

Osservatorio Internazionale

Brazil and Food Law A new model to face the Food Issue*

Gerardo Figueiredo Junior
Giovanna Longo Eischen

1.- What is Food Law?

The idea for this article arose after a “live” on Instagram with Prof. Fernando Passos, a Brazilian Law Professor and very good friend, transmitted to a widely varied audience, including students, lawyers, and other professionals who were, somehow, drawn to the issue and to the credibility conveyed by the speaker, whom I consider a mentor.

The agenda called for a discussion on a newly-enacted statute to curb food waste, a common and, dare I say, cultural practice in Brazil.

It is worth pointing out that this conversation took place at a rather delicate time not only for the country but also for the planet. We are living amid a pandemic caused by the novel coronavirus, which indistinctly spread across countries and social classes. Unfortunately, many lives have been snuffed out, and not only because of the disease caused by Covid-19, but also because of a series of consequences that impacted health in general and the nations’ economy.

As I write these words, mankind still struggles to find ways to beat the disease and solve the remaining nefarious impacts that all but paralyzed some sectors in the affected societies. Hunger

and lack of access to healthy and safe-for-consumption food are certainly some of the most serious legacies of this time, and it will take a great effort on the part of governments and society at large to find solutions that can alleviate the problem first and subsequently end it for good.

So, what is Food Law and how can this paper contribute to the issue?

Several countries have long dealt with the issue of food in quite a systematized and multidisciplinary manner. Thus, Law is but one of the areas that seek to address food security as a priority to ensure the health and the well-being of the population. One of the challenges of Food Law is to find ways to make legislation applicable to food production and sale more efficient, which is only possible when legislators are sensitive to these issues. However, the role of law professionals goes beyond mere knowledge of the law. They must question it as often as they can so that the system can be kept current, but without compromising the principles undergirding the subject in point.

When one understands the importance of food in the economy, not just in an isolated manner, but rather as a factor whose changes directly impact other areas, one begins to understand that the simple change can trigger genuine virtuous cycles, positively affecting health, culture, tourism, services. Conversely, it is important to remember that regulations can either hold a country back or bring about disaster, which underscores the importance of ensuring the participation of all actors involved in legislative discussions, be they representatives of a production chain, regulators, or consumers.

Food law is therefore an inclusive field by nature,

(*) This article was originally written in Portuguese and published as a book chapter in “*Estudos Jurídicos: Constitucional e Empresarial – em homenagem ao Professor Fernando Passos: 20 anos de coordenação do curso de Direito da UNIARA*”. Brazil: RiMa Ed., 2020, 199.

and it seeks to develop tools that can also generate wealth from the premise of population health and safety.

To better understand how that works, take the example of Spain, a country of great tradition in tourism and in gastronomy which, a few years ago, gathered together several specialists, among which were food producers, restaurant owners, renowned chefs, and legal scholars, with the purpose of putting forward advancements in the legislation to ensure protection granted by the State to the creation of new culinary recipes, respecting its world-renowned local culture and, undoubtedly, one of the main magnets for foreign tourists.

This collaboration among professionals demonstrates the importance of gastronomy to that country's economy, since it is well known that tourists often seek experiences connected with a people's cuisine, be it their primary or secondary reason when choosing their destinations. Restaurants, hotels, and several other services are fostered by the choices a country makes in terms of policies and legislation, and that is one of the ramifications that Food Law can address.

2.- Food Law in some countries

Obviously, the reality of each country is a rather significant factor in the importance given to another issue, and it is important to remember that the free transit of goods within the European Union requires strong regulation and constant surveillance capable of ensuring the well-being and the health of the citizens of the Community, regardless of the origin of the food being consumed, which also helps to explain the current stage of development of Food Law in that continent.

Under the regulations of the European Community, food legislation addresses the general principles and regulations setting forth safety procedures, considering the need to ensure enough quality food to the population, comprising the production, transformation and distribution of food (EC Regulation No 178/2002, which created

the European Food Safety Authority).

In the United States, the agency in charge of food safety is also in charge of regulating drugs – the Food and Drug Administration (FDA), expanding the nomenclature to Food and Drug Law. This in turn reinforces the connection that exists between health and food, with the FDA being responsible for mitigating the risks to consumer health and safety, not only preventively, which is done through sector regulation, but also vigorously representing actions that may compromise the objectives of that country's food and drug laws.

Notably, in these countries there is an authority in place to address food issues in a centralized manner and on a national level or on a block level, as is the case with the European Union.

In Brazil, there are several actors involved, and at all governmental levels, which can often bring about uncertainty in terms of the adopted policies, even if one can argue for the need to regionalize the manner of addressing these policies on account of the country's territorial extension and each region's singularity. To name but a few, there is the Ministry of Agriculture, Livestock and Food Supply (MAPA), the National Health Surveillance Agency (ANVISA), the state and local health surveillance agencies, the Consumer Advocacy Agencies (Procons), the State and Federal Attorneys' Offices, each with specific jurisdictions, which often overlap. The issue involves debating whether the number and rigor of the existing regulations in Brazil and the plurality of the actors involved are in themselves enough to ensure the protection of the citizens and the efficiency of the system in every sense, balancing the population's safety and the economic development in a fair and sustainable fashion.

One of the most recent examples of how regulations can become true bottlenecks, without necessarily protecting citizens, is the unjustifiable existence, for nearly six decades, of a statute that prevented the circulation of certain types of food across the Brazilian territory. Over time, the motivation that underpinned the enactment of the statute was lost, but the law continues to be used by governmental agents as grounds for apprehen-

sions and other sanctions, creating absurd and unsustainable situations, as will be explained below.

3.- Artisanal Food – Example of Legislative Improvement

Up until a short time ago, Federal Law No 1283 was still in effect in Brazil. Enacted in the 1950s, it prevented the circulation of products across the national territory, which included artisanal cheeses made from raw milk. Among the affected products was the nationally renowned cheese produced in the region of Serra da Canastra, in the state of Minas Gerais.

In practice, this statute prevented consumers in other states from having the privilege of tasting some of the world's most famous cheeses, considering that, in a recent competition held in France, some of the products from Serra Canastra were recipients of awards and recognized as high-quality. Nonetheless, the law persisted, and it was only amended a few years ago. A recent event that took place in Rio de Janeiro gained particular notoriety. During an important international music festival, a renowned chef was forced to give up on a restaurant specially built for this event when health surveillance agents confiscated the cheese that was to be used as an ingredient under the aforementioned law that had been in effect thus far. Although the law justified the measure, a debate ensued on the usefulness of this law on account of the modernization of production methods that has taken place since the 1950s and considering that the market was full of imported products manufactured with the same technique as that of the domestic artisanal cheese that were not reached by similar restrictions.

On June 14, 2018, almost 70 years after the enactment of Law 1283/50, Law 13680, later regulated by virtue of Decree 9918/2019, put an end to these barriers preventing the circulation of artisanal foodstuffs from animal origin.

The new statute has not eliminated the requirements of safety and quality for artisanal products

with the end of the Federal Inspection Service (SIF) stamp thus far required for the sale of these products. On the contrary, it upholds the health requirements ensuring health and safety to the end consumers, who are now permitted to enjoy such delicacies.

Another stamp (the ARTE stamp) was created in lieu of the old SIF stamp. This new stamp is under the jurisdiction of each state, which will take account of the region's characteristics to confer upon the products recognition of artisanal compliance.

One of the criticisms regarding the SIF stamp had to do with the fact that the requirements to obtain it did not take account of small artisanal producer's specificities.

This would often lead some producers to keep their products clandestine, contributing towards informality and, in some cases, towards allowing products made through questionable manufacturing processes to be sold.

One of the guidelines of the current model is to ensure that the requirements for the grant of the ARTE stamp do not increase the red tape and production costs, while ensuring quality of the final product.

Once consumers started to learn more about these products, one of the immediate consequences was the increase in tourism in the regions where the artisanal cheeses are made, that is, an increase in gastronomic tourism, benefiting the communities around these properties.

Without a doubt, gastronomy is one of the most important cultural factors in a country, and the capacity to boost local economy is often underestimated or negatively impacted by archaic regulations or by absence of adequate incentive policies.

Another example of a success story took place a few years ago in Lima, Peru. Currently, two of the 10 best restaurants in the world are located in the Peruvian capital, according to the 2019 edition of the renowned publication *The World's 50 Best Restaurants*.

This fact has positioned Lima as the gastronomy capital of South America, leveraging the tourism

industry as well as the other services that gravitate around it, which is notable for the city previously relegated to being a mere passageway towards historic destinations, such as Machu Picchu.

This did not happen by chance, but rather through a concerted action by the Peruvian government, legislature, and private initiative. Regulations were revamped or created to enable the exponential growth of local tourism using as the main attraction the international reputation gained by Lima based restaurants.

The improvement of the legal framework is but a part, albeit an important one, of society's evolution, and the power of these changes to bring about almost infinite possibilities to improve a populations living standard become increasingly clearer.

An archaic piece of legislation, on the other hand, causes enormous losses, impairing or preventing social and economic development. Hence the importance of questioning the usefulness and the adequacy of a regulation, always looking to legitimate means to revamp it.

4.- *The Fight Against Food Waste – Old News*

I started this article by mentioning the conversation with Prof. Fernando Passos, an exceptional professional and educator, during which I spoke about laws to curb food waste, one of the issues debated with Government Ministers, Federal Supreme Court Justices, legal scholars, and so many other brilliant interlocutors.

And I was among the lucky ones attending one of those lives with Prof. Passos, in the "space" that he generously opened to attempt to spread knowledge of this "novelty" to as many people as possible. In other words, discuss how Brazil, through the enactment of the new law, would start to treat its food surplus as still proper for human consumption. Personally, I consider this an old issue, since there already exist several governmental and private initiatives looking to create channels to bring donors and beneficiaries together, althou-

gh the new law is an important step towards stimulating this practice, as we will see later on in this article.

Senator Fernando Collor de Mello's bill was approved in Congress and made into Law 14016, of June 13, 2020. It aims at fighting food waste through the donation of surplus food that is still proper for human consumption.

The issue of food waste is not particular to Brazil only. Several countries already have laws in place to curb this practice or stimulate donations through incentives.

Nonetheless, it must be considered that Law 14016 was enacted amid the Covid-19 pandemic, and the taking of any steps that could lead to some sort of economic punishment to business owners could aggravate the crisis already caused by retraction and consumption, without necessarily incentivizing an increase in donations.

Conversely, tax breaks by way of incentives might not be interesting to the Government at a time when tax revenues are low.

The Law has sought to fend off an old concern that has led many business owners to quit donating, namely, the risk of running health-related and consumer-related infractions, even if the donation was a gracious act, for fear of interpretations that often equated the act of donating to a consumerist relation or that attributed some tort liability to the donor due to some incident, even if as a result of inadequate storage of the food already in possession of the beneficiary.

Regrettably, inadequate transportation and storage can compromise the quality of the product and the safety of the beneficiary, but there have been interpretations linking the donor and the intermediary in a liability chain often entertained under the Consumer Defense Code, Law No 8078/1990.

All the care taken up to the donation moment was not enough, therefore, to exempt the donor – and subsequently the intermediary – from liability.

That issue having been resolved, every establishment producing and supplying food, including raw food, processed food, and ready meals, can donate unsold surplus food, provided that it is still

good for human consumption. Donors must observe the expiration date, the conservation conditions, the safety and the integrity of the food, even if there is damage to the packaging. In addition, the food must retain its nutritional properties and safe for health, even if the food does not look commercially desirable. These conditions having been met, hospitals, supermarkets, cooperatives, restaurants, cafeterias, or other companies that supply meals to their own workers, may donate food.

It warrants mentioning that the law does not reach individuals that may want to donate their surplus foods, although it is recommendable that the same level of care required of legal entities be observed by anyone wishing to contribute to the success of this initiative.

No burden will be associated with the donation, i.e., it is a voluntary act, and the donor's gesture is not to be saddled with any cost.

Donating is and must always be a responsible act and, even if the Consumer Defense Code or tort liability statutes do not apply to the donor and to the intermediary, this does not mean that neither is accountable for acts or omissions of any kind.

To illustrate the issue, if a business owner should knowingly donate food that is inadequate for consumption, that business owner will be liable for intentional misconduct and subject to applicable civil and criminal sanctions according to the case. It is therefore important that the aforementioned requirements be fully scrutinized before a donation is made. Likewise, the intermediary must ensure that the food maintains the same conditions when delivering it to the eventual beneficiary.

Moreover, despite being enacted at a time of emergency in the country, it must be pointed out that the Law will not be for a temporary term, although it contains an article the efficacy of which will terminate upon cessation of the state of emergency the countries experiencing and which

addresses the assurance of purchase, by the Federal Government, of food through the Food Acquisition Program (PAA, in the original acronym), a set of initiatives seeking to ensure the acquisition of a portion of the food produced by family farmers and fishermen, who have been badly hit during the pandemic.

Why, then, did I refer to the Law as “old news”? Although the law to curb food waste has just been recently approved, there exist numerous programs created by state and local laws, which do not expire and are not altered by Law no. 14016/2020, except with respect to the liability of donors and intermediaries, as already mentioned. The federal, state, and local governments have long had programs to bring together donors and beneficiaries, relying upon food banks or the participation of civil society, religious institutions, as well as social and humanitarian organizations.

This model exists in several countries and new technologies are constantly incorporated into it to make donations even more efficient.

Currently, platforms can easily find donors willing to donate, bringing them closer to organizations capable of ensuring that the food will get to the beneficiaries. All it takes is downloading a simple app and registering.

Similar tools already exist in Brazil, and they can be found through quick searches on the Internet. A study carried out by EMBRAPA¹ in 2019 demonstrated that one person in Brazil annually discards around 40 kg of food that could well be given to other persons. For a family with three persons on average, the study shows that roughly 130 kg of food are wasted per year, which, at the end of this period, adds up to approximately R\$ 1,000, an amount that could be used to provide for the other needs for each of these families.

The study shows that waste is not bad only for those who lack access to adequate food, but it is also economically unjustifiable for the wasting party. Families need to plan their own consump-

(¹) The study is available at: <http://www.fao.org/documents/card/en/c/ca9692en>.

tion carefully, even if at times it may be difficult to avoid any surplus.

And donating can indeed be a part of this planning. If individuals and legal entities were to include the surplus when calculating their regular consumption, many other families and groups could be served, and the issue of food insecurity in our society could be significantly reduced.

Per a UN report, as of 2019 almost 48 million people are afflicted with hunger. As a result of the pandemic, the number is expected to rise significantly in 2020, in light of the difficulties in supplying adequate food to these individuals. In Brazil, the numbers diverge considerably, but it is important to remember that they do not reflect hunger only, but rather in adequate food to ensure the health and the well-being of groups with little access to these resources².

As already mentioned, there are laws around the world that seek to mitigate food waste through different solutions, such as the application of penalties or the creation of tax breaks for donors.

Take French laws, which are quite strict, punishing with penalties or imprisonment those who do not donate (*Loi 2016-138 and Loi 2020-105*). Conversely, recent Italian legislation takes a different route, providing tax breaks for those who choose to donate food regularly (*Legge 19 agosto 2016, n. 166*). As these are relatively recent laws, it will take a while to assess the results achieved by one or the other form of curbing waste, assessing whether the most effective responses are due to fear of punishment or the expectation of the reward promised to the donors.

At this point, I invite the contribution of my colleague Giovanna Longo Eischen, a lawyer, currently doing a Master of Laws in Food Law at Michigan State University, who has worked and studied these issues in the United States for years. She tells us a little about how North Americans are handling this issue:

In the United States, with respect to data on food

waste, the numbers are even more expressive. Roughly 40% of all the food produced is discarded. This practice stems from the North American culture of wealth, abundance and large-scale consumption.

In this sense, it must be pointed out that there is no US federal law mandating the inclusion of an expiration date on the package of a food product. This in turn brings insecurity to the layman consumer who does not possess enough sufficient knowledge to understand whether a product is safe for consumption, and therefore chooses to discard. However, most of the waste is caused by institutions in the food sector. Restaurants, supermarkets, and the hotel industry play a major role in reducing the rate.

For illustration purposes only, the supermarket sector sets very rigorous aesthetic standards for horticultural products. A mere change in coloring leads the product to be immediately discarded. In cases like these, the producer does not so much as harvest the product, choosing instead to let it rot. Some wiggle room with regards to these aesthetic standards would not bring any loss to food safety.

The federal statute titled “Bill Emerson Good Samaritan Act”³, enacted in 1996, protects the donor against any civil or criminal liability resulting from the donation of any food that caused injury to its recipient, provided the donor acted in good faith. The act sets a standard of fault whereby donors of food products who voluntarily and consciously knew that their conduct could injure another person’s well-being and health will be held liable for negligence – but only in these cases. Still, in that respect, the donor will not be responsible for the nature, validity, packaging, or condition of the food that was apparently in adequate shape for consumption, provided that the donation was made in good faith. This model of civil and criminal liability is adopted across the country.

⁽²⁾ Available at: <https://www.congress.gov/congressional-report/104th-congress/house-report/661/1>.

⁽³⁾ Available at: <https://dec.vermont.gov/waste-management/solid/materials-mgmt/organic-materials>.

Furthermore, the aforementioned act sets forth a minimum standard to be observed by each US state. The states in turn have leeway to set higher standards of civil and criminal liability for the donor.

Different US states also have been adopting innovative legislation in curbing food waste. Vermont, for example, has passed a statute that forbids residents from throwing food leftovers directly into the trashcan. Residents must choose between composting or recycling leftovers⁴.

With regards to the recovery of wasted food, it is vital that we understand the hierarchy to be abided by. The EPA (United States Environmental Protection Agency) sets forth a step-by-step to determine the destination of food that has been discarded⁷:

1. Prevention through source reduction: the first step entails reducing the amount of leftovers. The adoption of tax breaks offered to business owners engaged in these initiatives and investment in education for consumers are good examples of steps to be taken.
2. Feed hungry people: food that has been discarded but is still safe for human consumption must be donated to food banks, community kitchens, and shelters.
3. Feed the animals: food that is not approved in the donation triage and is not suitable for human consumption goes to animal consumption.
4. Industrial use: supply surplus food to be used as an energy source.
5. Composting: the use of leftovers to create a nutrient-rich soil.
6. Landfill/incineration: food must only be thrown away as a last resort; this step must only be taken when leftovers cannot be used in any of the aforementioned options.

Lastly, the importance of Food Law, a branch of law that is still incipient in Brazil, must be underscored. It must be pointed out that Food Law can address issues that up until recently had been

neglected. Its importance is essential to ensure the Role of Law, as provided for in the Brazilian Constitution. Brazil's recently-enacted Law No 14016/20 carries with it the possibility to mitigate food waste, prevent food from being inadequately discarded, ensure food safety, and benefit the environment. In lockstep with the United States legislative trend, this statute has been a long time coming and must be applauded.

As can be seen, the issue of food waste is hardly unique to a single country. It is an internationally debated issue that has gained prominence not only because of hunger or malnutrition, but also because of the growing concern over the right thing to do.

And one of the reasons why there should be a branch of Law dedicated to discussing food is precisely the constant search for legal solutions that can benefit society, whether in terms of health and safety or as a manner of generating wealth to the population.

ABSTRACT

This paper was published in a previous version in Portuguese language in the work "Legal Studies: Constitutional and Corporate", released in Brazil in 2020 and which brought together several authors, among them law scholars, members of the constitutional courts and professors.

Writing about Food Law in Brazil is quite unreasonable, because although there are researchers on the subject, there is little literature about it. The laws on food and food security exist and are many, but the critical view on this set is still incipient in the country.

The point chosen was the waste of food, especially during the first year of the pandemic caused by the Coronavirus, which led to urgent measures to alleviate the serious situation of access to healthy food of the most vulnerable groups.

(⁴) Available at: <https://www.epa.gov/sustainable-management-food/food-recovery-hierarchy>.

Let this reading be a way to spread Food Law a little more in Brazil, helping the foreign community to understand how one of the most important food exporters is dealing with the challenge of bringing healthy food to Brazilians themselves.

Questo lavoro è stato pubblicato in una precedente versione in lingua portoghese nel volume "Legal Studies: Constitutional and Corporate", pubblicata in Brasile nel 2020 e che ha riunito diversi autori, tra cui studiosi di diritto, membri delle corti costituzionali e professori.

Scrivere di Food Law in Brasile è abbastanza inconsueto, perché sebbene ci siano ricercatori sull'argomento, ci sono poche pubblicazioni in

argomento. Le leggi in materia di cibo e sicurezza alimentare esistono e sono tante, ma la visione critica su questo insieme è ancora insufficiente nel Paese.

La prospettiva adottata è quella dello spreco di cibo, soprattutto durante il primo anno della pandemia causata dal Coronavirus, che ha portato all'adozione di misure urgenti per alleviare la grave situazione di accesso al cibo delle fasce più deboli della popolazione.

L'auspicio è che questo lavoro possa essere un contributo per accrescere l'attenzione verso il Diritto alimentare in Brasile, aiutando la comunità straniera a capire come uno dei più importanti esportatori di cibo sta affrontando la sfida di portare cibo sano agli stessi brasiliani.



rivista di diritto alimentare

www.rivistadirittoalimentare.it - ISSN 1973-3593 [online]

Anno XV, numero 2 • Aprile-Giugno 2021