



INTRODUCTION AND PURPOSE OF THIS GUIDE

ROLE OF LAW IN THE IMPLEMENTATION OF THE RIGHT TO FOOD

The statement that the continuation of widespread global hunger is unacceptable and that individuals have a right not to suffer from hunger and malnutrition has been accepted and proclaimed in many international instruments and by several intergovernmental institutions, among them the Food and Agriculture Organization of the United Nations (FAO), the International Fund for Agricultural Development (IFAD) and the World Food Programme (WFP). While global efforts since the Second World War targeted eradicating hunger and guaranteeing world food security, these activities were not taken within the framework of human rights principles.

The 1996 World Food Summit and its follow up changed this profoundly. The content of the right to food was clarified through the work of the Office of the High Commissioner for Human Rights (OHCHR), the Committee on Economic, Social and Cultural Rights (CESCR) and FAO. Better ways of implementing the right were developed, notably through the *Voluntary Guidelines to Support the Progressive Realization of the Right to Adequate Food in the Context of National Food Security* (Right to Food Guidelines). Today, striving to ensure that every person enjoys adequate food is seen not only as a moral imperative and an investment with enormous economic returns, but also as the realization of a basic human right.¹

The right to food is legally binding on the 160 States Parties to the International Covenant on Economic, Social and Cultural Rights (ICESCR), which was adopted by the United Nations General Assembly in 1966 and entered into force in 1976. As with all human rights, the greatest challenge with respect to the right to food is

¹ See FAO. 2005, Foreword.

finding the most effective ways of implementing it – that is, how this right can be given concrete effect at the national level and how public authorities can be held accountable for their action or inaction.

According to Article 2.1 of the ICESCR, each State Party is obliged to “take steps, individually and through international assistance and co-operation, especially economic and technical, to the maximum of its available resources, with a view to achieving progressively the full realization of the rights recognized in the present Covenant by all appropriate means, including particularly *the adoption of legislative measures*” (emphasis added). International human rights law does not formally oblige State Parties to incorporate the Covenant’s provisions literally in domestic law. Ultimately, it is for the each State Party to the ICESCR to determine the legal status which will be given to its provisions – in this case the right to food – within that legal system.

Depending on a country’s legal and constitutional system, the international treaty’s provisions can become domestic law either by “automatic incorporation”, whereby they have the force of law directly and immediately,² or by “legislative incorporation”, whereby the treaty provisions must be implemented by national legislation to have binding effect.³ In some other states, domestic implementation of a ratified international treaty occurs through the method of transformation – that is, by amending relevant domestic laws to make them consistent with treaty obligations.⁴ Some countries also follow a mixed dualist/monist approach (e.g. Germany). In its General Comment (GC) 3, the CESCR considered that in many instances legislation is highly desirable and “may be even indispensable” in order to give effect to the rights guaranteed in the ICESCR (paragraph 3).

Indeed, regarding relevant international treaty provisions on the right to food, most obligations under this right are non-self-executing – that is, they cannot be given effect without the aid of legislation. In addition, the cross-cutting and complex nature of the right to food and its interrelationship with other human rights calls for legislative action, even where the ICESCR and other relevant human rights treaties are directly applicable within the national legal order. This is because the incorporation of the right to food in a domestic legal system by means of legislative action can provide a high level of protection for this human right. Thus any person considering that his or her right to food has been violated – in its accessibility, availability or adequacy component – can rely on such a legal provision and claim an appropriate remedy or redress before the competent administrative or judicial authorities.

2 So-called “monist” system. This is the case, for example, in Finland, Netherlands, Switzerland, the United States of America and many Latin American countries. However, even in countries with this type of system, some international treaty provisions (called non-“self-executing” provisions) or some aspects of treaty provisions may require implementing legislation before they can be applied by national judges.

3 So-called “dualist” system. This is the case, for example, in Canada, Croatia, France, Iceland, Italy, the United Kingdom, and Commonwealth countries. See Steiner, H.J. & Alston, P. 2000. p. 999.

4 This is the case, for example, in Sweden.

At the national level, the choice of adequate legal strategy for implementing the right to food will depend on the particular mix of policies, institutions and legal frameworks at play in each country. In some countries, current constitutional provisions combined with existing sectoral legislation pertaining to various dimensions of the right to food may suffice to ensure the effective enjoyment of this human right for all persons under their jurisdiction. In other countries, it may be necessary to develop a special framework law on the right to food before incorporating the right to food into the most relevant laws affecting the enjoyment of the right. In other countries – where ratified human rights treaties automatically have the force of law – the right to food will be applicable directly at the national level and binding on state authorities and national courts. However, directly arguing a case on the basis of the text of the ICESCR before domestic courts that have little or no knowledge about international human rights law is highly uncertain.⁵

While some form of legislative action is thus essential to implement the right to food (and all human rights) at the national level, legal solutions alone are not sufficient to achieving its full realization. Effective enjoyment of an economic and social right – even if constitutionally or statutorily recognized – is not possible without effective policy and programme follow-up. Therefore, other means will also be necessary, which may include a wide range of social, economic and political measures. However, an analysis of other “appropriate means” (ICESCR, Art. 2.1) for the implementation of the right to food at the national level is beyond the purpose of the present Guide, which focuses on *legislative* means only.

CHOOSING AN ADEQUATE LEGAL STRATEGY

There are three main complementary levels of legislative action for implementing the right to food at the national level: (i) incorporation of the right into the national constitution; (ii) adoption of a framework law relating to the right to food; and (iii) a comprehensive review of all or the most relevant sectoral laws affecting the enjoyment of the right to food for their compatibility with this human right.

Including the right to food in the national constitution

Within a given country, the exercise of fundamental rights and freedoms is governed in principle primarily by the state constitution. The protection of human rights through constitutions is the strongest form of legal protection as constitutions are considered the fundamental or supreme law of the country.⁶

⁵ See Courtis, C. 2007.

⁶ Since the mid-1990s, new constitutions, including bills of rights, have been adopted in a great number of countries in Central and Eastern Europe as well as in Africa. South Africa is often quoted as a country that has one of the most progressive constitutional provisions relating to the human right to food.

Adopting a framework law on the right to food

While constitutional provisions are termed rather broadly, a framework law on the right to food can elaborate further on this right and thus make it operational in practice. The term “framework law” refers to a legislative technique used to address cross-sectoral issues; framework legislation lays down general principles and obligations, and leaves it to implementing legislation and competent authorities to determine specific measures to be taken to realize such obligations, possibly within a given time limit. A framework law on the right to food can give a precise definition of the scope and content of this human right, set out obligations for state authorities and private actors, establish necessary institutional mechanisms and give the legal basis for subsidiary legislation and other necessary measures to be taken by the competent state authorities.

Reviewing relevant sectoral legislation for its compatibility with the right to food

The legal implementation of the right to food through its incorporation in the existing domestic legislation requires a comprehensive review of all relevant sectoral legislation affecting the availability, accessibility and adequacy of food. Such a review must be wide-ranging enough to cover all the relevant areas, but narrow enough to be feasible. The relevant legislation must be modified or amended as needed, and new legislation adopted must be compatible with the right to food in order to ensure its conduciveness to the full realization of this human right.

Sectoral review is particularly important as, in practical terms, the realization of the right to food depends on many factors and actors. The relevant laws affecting its enjoyment may thus range from production and marketing of food, product labelling and consumer protection, food safety, education, social security and labour to trade and natural resources. These laws were drafted for specific purposes and with specific sectoral objectives, most often without taking into account the possible human rights implications. As a result, some of their provisions may and often do represent an obstacle to the full enjoyment of the right to food. Therefore, even in a country where this fundamental right is implemented legally through constitutional provisions or a framework law (or both), a right to food compatibility review of sectoral laws most relevant for the realization of this right seems necessary and desirable.

As underlined by the CESCR, whatever the preferred methodology for legislative implementation of the right to food in a given state, several principles must be respected – among others, the means of implementation chosen must be adequate to ensure fulfilment of the obligations under the right to food, the need to ensure justiciability of the established right must be considered, and account should be taken of the means that have proven to be most effective in the country concerned in ensuring the protection of other human rights (GC 9, para. 7).

PURPOSE OF THIS GUIDE

In recent years, a number of countries have begun drafting specific legislation aimed at ensuring or promoting the realization of the right to food; these include Argentina, Bolivia, Brazil, Ecuador, Guatemala, Honduras, Indonesia, Malawi, Mali, Mexico, Mozambique, Nicaragua, Peru, South Africa, Uganda and Venezuela (Bolivarian Republic of). While several other countries have also taken initiatives related to the realization of the right to food, they have not undertaken – as yet – specific legislative activities with this specific purpose.

A comparative analysis of these legislative initiatives indicates that provisions referring to food in terms of a right are being incorporated mainly into legislation on food and nutrition security,⁷ laws specifically targeting certain sectors of the population and more general laws on food security. The emerging legal frameworks represent first steps towards the adoption of a human rights based approach to food security, which is reiterated in GC 12⁸ and the Right to Food Guidelines.⁹ A growing number of countries are also engaged in consultation processes on the adoption of special legislation on the right to food.

To date there has been no comprehensive guidance for governments seeking to take national legislative action with regard to the right to food. This Guide attempts to fill that gap. It does not intend, of course, to develop the content of international law. It aims to provide national law- and policy-makers with practical information and guidance for developing or strengthening national legal (and institutional) frameworks on the right to food, consistent with the ICESCR and other pertinent norms of international law.

This Guide acknowledges that it is for each individual state to decide (in accordance with its own specific historic, economic, social and other circumstances) how to best implement the right to food within its national legal system.¹⁰

Part One provides a brief introduction to international law and the human right to food.

7 Although some other countries also have national legislation on food and nutrition security, this Guide takes into account only legislation that actually refers to the right to food or defines “food security” in terms of rights in the law’s objectives, purposes or substantive provisions.

8 In 1999, the CESCR adopted GC 12 on the right to adequate food. It states that the right to adequate food is realized “when every man, woman and child, alone or in community with others, has physical and economic access at all times to adequate food or means for its procurement”.

9 In 2004, the FAO Council adopted the *Voluntary Guidelines to Support the Progressive Realization of the Right to Adequate Food in the Context of National Food Security* (Right to Food Guidelines). See Part One, Box 2.

10 According to the CESCR, whatever the preferred methodology, the means of implementation chosen by a state must be adequate to ensure fulfilment of the obligations under the right to food as established by the ICESCR (see CESCR, GC 9, on the domestic application of the Covenant, para. 7).

Part Two examines the state of incorporation of the right to food in national constitutions and discusses the effectiveness of the various forms of constitutional recognition of the right.

Part Three provides a brief analysis of the possible form and legal status of a framework law on the right to food and goes on to discuss in detail the possible contents of such a law. No “model” law is presented, since, depending on its history, socio-economic and political context, traditions, legal system and international obligations, every country has its own specific priorities and strategies. However, Part Three does discuss in detail the key elements that should be addressed when developing a framework law on the right to food. In addition, the checklist provided in the Annex gives a summary of the key elements.

Part Four considers the right to food compatibility review planning process, and explores selected areas of sectoral regulation, assessing possible effects on and implications for the realization of the right to food. The discussion covers a few of the many sectors that can be relevant to a right to food compatibility review (e.g. land, water, fisheries, labour, social security, food safety, labelling and consumer protection). It gives a useful introduction to some important subject areas from a right to food perspective, and illustrates in greater detail the application of the compatibility review methodology.

It is worth noting that each part can be read and used independently, according to the specific situation and the needs of the country in question.

The Guide supports the various options discussed with relevant contextual information and examples from national legislation (when such legislation exists), in order to show how legislators in various countries have addressed the points in question. It draws on both laws that have entered into force and draft laws that are publicly available.¹¹ The examples from the existing national laws or draft bills given in the boxes are for illustrative purposes only; they do not represent suggested terminology or wording to be used. It is hoped that the Guide will be useful to all those who, within and outside government, are interested in implementing the human right to food through legislative means.

¹¹ Readers will note numerous examples from Latin America, as it is mainly countries from this region that have incorporated the right to food into specific statutory laws.