered to constitute evidence pure and simple of a breach of the law but rather of a presumption of breach which may be rebutted by the findings of an expert produced by the defendant. This may be established with the use of a sample taken at the same time and under the same conditions as the original and subsequently maintained in reserve 1/.

The tests employed by the laboratories in order to ascertain the chemical composition of food do not necessarily either result in certainty or yield constant findings. Two factors are in this connection decisive for the purpose of the test s the reference values used (i.e. purity standards for the substances contained in the product analysed) and the instruments and methods of analysis employed.

Purity standards, both general and specific, may be laid down in the text of the regulations where they apply to additives authorized for use in the respective food 2/. The same applies for purity standards for constituents of food when the food which is analysed is not only defined by a food standard but is also described in precise terms as regards its chemical composition in the relevant legal provisions 3/; in other cases, where any doubt remains, reference will need to be made to the literature on the subject in order to ascertain the scientific purity criteria peculiar to the substances being analysed. Some countries have defined these criteria or standards in a food Codex, which is likely to be grounded in a wealth of scientific data,internationally currently available, among them the findings of the committees working under the Joint FAO/WHO Codex Alimentarius Commission 4/.

As for the methods of analysis to be used, these must be appropriate to the technical aim pursued. Clearly the choice cannot be left to the laboratory staff but uniform methods must be prescribed. Official control would be stultified if it were possible to contest the findings of the official laboratory simply by invoking a different method of analysis. For this reason the responsibility for testing the efficacy of the methods of analysis themselves as regards each type of product or substance and especially for requiring (or "recommending") their use by the official or quasi-official analysts responsible for food control normally lies with the central laboratory reporting to the appropriate government department direct. Often, too, the government department simply takes over methods developed by national 5/ or international 6/ scientific organizations or recognized standing.

1/ See below, 10.2.5.

2/ See above, 5.3.3.

3/ See above, 4.

4/ See above, 3.1.2.(e).

5/ In the U.S.A. the official methods of analysis are those established by the Association . of Official Analytical Chemists and are commonly referred to, for that reason, as AOAC methods. They are gaining currency internationally, having been taken over, for example, by the Federal Government in Canada. A similar role to that of the Association is played by the Society for Analytical Chemistry's Methods Committee in the United Kingdom. In Switzerland, official analytical methods are established by a federal association of cantonal chemists.

6/ The methods of analysis which are considered as being official in Denmark, Finland, Norway and Sweden are currently endorsed by a joint body, known as the "Nordic Committee on Food Analysis", which has been given responsibility to this effect by the four governments concerned. In addition, the methods of analysis which are recommended by the Codex Alimentarius Commission and its subsidiary bodies are gaining currency in many countries.

10.2.4. Administrative measures applicable in the case of established or presumptive offences

Whenever official inspection and, as the case may be, the analysis shows a food not to be in compliance with the regulations the control services may confine themselves to transmitting their findings to the courts responsible for the enforcement of food law.

This procedure is not always followed, however. In some countries, certain minor offences may incur a simple administrative sanction, without any reference being made to the courts. On the other hand, the interest of consumer protection may induce the inspection services to take immediate measures to constrain the offender without waiting for prosecution to take its course.

The food authority thus has a series of possible measures at its disposal, the actual choice of which, depending on the country and its administrative set-up, is made by either a central authority 1/ or a regional or local authority 2/. No hard and fast rule can be put forward. It is preferable, however, that in those countries where the choice lies with decentralized authorities the central authority ensure a certain coordination (e.g. by means of circulars or administrative directives) so as to avoid identical offences receiving different treatment according to the district where they have been committed.

(a) The warning

With minor offences apparently due simply to error or venial negligence on the part of a manufacturer or trader the inspection services may decide not to refer the matter to the courts, at least provisionally, in which case a warning is given. However, this procedure is possible only when the good faith of the offender is not in doubt (not an easy presumption if the authorities have had to take action in the past for similar offences) and, most important of all, where there is no risk whatever for the health of consumers.

Should a subsequent check show that the warning was of no avail then the statutory sanctions would normally be invoked.

(b) Compounded fines

In many countries the law allows the government department concerned to compound with the offender within legally prescribed limits by the payment of a summary fine, in the case of minor offences against regulations under the Act or against purely administrative rules, such as those governing labelling and the presentation of foodstuffs for sale. The fact of compounding implies an admission of guilt on the part of the presumed offender. It cannot be subsequently appealed against since it bars further legal proceedings in the courts 3/.

1/ Thus, in the U.S.A. the necessary measures are taken by the Compliance Services on the recommandation of the district control authority. A similar system operates in Canada.

2/ In Switzerland the decision lies with the Cantonal Chemist; in the United Kingdom with the Food and Drugs Authorities of the respective counties and county boroughs, which have their own public health departments.

3/ See below, Bibl. IV-B: France t Dehove, op.cit., 3-18.

(c) Prosecution

When it is necessary to prosecute, because of the nature or gravity of the offence or the manifest bad faith of the offender, the inspection and control authorities bring the case before the courts. This is usually done by submitting the evidence contained in the inspector's and analyst's report. However some countries consider that this procedure might unduly influence the judge and the evidence is retained by the control authorities and produced at the public hearing.

In most countries the judicial authority before which the case is brought is free to deal with it as appears appropriate in accordance with the law. Usually, however, the prosecuting magistrate intervenes at this stage by requiring the accused to appear and defend himself in court. The writ takes the form of a summons served upon the defendant, the food inspection authority being also notified.

(d) Seizure

The basic legislation providing for food control generally empowers inspectors to seise goods which they consider suspect and/or articles such as weights and measures, which have been used in the commission of the alleged offence. Rather than leave the exercise of these powers to the sole discretion of the inspector himself, it seems prudent if seizure is made dependent upon specific criteria fixed by law, for example, flagrant offences committed or handling food manifestly dangerous for consumers or upon the subsequent appraisal of the service to which the inspector is attached, which may thereupon confirm such seizure or release the goods. Seizure is made the subject of a special report, clearly identifying the goods, a copy being left with the person from whom they were seized.

One most beware of a possible confusion between, on the one hand, the administrative aot of seisure by the inspection services and, on the other hand, the penalty of seizure entailing forfeiture 1/ which the judicial authorities may order in certain countries. Obis matter will be dealt with further below 2/.

(e) Disposal of spoiled or unfit food

The food control regulations in several countries empower the inspection services immediately upon completion of the sampling process to order the disposal of food that is patently spoiled, noxious or otherwise unfit for human consumption 3/. As a general rule such a measure cannot be taken without the consent of the person holding the food. It must in any case be duly verified by a report recording the act of destruction. If the person in possession of the food opposes this measure dangerous or suspect goods are usually seized to ensure without delay consumer protection.

Moreover, certain laws prescribe that the government service detecting irregularities in connection with a food product, serious enough to render it dangerous to public health, shall immediately warn the producer or importer so that he may without delay take all necessary measures for the protection of the consumer, including the halting of distribution and, if possible, the calling in of all existing stocks 4/.

1/ Particularly in the U.S.A., for example.

2/ See below, 11.4.2.

3/ For example, in Belgium, Italy and Switzerland.

4/ In the U.S.A., where the judge may issue an injunction requiring all persons holding such stocks to withhold them from sale if the product is adulterated (see below, 11.4.2.), the procedure for the recall of suspected products by the producer is commonly used in serious cases. A well-known example was the recent recall from the food trade of all foods containing cyclamate after experience has revealed cancer-producing risks. Concerning the question of "recalls" in the U.S.A., see inter alia the June and November 1972 issues of Food Drug Cosmetic Law Journal (below, Bibl.III: op.cit.), in particular articles by Clevenger, Cody, Hagan, Kasperson and Fine, Lambert, Karl, Livingston, Kahn and Healton.

The basic Act may also specifically authorise the government department concerned to permit food declared unfit for human consumption to be sold for animal feeding (subject to denaturing it and provided it does not constitute a danger for animal feeding 1/).

(f) Temporary prohibition of manufacture or sale

This is an additional measure for the protection of the consumer. It is highly effective and may be resorted to pending the intervention of the courts in criminal proceedings 2/. This is concerned with foods which appear unfit for human consumption. Such prohibition must in any event set out the cause and be officially notified to the manufacturers or tradesmen, who usually have the right of appeal to a higher administrative authority or to the courts.

10.2.5. Guarantees to persons

The respect for rights of persons subjected to control may be guaranteed fay means of three types of provisions t those which prescribe the procedure for the carrying out of control operations; those which provide for appeal by an individual; and those which provide for an appraisal by experts subject to cross-examination.

(a) Procedural rules

The purpose of such a procedure is to avoid arbitrary decisions on the part of officials by permitting the circumstances under which they carried out their duties to be checked.

In the sphere of food control, in particular, the procedures required and the rules governing the technical aspects of such control are mandatory for the authorities. Otherwise there is danger that the criminal proceedings would be rendered inoperative. Such procedures and rules concern, inter alia, statements required in reports, the sampling procedure and analysis of samples.

Some regulations require that the analysis of samples shall be effected without diso losing, on the label affixed thereto, the name of the person from whom such samples were obtained. Violation of anonymity, however, does not necessarily render void the control procedure since the defendant is not thereby seriously prejudiced as he may put forward his own case particularly by cross-examining the officials' findings.

(b) Appeals

Irrespective of the remedies available to him in the event of a court sentence the defendant enjoys in some countries a right of appeal against the various measures that may be invoked against him. No such appeal lies, as a rule. against inspection or sampling operations where the purpose is simply to detect possible offences, provided these measures have not been carried out in such a way as to constitute an abuse of the official's powers and a grievance for the individual to which he would not normally be exposed. It is generally accepted, on the other hand, that it should be possible to challenge before a higher administrative authority or in the courts the actions of officials in carrying out their duties, or coercive measures imposed by the control services,such as seizure, destruction order, or temporary prohibition of manufacture and sale.

1/ This procedure is followed in Australia (Viotoria), Sweden and the U.S.A. See below. Bibl. II: PAO 1967, Doc. SP 10/30 - GPFL, op.cit.

2/ Notably in the Scandinavian countries and Finland.

Such appeals, when provided for in the regulations, are governed by quite strict procedural provisions which require that they shall be instituted within a certain time limit.

(c) Expert analysis and counter-analysis

In all cases where prosecution for fraud takes its origin in the findings of the official analyst, the rights of defence imply the need for a further expert opinion (and by that token, for a fresh analysis) in order to crosscheck the original findings. This hearing has the character of a cross-examination as the defendant is able to call in an expert witness to repeat the test on his behalf.

All modern sampling regulations prescribe the setting aside of one or more additional specimens taken at the same time and under identical circumstances as the original. Usually the manufacturer or tradesman in possession of the products subjected to the inspection control may retain a reserve sample duly labelled, dated and sealed by the inspector. In the case of several reserve samples, those which are not retained by the holder are forwarded to the food control services for safe custody.

The actual procedure for a cross-examination by expert witnesses as described above will usually be regulated in detail but may vary from one country to another. Since the purpose of the procedure is to protect the interests of a defendant it is not normally imposed ex officio and it is for the defendant himself to exercise this right within a prescribed statutory time limit. He may,however, confine himself to requesting a cross-examination without naming an expert, in which case the latter is appointed by the court.

10.3. Control at the production stage

10.3.1. General characteristics

A system of inspection at the production stage may apply to specific types of products, such as meat, poultry or raw agricultural commodities, often under correspondingly specific regulations 1/. Inspection in this case is of a mandatory nature. But inspection at the production stage may also be governed by agreements between the ministry and the firms or producers' associations for a given food sector, under legislation for agricultural adjustment and not per se for the control of fraudulent practices 2/. The sort of control described normally requires the consent of those who come within its scope.

Production inspection systems have the following features:

(a) they may be applied not only to finished food products - i.e. products as they appear upon leaving the production line when they are ready to be brought into the trade but also to semi-finished products and raw commodities;

(b) they usually stem from a quality promotion policy whose primary purpose is to secure stable outlets for the products in question on national and international markets;

(c) they are in no way intended to supplant systems of control carried out under the basic Food Act. They are on the contrary anterior to such systems and accordingly call for coordination of control measures which affect the same product first at the production and then at the marketing stage;

(d) their operation implies the continued presence in or frequent visits to the production plant of inspectors who are thoroughly acquainted with the conditions and methods of manufacture used by the firm in question; they also imply the keeping of a record of technical instructions or recommendations and a register containing findings arrived at on the occasion of inspections.

1/ Such is the case in the U.S.A., where the Meat Inspection Act 1970 and the Poultry Products Inspection Act of 1968 provide for distinct federal control systems for meat and poultry production.

2/ In France the Agricultural Adjustment Acts of 1960 and 1962 so provide. See below, Bibl. IV-B, France: Dehove, op.cit.. 3-40.

As in the case of control at the distribution stage production inspection calls for the taking of samples and their analysis in the laboratory. It should be pointed out, however, that measures designed to uphold the rights of the person subjected to control, particularly the setting aside of reserve samples for subsequent cross-examination for the hearing of expert witnesses are justified only where the purpose of the inspection process is punitive in character.

The details reported at the time of the inspection together with the findings of the analysis are communicated to the producer only if they reveal that his products do not comply with the required or recommended quality standards. The information in question normally provides the basis for an official evaluation by the food control services as to the conformity, nonconformity or doubtful conformity of the controlled products.

In this connection where control at the production stage reflects commercial promotion purposes it usually refers to more stringent and detailed quality standards than those representing the minimum requirements under the regulations. These quality standards are, in principle, established by the trade sector concerned and approved by the Government. In such cases, therefore, quality assessments made by the food control services at the production stage are equivalent to an official award or recognition of quality certificates at the distributive stage 1/.

The generalizing of inspection controls in such a way as to take in all stages of production is desirable particularly in the case of products requiring a complex packaging process, such as preserved foods. It provides an effective means of quality promotion and the producers themselves are likely to find it an invaluable source of information regarding both the acceptability of their own manufacturing processes and the quality of the raw materials they use.

10.3.2. Collaboration with the food control services by firms and trade associations

The proposal has been made to enhance the efficacy of food control at the production stage through the collaboration of firms subjected to such control or through the manufacturers' associations. This has been experimented in the U.S.A., where there is an agreement between the federal government and a number of big food manufacturers that have the equipment and staff necessary to effect detailed controls 2/. The firms concerned undertake to certify that their products conform to the regulations when they leave the production line and to remedy any shortcoming reported by the authorities at the distribution stage.

This kind of experiment does not appear to have met with the success hoped for and is not suitable for universal adoption 3/.

Another form of collaboration between the government and the manufacturers' associations has been successfully developed in certain countries. It consists in submitting for adoption by the control authorities draft technical quality standards reflecting "good manufacturing practice"4/.

1/ See above, 8.2.3.

2/ This is the "Self Certification Program". See below, Bibl.: IV-B, United States of America, Golle, op.cit.

3/ Despite this the recent Swedish Food Act introduced a system of internal supervision affecting mostly the conditions of hygiene required in the manufacture of food products within the firm itself and maintained by it. (See below, Bibl. IV-B Sweden: B. Augustinsson, op. cit.)

4/ See above, 9.2.2.(a).

10.4. Import control

Normally food coming from abroad is required to comply with the legislation of the importing country. As a corollary to this some countries permit exceptions to be made in respect of goods intended expressly and exclusively for export or which are in transit through their territory.

Frontier control of imported foods is in practice left all too frequently to customs officials, who rarely possess the necessary technical qualifications. In particular in the developing countries, there is a considerable risk that a market may be found there for imported goods of inferior quality which would not pass inspection in the country of origin or are otherwise unlikely to find suitable commercial outlets. In an attempt to put an end to such practices, the United Nations Conference on the Human Environment which met in Stockholm in 1972 recommended the drafting of a Code of Ethics for International food Trade 1/.

A formula has been proposed whereby these countries could protect themselves by means of a general legal provision requiring imported foods to be marketed only if they met the requirements of the exporting country and have been passed by the inspection services of the latter, and are labelled to that effect or are accompanied by an official inspection document akin to a certificate of origin.

Against this somewhat drastic simplification of the problem it may be objected that a large number of imported products may offer considerable advantages to the importing country even though they may not conform in every single respect to the standards of the exporting country. With this consideration in mind one may propose that the marketing of products imported in this way be made subject to the following conditions:

(a) failing complete conformity any departure of the product's characteristics from those statutorily prescribed in the importing country should be stated in the documents accompanying the product when imported;

(b) in this case the food control authorities of the importing country should be empowered following inspection to authorize the sale of the product to the public or to prohibit its being placed on the market.

1/ See below, Bibl. II: United Nations, 1972, op.cit.

11. PENAL ASPECTS OF FOOD LAW

11.1. The legal basis for its enforcement

Food law has a penal character insofar as it defines offences, and prescribes procedures for recording them and penalties for their sanction. Few countries are exceptions to this rule. The judicial authorities responsible for food law enforcement must find thereunder a specific authority for their decisions, defining and supplementing the provisions of the general criminal law and procedure. This follows from the principle in every modern state that no penalty may be imposed by the courts save in accordance with criteria and subject to the terms and conditions fixed by the law-Nulla poena sine lege.

11.1.1. Application of the general criminal law

Criminal law encompasses a number of matters of general character such as the classification of offences and penalties, attempted offences, subsequent offences, several offences resulting from a single act, the participation of several persons in an offence, justification, the means of defence and extenuating circumstances. There is therefore no need to derogate from these general rules for food law enforcement at the production or marketing stages.

However, there is a tradition in several countries for the general criminal law to define offences involving principally but not exclusively food. By way of example one may mention short deficiency of weight, deception as to the nature or quality of food intended for human consumption, poisoning or causing bodily injury to or impairing the health of persons and adulteration of food.

11.1.2. Relationship between the general criminal law and the penal provisions contained in food law

The question as to whether these offences should be treated under the general criminal law or under food law is given different answers in different countries. But whatever the answer thereto, it is important that there shall be no possibility of conflict between the general criminal law of the country and the special rules governing the prevention and punishment of offences where food is concerned. The problem arises in practice concerning not so much the definition of offences as the nature and the severity of the penalties they incur.

To remove all uncertainty in this connection anyone of four approaches may be followed:

(a) to define the offences in question under the general criminal law so that they link up automatically with penal provisions of the particular field of law in question. For this purpose, criminal law confines itself to setting up as offences, and prescribing the relevant penalties therefor, any failure to observe the regulations, whether mandatory or prohibitive, contained in the particular law. This approach, then, consists in the automatic reference from the general law to the particular law. This reference, in fact, has only a theoretical value since a penal provision stipulating the sanction of a particular law normally has its place in such law;

(b) to define the offences in question under the criminal law in general terms and also to fix the penalties in respect thereof subject, however, to the application of more detailed previsions contained in the particular law. This is the conditional reference from the general to the particular law, a procedure that is tantamount to limiting the application of the criminal law to matters that are not regulated by any particular law;

(c) to include among the penal sanctions of the particular law, as opposed to the approach described under (b) above, specific reference to the previsions of the general criminal law for the purposes of defining preventing or punishing certain offences. This method entails automatic reference from the particular to the general law and offers the advantage of respecting the unity of the general criminal law;

(d) to provide under the particular laws governing food for a definition of offences peculiar to this field but subject to the application of the general criminal law and of any stricter penalties which may be enacted therein. This method represents a conditional reference from the particular to the general law and is frequently resorted to for the application of enactments governing food.

Where the same act constitutes two distinct offences this is not a case of conflict between juridical rules but of concurrent offences. The rational solution would be for the greater offence to absorb the lesser. Bras the offence of selling food harmful to health would be absorbed by the crime of homicide if consumption of the food in question were to cause the death of the consumer.

11.1.3. Application of the penal provisions of food law

Despite what has been said it sometimes happens that rules of the general criminal law come into conflict with those of the. particular, i.e. food law, whether in the matter of defining offences or laying down penalties or penal procedures. In such oases a general principle of law must be applied whereby a special law is considered as a derogation from the general law - specialia generalibus derogant, food law contains many penal provisions which, while they do not conflict with those of the general criminal law, nevertheless supplement it by defining particular offences laying down the penalties in each case and providing particular procedures therefor.

11.2. Definition of offences

The criteria governing the application of a penal sanction are to be sought in the first place in a legal definition of punishable offences.

11.2.1. Fraudulent practices involving food

The underlying principles of protection of consumer health and promotion of fair trading, while representing the characteristic functions of food law 1/ are nevertheless lacking in the necessary precision for identifying the offences thereunder. Thus offences concerning questions of good faith or of public health are considered general categories of offences in many countries 2/, and a number of national food laws make provisions to enumerate and sanction a group of specific food offences 3/. Among such enumerations are to be found offences consisting in the sale or offer for sale of a food which may be harmful to health, in the alteration of a food in such a way that it no longer complies with the requirements of the law 4/, in the sale of a food that is not of the nature, substance or quality that the purchaser may reasonably expect and in the sale or offer for sale of food in circumstances likely to mislead the public 5/.

1/ See above, 2.3.

2/ In the first part of his book I delitti contro la salute pubblica (See below, Bibl. IV-B: Italy t op.cit.) dealing with Italian legislation, R. Piccinino seeks to establish a typology of offences in the manufacture and marketing of foods and drugs.

3/ Notably the Common Law and the Scandinavian countries.

4/ This is "adulteration" in the meaning of the federal Food, Drug, and Cosmetic Act of the U.S.A.

5/ This is "misbranding" in the meaning of the federal Food, Drug, and Cosmetic Act of the U.S.A.

In other oases the legislator has been concerned rather to systematize descriptions of criainal acts involving food manufacturing or marketing 1/, either incorporating these descriptions in the basic Act or in a Criminal Code or in both simultaneously. They come under the generic concept of "fraudulent practice involving food". Their common characteristic is that they imply in principle bad faith on the past of the person committing the offence i.e. knowingly engaging in a fraudulent act.

Fraudulent practices involving food may be reduced to four main types of offences, deceit, adulteration, sale of adulterated food and the sale of spoiled food or food otherwise unfit for human consumption t

(a) Deceit

Deceit (or intent to deceive) where food is concerned may be the result of any acts designed to induce the acceptance by a contracting (or potential contracting) party of a food product offered for sale on the reliance of qualities which it does not in fact possess. By definition it constitutes a breach of commercial good faith 2/.

The kinds of deceit punishable by law are, generally, those involving the nature, composition or content of necessary ingredients, the kind, origin, quality or quantity of a food product. These acts may be committed in circumstances (i.e. aggravating circumstances) which justify an increased penalty, as for example deceit by making use of false weights or measures.

(b) Adulteration

Adulteration of food consists in its alteration with intent to deceive. Unlike deceit it may exist independently of a contract of sale and constitutes a fraud in rem necessarily applied to the food concerned itself.

However, to be a punishable offence, the alteration of a food must present specified characteristics. These will be generally defined by law, whether by statute or otherwise. One may mention, for example, the addition of unauthorized substances, the unlawful removal of nutritive principles and the substitution of ingredients. Further where the offence of adulteration is defined by the law (as it is in many countries) in very general terms, all foods may be considered to be adulterated that do not comply with their respective standards of composition.

Adulteration, furthermore, may have no effect on the health of consumers, in which case it is related to offences against fair trading in food since the only effect is to mislead consumers and purchasers as to the nature, composition and essential qualities of the product at the time of sale. On the other hand numerous forms of adulteration may render the food noxious or dangerous from the public health standpoint. In such cases the adulteration becomes, under the law of many countries, a distinct offence and subject to severe penalties, namely that of manufacturing or tampering with a food in such a way as to render it harmful to health 3/. In other countries on the contrary, an injury or attempted injury to public health constitutes not a distinct offence but an aggravating circumstance to the offence of adulteration, rendering the offender liable to heavier penalties 4/.

1/ French legislation offers one of the best examples.

2/ The legal effect of deceit is to vitiate the consent of the purchaser so as to render the contract void. This, however, is a matter of contract law and lies outside the scope of this study.

3/ Examples are Canada, Federal Republic of Germany, Switzerland, United Kingdom and the Scandinavian countries.

4/ Examples are Austria and Prance.

(c) Sale of adulterated food

This offence merits separate consideration, even though it is sometimes grouped together with adulteration in the strict sense. While it is equivalent to the latter so far as legal proceedings are concerned, it is objectively distinct from it by reason of its constituent elements. Thus if it is to be made the object of an official prosecution it must consist of not only the adulteration of a food as defined by the law but also the act of trading in that food. In this connection offering and presentation for sale are ordinarily treated as equivalent to sale pure and simple. Besides, since this is a fraudulent practice involving food, an essential element in the offence is that the offender is not unaware of, or cannot reasonably be unaware of .the fact that the food in question is adulterated or that it does not comply with the regulations. No allowances, moreover, are made for ignorance if it is the result of culpable negligence 1/.

As in the case of adulteration, the sale of adulterated foods renders the offender liable to heavier penalties either in the form of a particular classification of the offence or by virtue of aggravating circumstances where the foods have been rendered noxious or otherwise dangerous for the health of consumers.

(d) Sale of spoiled food

The offence of selling or offering for sale foods which are spoiled or are otherwise unfit for human consumption bears many resemblances to the offence previously described. It differs, however, from the sale of adulterated food in that the modification of the product is the result not of intentional tampering but of the working of a natural agency caused, for example, by exposure to air or fermentation.

The constituent elements of this offence are on the one hand material and, on the other, the intentions of the offender. In the first place it must be established that the food was spoiled rendering it unfit for human consumption. It is also necessary to show that the person in possession of the food was not reasonably ignorant of the state of such food, e.g. because a date limit is indicated on the packaging or because the food is manifestly perished and that there are therefore grounds for a presumption of fraudulent intent.

As in the case of adulteration or sale of adulterated food the penalty incurred will be all the heavier if the products sold are, in addition to being spoiled or unfit for human consumption, noxious or otherwise harmful to health.

11.2.2. Additional or accessory penal provisions

The penal provisions of food law are not limited to defining and punishing fraudulent practices as such. They establish, in most countries, at least a number of qualifying provisions, some of which may be considered as designed to prevent deceit and adulteration while others concern infringements of the regulations or of administrative measures operated by the inspection services.

(a) Additional qualifying provisions designed to prevent deceit and adulteration

1. Ihe holding of adulterated or spoiled foods

Even when foods which have been adulterated or are unfit for human consumption cannot be considered as being offered for sale, the mere fact that a person has them in his possession without legitimate cause may constitute an offence if they are held at certain specified places such as shop, or business premises or warehouses serving the trade, means of transport, workshops or places where food is manufactured or packaged. In such cases there is a presumption that the holding of the goods is necessarily intended for the commission of the offence of selling adulterated or spoiled goods, unless, of course, the holder can demonstrate a valid reason therefor.

1/ See below, 11.2.3.

The presumption, however, implies that the person in possession of the foods is aware of their faulty character. Furthermore, if the foods are injurious, noxious or otherwise harmful to health the penalty will normally be heavier.

2. Holding or selling products or materials intended for purposes of adulteration

Where such an offence is defined by the law the purpose is to prevent persons holding or manufacturing food from readily finding supplies of instruments for, or chemical means of, adulteration or from having them at their disposal. However an offence defined in this way remains somewhat theoretical in character since it is rare to find, say, a chemical that can have no other use than that of food adulteration.

3. Holding weights, measures or instruments that are false or otherwise not in conformity with the regulations

The purpose of the legislator here is to prevent offences of deceit being perpetrated by means of such weights, measures or instruments. But the inspection of these is usually carried out under regulations distinct from those applying to food 1/ and is accordingly placed in the hands of inspectors who do not report to the food authorities (for example, inspectors of weights and measures).

(b) Accessory criminal qualifications established by general enforcement regulations

The responsible government services are very often vested with general rule-making powers concerning such matters as the definition of foods, their labelling and presentation and the level of incorporation of additives 2/. The violation of the rules made by virtue of these powers is not necessarily a fraudulent act such as deceit, adulteration or the sale of adulterated food. For every fraudulent act implies that the person committing it is aware that the goods are not in conformity with the regulations in force, i.e. that he is acting with either manifest or presumed unlawful intention. In this case, on the other hand, unless the context otherwise provides the bad faith of the offender is not a necessary element in the offence. Legal proceedings may therefore be commenced as a matter of course, so long as the material fact is established. As is to be expected the penalties prescribed therefor are usually less severe than those for cases of fraud in strict sense since these presuppose full knowledge of the illegal act.

(c) Accessory criminal qualifications concerning offences under the control regulations

The food control regulations contemplate a variety of minor offences, whose purpose is to sanction either the refusal of persons to submit to certain enforcement measures or the non observance of control regulations. These offences are liable to be sanctioned notwithstanding the absence of fraudulent intent on the part of the offender.

11.2.3. Gross negligence and offences of omission

One characteristic of contemporary criminal law is the development of the concept of unintentional offences or offences of omission. This is a logical outcome of the increasing risks associated with activities that are dangerous to man or his environment. Food law, particularly in so far as it regulates the use of additives and many applications of modern technology, is no exception to the general trend.

1/ For example, the Trade Descriptions Act of the United Kingdom.

2/ See above, 3.2.2.

Unlike various types of fraud involving food, which presuppose an illicit intent by the perpetrator, many offences which may adversely affect the health of others 1/ are in fact the result of simple negligence on the part of the tradesman or manufacturer. Their sanction accordingly raises a particular problem in criminal law.

As regards deceit (or the intent to deceive) 2/ it is in any case often impossible to establish a fraudulent element. For this there needs to be some positive act aimed at deceiving another person, for example, dishonest advertising. A frequently recurring example of such "offences by omission" is the absence of a mandatory label statement on a food offered for sale.

Adulteration also implies fraudulent intent, yet it may be the result of careless proportioning of ingredients, an inappropriate manufacturing process, or simply ignorance of a defect in the composition or quality of a raw material. In oases such as these, it is less a question of fraud than of negligence on the part of the producer.

Lastly, the sale or offer for sale of adulterated or spoiled foods often give rise to difficulties when inspection is carried out at the retail stage. A retailer may not be aware of the defective character of the finished products sampler on his premises. This raises a question of principle, therefore, as to whether this lack of awareness ought to be considered as punishable.

To obviate such difficulties, the general tendency is for the draftsman in many countries to qualify offences by objective criteria by linking them to the simple establishment of a fact 3/. According to this approach it is a punishable offence to sell any food which is liable either to mislead the purchaser or to be harmful to his health or even more directly, to sell a food which does not conform with the regulations. These acts incur penalties inasmuch as they are likely or liable to induce fraud. The application of such a principle depends on various legal reasonings, which are generally developed in interpretation by the courts.

(a) The offences under food law constituted by deceit, adulteration and the sale of adulterated or spoiled food may be the object of a simple presumption of fraudulent intent once the material elements of the offence (such as illegal modification of the product, spoiled condition,or nonstandard labelling) have been established. In such a case the judge without farther enquiry applies the presumption of fraud 4/. This presumption is, however, rebuttable and the accused may demonstrate that he could not reasonably have been aware of the illegal character of the goods.

(b) such offences may also, depending on the circumstances and the nature of each case, give rise to an irrebuttable presumption of fraudulent intent. This arises where the judge is of the opinion that the offender had the duty and physical possibility of checking or having checked the state of these wares before offering them for sale. In this case what attracts the specific penalty is the negligence of the accused as regards checking the feed. This approach certainly makes for a more effective prevention of fraud and, by that token, for a better protection of the consumer. At the same time, on the nulla oulpa sine lege principle - itself a cerellary of the principle nulla poena sine lege - it is necessary that the duty of checking be clearly enjoined by the law itself and sanctioned as such. If it is not so enjoined the presumption of fraud can rest solely on the notion, itself some- what artificial, of am implied duty to check. This idea has gained currency in some countries but ham attracted serious criticism in learned writings on the subject 5/. In any event

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1/ See below, Bibl. IV-B: Italy: Piocinino, op.cit.. pp. 321 ff.

2/ See above, 11.2.1.(a).

3/ See below, Bibl. IV-B .Italy t Piocinino, op.cit.. pp. 213 ff.

4/ See below, Bibl. IV-B: France: Fourgoux A Jumel, op.cit., 15.1.2.2.

5/ Ibid., 15.1.2.3.

penal sanctions for negligence raise a number of difficult problems in criminal law, concerning the awareness which the offender may have of the possible consequences of his negligence, his objective or subjective capacity for acting prudently, the adaptation of penalties in accordance with the degree of negligence or the degree of deliberation in such negligence 1/.

(c) Where the law is silent as to the penalties for negligence the legislator may make material infringements punishable without taking into consideration the theoretical connotation of the offence of fraud in criminal law, as a result of which the enquiry into, or presumption of, fraudulent intent is automatically precluded. In such oases, therefore, the infringement comes under offences of omnisaion. This method finds its most frequent application in oases of contravention of regulations for the enforcement of the basic Food Act 2/.

11.3. Penalties

11.3.1. Traditional penalties affecting the liberty and/or assets of the person convicted

Food law provides for the traditional penalties of fines and imprisonment. These can, in the appropriate case, be cumulative.

Certain countries classify offences according to the maximum penalty which may be incurred for their commission. The classification determines the jurisdiction of the courts 3/.

The maximum penalty under the nulla poena sine lege principle ought to be fixed in the enacting legislation. Its ceiling may be raised by reason of aggravating circumstances as provided by the law. The enactment of a lower limit is not essential but is desirable lest a judge show undue clemency. The judge, however, may impose a penalty of lesser severity than this legal minimum if he is satisfied as to the existence of extenuating circumstances, these usually being left entirely to his discretion.

In addition, the laws of several countries provide for the award of suspended penalties to be enforced only in the event of a repetition of the offence occurring within a stated period (examples of such provisions are the conditional sentence or stay of execution, which may be accompanied by a probation order).

Fines may be imposed not only on individuals but on firms and other corporate bodies possessing assets of their own 4/. Usually the judge is free himself to decide on the amount of the fine, within limits laid down by the law, according to the gravity of the offence, i.e. a concept implying reference to objective criteria. But subjective criteria may also be used. Thus, under the law of some Scandinavian countries 5/,the judge is required to assess the amount of a fine in proportion to the daily income of the convicted person or the daily turnover in the case of a business.

The severity of the sanctions for fraudulent acts involving food varies noticeably from one country to another. The evolution of food law has been marked, especially in recent years, by a trend towards heavier penalties and a diversification in penalties, designed te reflect the variety and at times the very serious nature of the risks to which the consumer is exposed.

1/ See below, Bibl. IV-B: France: Fourgoux & Jumel, op.cit., 15.1.2.4.

2/ See above, 11.2.2.

3/ Examples are Belgium, France and Italy.

4/ See below, 11.5.

5/ See below, Bibl. I: Bigwood & Gérard, op.cit., Vol. 4, Chapter 20, B.2.

11.3.2. Penalties affecting the business activity or commercial standing of the offender

Experience has shown that the most effective penalties where industrial or commercial firms are concerned are those which adversely affect their balance sheets. Penalties of this nature have been adopted by most countries and fall into the following two groups:

(a) those which give publicity to the sentence passed. In such cases the commercial standing of the person or firm is damaged. The means for putting the sentence into effect may be the publication of the sentence itself in one or more newspapers, at the discretion of the judge, whereby the matter may effectively be brought to the notice of the offender's clientele, or the posting of a copy of the sentence, for example at the entrance to the shops or plant belonging to the offender;

(b) those which prohibit, suspend or otherwise hinder the offender from exercising his normal activities. Obis kind of penalty consists chiefly in the withdrawal of the trading or manufacturing licence, the closing (usually temporary) of the offender's premises or plant, and the suspension of the right to engage in specified industrial or commercial activities. Despite their effectiveness, such measures are considered as being accessory or supplementary to the traditional sentences of fines and/or imprisonment.

11.4. Coercive or prohibitive measures for consumer protection having only a subordinate penal character

11.4.1. Measures directly affecting the object of the offence and the physical instruments employed for its commission

These measures, frequently considered as accessory penalties, are in reality designed principally as a means of protecting the public and preventing further offences. They are essentially measures for the seisure and destruction of confiscated foods or articles so as either to render them unusable or to enable them to be disposed of forother uses.

Foods which have already been provisionally seised by the inspection services may be confiscated, as may also physical objects that have been used directly in the commission of the offence such as irregular weights, and measures; weighing instruments or instruments for denaturing; chemicals and, in some oases, even transport vehicles.

When seized or confiscated foods do not constitute a hazard to public health or, even when such articles can still serve a lawful purpose the judge may order them to be sold and the proceeds paid to the Treasury or handed over to named philanthropic or charitable bodies. In other oases the judge will order that the food or other articles affected by seizure shall be destroyed or rendered unusable.

11.4.2. Injunctions. prohibitions or constraints made for consumer protection purposes

Among these measures may be listed seizure applicable in certain English-speaking countries, particularly in the U.S.A. The judge may order the seizure of and, where appropriate, the destruction of, not only the foods placed under distraint by the inspection services and produced by them in court but all batches of merchandise containing the foods sub judice which are still in the possession of the accused, whenever they are declared unfit for human consumption. Nevertheless if the accused admits the charges brought against him and offers to repack his product at his own expense as required by the regulations then and if it is possible, the judge may allow him to do so 1/.

1/ See the Federal Pood, Drug and Cosmetic Act, section 304, where provision is made for the "salvaging", as reutilization is termed, of stocks that have been seized (see above, 7.4.3.). On the same subject see below, Bibl. IV-B:United States of America t Jacobs, op.cit.

Yet another measure of constraint that has had considerable development in the Common Law countries is that of the injunction. When invoked for food it consists in requiring any person responsible for production or marketing of any foods declared to be adulterated immediately to discontinue the production of or trade in such food. The practical effect of such injunction is to necessitate its recall without delay by the producer or distributor 1/.

For the sake of completeness, mention may be made of measures imposing fines which are accumulated according to the number of days, weeks or months of delay intervening in complying with certain legal obligations or injunctions ordered by the court. However, so far as the author is aware, this type of measure finds little or no application in food law.

11.5. The determination of the person responsible under the criminal law

11.5.1. Natural persons

At first sight the designation of the person responsible under criminal law for an offence involving food should be readily apparent from the provisions of the law defining such offence. Thus, a provision designed to prevent or sanction the sale of a food containing an unauthorized additive may affect either the manufacturer or the verdor of the food or even both of them. In practice, however, the problem is frequently more complex, given the large number of intervening persons involved from the supply of the raw materials ta the retailer stage, who can play a decisive role in determining the composition, quality or packaging of a food offered for sale.

The way the food control services are organized tends in a number of countries to place criminal responsibility on the holder of the defective product. If this person is a tradesman, he may be unaware of its defective character, especially if the defect is not readily discernible. The question then is one of determining to what extent the law makes it incumbent on the person in possession of goods to check their condition and if necessary to sanction his negligence 2/.

The same is true for the manufacturer if he makes use of raw materials that may prove to be defective and thus give rise to an alteration in the final product which is punishable at law. It is true that a manufacturer can command the necessary teohnical facilities for checking his wares, thus guaranteeing a wholesome product and one that will also be consistent with the demands of fair trading. On the other hand, the tradesman, whether wholesaler or retailer, rarely possesses such facilities. His liabilities under criminal law are limited in the case of foods of wide and good repute to his obligation to check that Buch products are ostensibly in good condition and to comply strictly with the manufacturer's instructions regarding their storage, as for example the observance of expiry date, if this is indicated 3/.

As a general rule, however, where the offence involves product presentation (in particular inadequate or equivocal labelling or dishonest advertising) then, clearly, it is the person materially responsible for the packaging - manufacturer, importer or wholesaler - who should be prosecuted. But where the offence involves the composition or intrinsic quality of the food it would be logical to refer back to the source and call the producer to account. However in most countries, regarding foods imported from abroad the importer is responsible for what he imports. As a consequence, failing an international system for legal cooperation and reciprocal recognition of inspection controis, it is often impossible to pin down the person effectively responsible for the defect in question.

1/ See below, 10.2.4.(e) and the reference. therein cited.

2/ See above, 11.2.3.

3/ On this subject see below, Bibl. IV-B: France: Fourgoux & Jumel, op.cit. 16.1. and 16.2.

The solutions most frequently adopted are, on the one hand, frontier inspection of imported products (but such control is not always effective when the inspection services are not specialized) 1/ and, on the other hand, the requirement that the name or registered office of the importer be indicated on the packaging 2/, so that the latter is considered to be the person legally responsible for any defect that may be established. This approach resembles that whereby criminal responsibility can be assigned to the original offender by following the chain of responsibility in certain fields according to the tradition of the law in question. Thus, where the manufacturer or, failing him, the importer, is known, the commercial middlemen and retailers are prosecuted only for acts directly and personally imputable to them.

If the person in possession of an adulterated produce or a product that is otherwise not in conformity with the food laws is merely the agent or employee of another, the latter is, as a general rule, criminally liable by reason of his duty of supervision and the authority he is supposed to command.

11.5.2. Corporate bodies

Criminal law has always concerned individuals only. Accordingly, when the accused is a firm whether producer, importer or distributor, it is its director, manager or other person responsible for it against whom the law is invoked. This, however, does not necessarily confer immunity on subordinate employees in a firm, for example, heads of laboratories, who may be personally responsible, by reason of the position they occupy and of whose negligence the directors may not be aware.

Apart from the penalty of imprisonment, which cannot, of course, apply directly in the case of a company, one may note that with the development Of food law (as well as that of industrial and commercial law) there has been a trend towards generalization of the infliction of penalties on companies as such. Examples of these include fines, penalties affecting the good name of a company by publication of sentences,and penalties affecting the carrying on of business whether, inter alia, by closure of premises, suspension of industrial or commercial activities or by withdrawal of licences.

11.6. Judicial procedure

11.6.1. Applicability of general rules

The rules governing the organization of the judiciary, the jurisdiction of magistrates and higher courts, public proceedings, the exercise of the right of appeal, affect the whole range of criminal offences committed in a country and they do not make special provision for the production of or trade in food. Furthermore, the principle of the unity of the judiciary would ill accord with the existence of special courts or tribunals for the prevention of fraudulent practices.

A trend may be noted, however, in some countries towards the institution of divisions or "sectors" presided over by specialist magistrates to permit the centralisation of fraud oases.

1/ See above, 10.4.

2/ See above, 8.2.1.(e).

11.6.2. Special rule.

Many special previsions for the prevention and punishment of fraud involving food have been introduced in the procedural sphere to take into account both:

(a) the peculiar conditions under which an offence may be reported, the principal provision being that of counter-checking referred to above 1/; and

(b) the application by the courts of special measures of coorcion, injunction or prohibition in order to protect consumers,such as seizure of food as previously mentioned 2/, the particulars of which, often peculiar to the country concerned, lie outside the scope of this study.

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1/See above, 10.2.5.

2/See above, 11.4.2.

12. CIVIL LIABILITY IN RELATION TO FOOD

12.1. Where civil liability begins

Civil liability consists in being answerable in law for an act or omission resulting in injury to a third party. The legal remedy for such injury is reflected in the "damages", or pecuniary satisfaction, that may be obtained.

Where food is concerned the act or omission may consist in the failure to perform or the imperfect performance of either a contract (e.g. in connection with the supply of a consignment of food products) or of an obligation arising out of a contract (e.g. the guarantees given by the vendor). The liability in such cases is purely contractual, and by that token comes under the law of contract, with no direct connection with food law so that it lies outside the present field of enquiry.

This chapter, accordingly, is concerned, with civil liability, not deriving from contract, to redress an injury of which food is in some way the vehicle (e.g. injury to health, breach of trust vis-à-vis the consumer) and stemming from the application of principles embodied in the law 1/.

12.2. Civil liability not arising out of a contract

12.2.1. Where noncontractual liability begins

The legislator has two methods available to him in order to determine what acts should be a source of noncontractual liability 2/. One of these methods, characteristic of the so-called Romano-Germanic legal systems, establishes systematically under the general provisions of the law the basic conditions whereby one person causing another an injury may be held liable for its redress 3/. The other method, being the one followed in the Common Law countries, consists in extracting from case law legal categories of acts, known as torts, for which the injured party may claim specific civil redress 4/.

Quite often, civil liability may arise from an act or omission which is also an offence under criminal law. In particular, it is common in the manufacture and marketing of food to find that the acts for which an individual may claim redress consist of, inter alia, misrepresentation, adulteration, or the sale of adulterated or noxious products. In most countries, a wrong may be actionable irrespective of whether it is also an offence under criminal law. In such cases, the act must, depending on the legal system applicable, either satisfy the broad conditions which govern obligations taking their origin in a technical offence (quasi ex delicto) or, alternatively, be deemed to be a tort considered as such by the courts.

1/ Commercial liability even when not arising out of a contract, e.g. when tradespeople claim damages in respect of unfair competition has no connection per se with food law and is accordingly not contemplated here.

2/ A more detailed description of these two methods, consisting of a comparison of the British and French systems as applied to food, is given in Bigwood & Gérard (see below, Bibl. I, op.cit., Vol. 4, Chapter 20, II).

3/ This is referred to in the Code Napoléon concept represented as responsabilité quasi-délictuelle or responsabilité aquilienne.

4/ Thus, the English law of tort contemplates a number of specific civil wrongs, in particular the tort of negligence, which must often be proved in claiming civil damages through the courts.

However, irrespective of the differences in legislative approach and in the circumstances in which a wrong may be civilly actionable, it is still necessary to identify the grounds upon which ultimately the obligation to redress is based. Traditionally the obligation arises out of a wrong, or tortious act, committed by someone. In this connection, where the person so liable is not its actual author, it is because the law deems him to have been negligent in the accomplishment of a duty of directing or supervising the author. The common denominator, therefore, is the imputability of the person deemed to be responsible. This is tantamount to saying that liability attaches to a person and that redress of a grievance depends on the production of evidence to show that the fault or negligence exists. But this is difficult, if not impossible, to demonstrate, especially where one is dealing with activities by their nature involving major risk (e.g. an airline or nuclear plant operation),so that one must fall back on the concept of objective liability. This concept has been embodied in various international conventions. Thus, the obligation to repair an injury arising out of dangerous activities rests with the entrepreneur, but the liability for damages applies within predetermined limits, without it being necessary to establish the subsistence of a fault or negligence on the part of the owner or his agents. In this case liability derives not from a wrong committed or presumed to have been committed but from the risk attaching to the activities in question, a risk which may be covered by liability insurance in the manner and subject to the limits laid down by law.

In the food sector, a recently emerging school of thought advocates the requirement of automatic payment of damages by food manufacturers or packers to persons whose health has been impaired by food whose defective nature has been duly demonstrated. This takes at its premise a novel kind of civil liability, namely products liability, the principles of which have been developed for the most part in the U.S.A. 1/. This offers a refinement on the system of liability without negligence. Under it, the consumer is guaranteed a legal remedy, without making it depend on the proof of a fault by the producer, packer or other person held responsible. The result, too is the same as that obtained under systems of strict liability 2/, or on that of failure in an implicit duty of care in the matter of control 3/. It is pertinent to note in this connection that several international bodies 4/ are advocating a worldwide harmonization of principles governing the civil liability of industrial producers.

12.2.2. Damages involving food

The wrong sustained by individuals in food matters consists more often than not in harm done to the health of the consumer of defective food - for example, food poisoning. At this point, difficulties usually arise concerning not so much the nature of the injury suffered (this can be established by medical examination) as the assessment of its gravity and, consequently, of the amount of the damages to be awarded.

The courts in many countries provide that a foreseeable injury whichc may not occur does not constitute grounds for damages. For a claim for damages to lie in such cases evidence must be furnished of the existence of the injury.

Frequently, too, damages which cannot be assessed in pecuniary terms are nevertheless taken into account for reasons of principle or on moral grounds, in which case "nominal" damages Will be awarded.

1/ See Bibl. IV-A, Kessler, op.cit., and Bibl. IV-B, United States of America, Condon, op.cit.

2/ As in the case of the Federal Republic of Germany, for example.

3/ This approach is to be found in French law, as well as in criminal law. See above, 11.2.3.

4/ Notably the Council of Europe, Strasbourg, the Hague Conference on International Private Law, and the International Institute for the Unification of Private Law (UNIDROIT), Rome.

12.2.3. The causal nexus between acts and subsequent injury

For a tort involving food to be civilly actionable, evidence must be produced in court establishing the causal connection between an act and the injury in question.

This raises a number of legal problems for which a solution is usually to be sought before the courts. Thus, it is widely accepted that the injury must be a necessary and direct consequence of the act (by which token, indirect injury cannot be grounds for damages). The difficulty, more precisely, lies in the need to determine, in each particular case, whether or not there is a direct nexus between the injury suffered and the alleged cause - for example, an illness following the ingestion of spoiled or noxious food - or whether the injury can be ascribed, and to what extent, to a series of causes. In such cases it is necessary to have resort to expert opinion for the evaluation of questions of facts.

12.2.4. Who is liable ?

As pointed out earlier 1/, the person liable may be not only the actual doer of the act causing the damage but also any person held vicariously liable under the law for the acts of others arising out of managerial or supervisory responsibilities exercised by him.

Thus,a firm of food manufacturers or packers can be - and, indeed, often is - civilly liable; and responsibility may attach to a firm as body corporate as well as personally to a director or employee, e.g. a chief of laboratory or a production manager, for the commission of serious mistakes involving either negligence or fraud, so that these individuals may be sued for damages along with the firm itself. In such cases, the civil liability of directors or employees of the firm may be joint, so that the injured party or his heirs or assigns can claim damages against any representatives of the firm, who may then claim indemnification from those persons held to be jointly liable.

The pecuniary risks of civil liability may be covered by insurance, though the law may place limits on the insurers' liability, for example, by means of clauses exonerating the insurers in the case of wilfully committed or particularly serious offences or negligence. For it would, of course, offend good sense if food manufacturers were able to render themselves immune in advance from the civil consequences of fraud or manifest indifference where the health of the consumer is concerned. However, it is important that the consumer shall be protected against the insolvency of those responsible in the event of civil judgement being given in his favour. It is therefore more logical in such cases to allow the insurer to recover through the courts compensation paid to the victim from those responsible for the wrong. Meanwhile, it is chiefly through penalties designed for prevention and control purposes 2/ that the worst abuses of certain manufacturers and traders can be avoided.

12.2.5. Who may be awarded damages ?

Damages payable as a result of a wrong in which food is involved will be awarded to the person who suffered that wrong. If the latter dies as a result of the wrong done (e.g. in case of poisoning), damages are claimable by those persons who suffer a loss by his death - his family or other dependents.

Where damages are payable to a body corporate they are awarded on the grounds of precise material damages capable of evaluation in monetary terms, e.g. damage to a firm's goodwill or commercial standing. But if the injury suffered, while allowed by the judge, cannot be so evaluated, then the person causing that injury may be found liable as a matter of principle and have nominal damages only awarded against him. This happens in some countries, where consumers' associations may bring a civil action on behalf of their membership, whose individual identities are irrelevant to the case.

1/ See above, 12.2.1.

2/ See above, 11.3.

12.3. State liability

Like any other employer, the State may in most countries be judged to be civilly liable for the acts or grave omission of its servants resulting in wrongs done to a third party. However, liability will depend on whether or not the servants of the State have acted in their official capacity. It is only where they have so acted that the liability of the State and not of its servants as such can be invoked. The State being presumed to act, as a general rule, in the public interest, relief for wrongs resulting from the action, or failure to act, of its servants in the course of their duties is difficult to obtain, since the admissibility of such claims is subject to very stringent rules.

On the other hand, it is generally held that the public authority cannot incur any civil liability by reason of the exercise of its rule-making powers. This principle finds corroboration in the affirmation that, in using such powers, the State acts not as an individual under the civil or common law, but as a public entity responsible for deciding what is in the general interest,by means of the regulations it issues, and to secure the defence of that interest by the use of its own powers of coercion.

Although some recent writers have endorsed the view, it seems, however.difficult to accept the idea that "no liability attaches to those with whom the decision to authorize or to prohibit lies" 1/. Thus, it is hard to deny the liability of the State if a substance proves to be noxious after it has been included in a positive list, and still harder to do so if the listing has been obtained as a result of some irregularity 2/. For it is scarcely equitable that liability for a civil wrong arising in connection with food and due to an error in appreciation on the part of a Government authority should be laid at the door of a manufacturer or packer who has scrupulously observed the prescriptions contained in the law or regulations 3/.

In order, therefore, to remedy in some degree this unsatisfactory situation it has been proposed that a legal system of liability should be based on the principle of risk (and not on a presumption of a fault or negligence 4/) and, by way of corollary, give the manufacturer the option of insuring against such risk.

12.4. Rules governing legal jurisdiction and procedure in civil liability

The judicial application of civil liability in food law is subject to the same general rules governing jurisdiction and procedure as apply throughout the whole of private law.

In those cases where an act or omission involving noncontractual liability constitutes a criminal offence involving prosecution in the courts, it is often necessary, e.g. in the Common Law countries, for the injured person subsequently to bring proceedings in the civil courts in order to obtain redress for the wrong he has suffered. In certain countries, however, it is possible to join the civil action to that brought before the court with criminal jurisdiction, in which case the result of the civil action depends on that of the criminal proceedings.

1/ See below, Bibl. I, Université Libre de Bruxelles, op.cit., Bigwood: "Conclusions from the work of the Colloquium", i.e. of the Colloquium on Food Law in the Europe of Tomorrow.

2/ See below, Bibl. IV-B, France: Fourgoux & Jumel, op.cit. 16.3.1.

3/ For an analysis of this sort of situation see below, Bibl. I, op.cit., Bigwood & Gérard (Vol. 4, Chapter 20, Section II-E).

4/ See above, 12.2.1.

Appendix: A SHORT BIBLIOGRAPHY ON POOD LAW

Arrangement of Sections

I. Works on food law in general

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