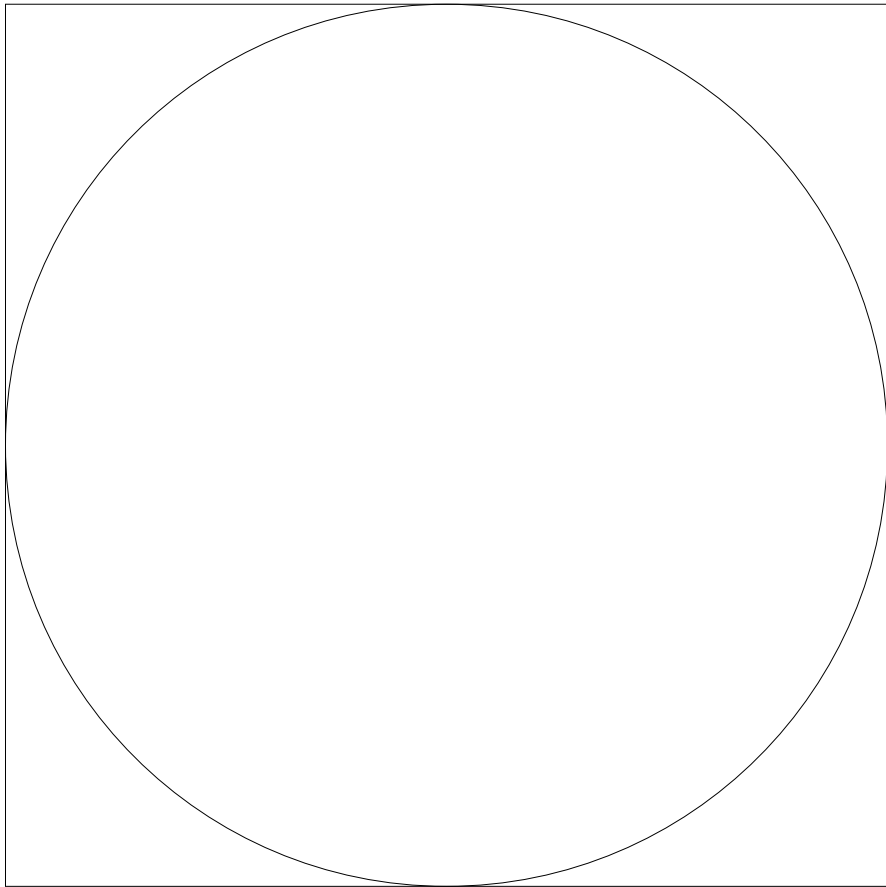


# GUIDE ON LEGISLATING FOR THE RIGHT TO FOOD





The companion CD includes a **Legal Database** and  
a **PDF Version** of the Guide



# **GUIDE ON LEGISLATING FOR THE RIGHT TO FOOD**

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**FOOD AND AGRICULTURE ORGANIZATION OF THE UNITED NATIONS**  
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## Foreword

*The right to food has been established and endorsed with greater urgency than most other human rights. In 1948, when the General Assembly of the United Nations adopted the Universal Declaration of Human Rights, it was given formal recognition as a human right (Article 25.1). Since then, the right to food, or some aspects of it, has been incorporated into a variety of binding and non-binding international human rights instruments. Among them, the International Covenant on Economic, Social and Cultural Rights (the Covenant) is the instrument that deals most comprehensively with this fundamental human right.*

*The right to food is legally binding on the 160 States Parties to the Covenant, Article 2 of which obliges State Parties to take steps, in particular legislative measures, for the progressive realization of the rights contained in the Covenant.*

*The right to adequate food and the fundamental right to be free from hunger were reaffirmed by the 1996 World Food Summit, which also called for better ways of implementing the rights related to food and encouraged all States to ratify the Covenant.*

*The World Food Summit: five years later established the mandate of an Intergovernmental Working Group to draft a set of Voluntary Guidelines to Support the Progressive Realization of the Right to Adequate Food in the Context of National Food Security. The Guidelines were then adopted by consensus by the FAO Council in 2004. These Guidelines recommend constitutional and legislative action as well as coordinated institutional frameworks to address the cross-sectoral dimensions of the right to food.*

*The Food and Agriculture Organization of the United Nations (FAO) has been providing support to countries wishing to adopt a human rights-based approach to food security since 2006. Legislative action is one essential part of such a human rights approach. Indeed, a number of countries have recently revised their constitutions or adopted new framework laws to give effect to the right to food. However, the body of knowledge and experiences in this field are limited.*

*FAO is proud to launch the **Guide on Legislating for the Right to Food**, which provides detailed guidance to legislative drafters and reviewers on legislative provisions and institutional coordination. While the present Guide addresses primarily States Parties to the Covenant, it provides equally valid guidance to non-Parties seeking to implement this fundamental human right. Following a brief explanation of the right to food in international law, the Guide discusses three main levels of legislative incorporation of this human right at the national level, i.e. constitutional recognition, framework law on the right to food and a compatibility review of relevant national legislation.*

*This publication comes at an opportune moment – many countries are currently seeking ways to reform their constitutions and adopt new laws in order to strengthen the right to food. To assist them in this process, the Guide provides detailed information and examples from other countries. In addition to the Guide itself, the companion CD-ROM contains the full text of all national legislation referred to. No doubt there will be updates to this Guide in the future as new lessons are learned from the number of countries that are increasingly engaging in right to food legislative processes.*



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## Acronyms and abbreviations

<b>AoA</b>	Agreement on Agriculture
<b>CEDAW</b>	Convention on the Elimination of All forms of Discrimination against Women
<b>CESCR</b>	Committee on Economic, Social and Cultural Rights
<b>CGIAR</b>	Consultative Group on International Agricultural Research
<b>CRC</b>	Convention on the Rights of the Child
<b>CONASAN</b>	Consejo Nacional de Seguridad Alimentaria y Nutricional (National Food and Nutrition Security Council) (Ecuador, Guatemala)
<b>CONASSAN</b>	Comisión Nacional de Soberanía y Seguridad Alimentaria y Nutricional (National Commission on Food and Nutritional Sovereignty and Security) (Nicaragua)
<b>CONSEA</b>	Conselho Nacional de Segurança Alimentar e Nutricional (National Council on Food and Nutrition Security) (Brazil)
<b>CSO</b>	Civil society organizations
<b>EEZ</b>	Exclusive economic zone
<b>ESCR</b>	Economic, social and cultural rights
<b>FAO</b>	Food and Agriculture Organization of the United Nations
<b>FIAN</b>	FoodFirst Information and Action Network
<b>FIVIMS</b>	Food Insecurity and Vulnerability Information Mapping Systems
<b>GC</b>	General Comment
<b>GRFA</b>	Genetic resources for food and agriculture
<b>HRC</b>	Human Rights Committee
<b>IAIA</b>	International Association for Impact Assessment
<b>ICCPR</b>	International Covenant on Civil and Political Rights
<b>ICERD</b>	International Convention on the Elimination of All Forms of Racial Discrimination
<b>ICESCR</b>	International Covenant on Economic, Social and Cultural Rights
<b>ICJ</b>	International Court of Justice
<b>IFAD</b>	International Fund for Agricultural Development
<b>IFPRI</b>	International Food Policy Research Institute
<b>IPRs</b>	Intellectual property rights
<b>ILO</b>	International Labour Organization

<b>ITPGRFA</b>	International Treaty on Plant Genetic Resources for Food and Agriculture
<b>NGO</b>	Non-governmental organization
<b>OECD</b>	Organisation for Economic Co-operation and Development
<b>OHCHR</b>	Office of the High Commissioner for Human Rights
<b>OIE</b>	World Organization for Animal Health
<b>MCS</b>	Monitoring, control and surveillance
<b>PBR</b>	Plant breeders' rights
<b>PCM</b>	Presidency of the Council of Ministers (Peru)
<b>PGRFA</b>	Plant genetic resources for food and agriculture
<b>Right to Food Guidelines</b>	Voluntary Guidelines to Support the Progressive Realization of the Right to Adequate Food in the Context of National Food Security
<b>SESAN</b>	Secretaría de Seguridad Alimentaria y Nutricional (Food and Nutrition Security Secretariat) (Guatemala)
<b>SINASSAN</b>	Sistema Nacional de Soberanía y Seguridad Alimentaria y Nutricional (National System on Food and Nutritional Sovereignty and Security) (Nicaragua)
<b>SISAN</b>	Sistema Nacional de Segurança Alimentaria e Nutricional (Brazil) Sistema Nacional de Seguridad Alimentaria y Nutricional (Guatemala) (National Food and Nutritional Security System)
<b>SPS Agreement</b>	Agreement on the Application of Sanitary and Phytosanitary Measures
<b>STE</b>	State trading enterprise
<b>TAC</b>	Total allowable catch
<b>TBT Agreement</b>	Agreement on Technical Barriers to Trade
<b>TRIPS Agreement</b>	Agreement on Trade-Related Aspects of Intellectual Property Rights
<b>UDHR</b>	Universal Declaration of Human Rights
<b>UNCLOS</b>	United Nations Convention on the Law of the Sea
<b>WFP</b>	World Food Programme
<b>WHO</b>	World Health Organization
<b>WTO</b>	World Trade Organization





# 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.<sup>1</sup>

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

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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,<sup>2</sup> or by “legislative incorporation”, whereby the treaty provisions must be implemented by national legislation to have binding effect.<sup>3</sup> 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.<sup>4</sup> 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.

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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.<sup>5</sup>

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.<sup>6</sup>

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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,<sup>7</sup> 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 12<sup>8</sup> and the Right to Food Guidelines.<sup>9</sup> 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.<sup>10</sup>

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

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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.<sup>11</sup> 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.

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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.

# **PART ONE**

## **BACKGROUND: THE RIGHT TO FOOD IN INTERNATIONAL LAW**

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# PART ONE

## BACKGROUND: THE RIGHT TO FOOD IN INTERNATIONAL LAW

Starting in the aftermath of the Second World War with the adoption of the United Nations Charter in 1945 and, more particularly, the Universal Declaration of Human Rights (UDHR) in 1948, the affirmation that an individual has certain rights that can be claimed from a state on whose jurisdiction he or she depends paved the way to the development of international human rights law. This body of law has at its centre individuals and the protection of their rights and freedoms. Today, there is an impressive body of human rights instruments adopted at international and regional levels.

Human rights treaties are a special category of international legal agreements. Human rights focus on the inherent dignity of all human beings and the equality of all. Another special characteristic of human rights treaties is that *individuals* (and not other states) are right holders while the main bearers of obligations flowing from the rights are the States Parties to these treaties.

The UDHR was the first international instrument that recognized the human right to food formally, as part of the right to a decent standard of living (Art. 25).<sup>12</sup> Since then, the right to food or some aspects of it have been incorporated into a variety of binding and non-binding human rights instruments, at both international and regional levels. Box 1 explains the difference between binding and non-binding international instruments.

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12 The UDHR, together with the International Covenant on Economic, Social and Cultural Rights and the International Covenant on Civil and Political Rights, form what is known as the “International Bill of Human Rights”.

**BOX 1. Binding and non-binding international instruments**

Binding international instruments – treaties, covenants, conventions – confer legal obligations on states that have ratified them. They thus require States Parties to ensure the effective implementation of the agreement at the national level. Non-binding international instruments – declarations, recommendations, resolutions – provide guidelines and principles and impose moral obligation on states. Although states are not legally bound by their provisions, they usually try to respect as far as possible the non-binding instruments they have committed to implement. In this way, non-binding international instruments have greatly contributed to the development of public international law and, more particularly, human rights law. Furthermore, non-binding instruments or some of their provisions may gain binding value over time, owing to state practice and the acceptance of such practice as law (*opinio juris*). This is the case with some provisions of the UDHR, which have been accepted so widely that they are now considered part of customary international law and are thus binding on all states.

The International Covenant on Economic, Social and Cultural Rights (ICESCR) is the instrument that deals most comprehensively with the human right to food. The ICESCR, which represents a codification of the earlier norm contained in the UDHR, entered into force ten years after its adoption, in 1976. As of June 2009, 160 States Parties<sup>13</sup> have ratified it and are legally bound by its provisions.

Other international instruments relevant to the right to food include several international human rights treaties dealing with the rights of certain categories of people (e.g. children,<sup>14</sup> women,<sup>15</sup> refugees,<sup>16</sup> persons with disabilities<sup>17</sup>) and with specific situations such as armed conflict.<sup>18</sup> Moreover, the right to food

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13 Last update 03 June 2009. Information available at: [http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg\\_no=IV-3&chapter=4&lang=en](http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-3&chapter=4&lang=en)

14 Convention on the Rights of the Child (CRC) adopted in 1989 and entered into force in 1990.

15 Convention on the Elimination of All Forms of Discrimination against Women (CEDAW) of 1979 (entered into force in 1981).

16 Convention relating to the status of Refugees of 1951 (entered into force in 1954) and related Protocol of 1967.

17 Convention on the Rights of Persons with Disabilities. The Convention entered into force in May 2008.

18 Convention of 1949 relative to the Protection of Civilian Persons in Time of War; Article 54 of the Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I), and Articles 69 and 70 of the Protocol Additional to the Geneva Conventions, of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II).

is addressed in a number of regional human rights instruments<sup>19</sup> in addition to numerous international declarations and UN resolutions.<sup>20</sup> Some authors also claim that the right to food or at least the right to be free from hunger is part of customary international law. Discussing this question, however, is beyond the purpose of this Guide and will not be addressed.

The above mentioned binding international instruments are complemented by a number of non-binding ones; these have contributed strongly to a better understanding and interpretation of the meaning of the right to food and the corresponding obligations of states. This is particularly the case for instruments developed within FAO, the United Nations Commission on Human Rights (since 2006, the UN Human Rights Council)<sup>21</sup> and the Committee on Economic, Social and Cultural Rights (CESCR).

In 1999, the CESCR adopted General Comment (GC) 12 on the right to adequate food which 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”. It also outlines in some detail the normative content of this right, states’ obligations and implementation at the national level. Although general comments of the CESCR are not legally binding, they give a highly authoritative interpretation of the rights contained in the ICESCR and are generally followed and respected by its States Parties.<sup>22</sup>

In 2000, the UN Commission on Human Rights appointed a Special Rapporteur on the right to food.<sup>23</sup> Building on GC 12, the Special Rapporteur has focused especially on further clarifying the contents of the right to food and giving meaning to the government obligations with respect to this right.<sup>24</sup>

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19 American Convention on Human Rights (adopted in 1969 and entered into force in 1978) and its Additional Protocol in the area of Economic, Social and Cultural Rights (“Protocol of San Salvador” which entered into force in 1999), African Charter on Human and Peoples’ Rights (entered into force in 1986), European Union Directive laying down minimum standards for the reception of asylum seekers.

20 See, for example, the Universal Declaration on the Eradication of Hunger and Malnutrition of 1974, the World Declaration on Nutrition, adopted at the International Conference on Nutrition in 1992, the Rome Declaration on World Food Security of 1966, the UN General Assembly Resolution 2004/19 of 2004, 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), adopted by the 127th Session of the FAO Council in November 2004.

21 In 2006, the Commission was replaced by the Human Rights Council, established by UN General Assembly Resolution 60/251 of 15 March 2006.

22 See UN. 1999 and Villan Duran, C. 2000.

23 The Special Rapporteur forms part of the special procedure mechanisms of the Commission, which consist of working groups, special rapporteurs, representatives or experts, appointed by the Commission to investigate and address violations on specific human rights thematic issues and on particular countries. For more information on special procedures, see: <http://www2.ohchr.org/english/bodies/chr/special/index.htm>

24 The Special Rapporteur has also explored various aspects of the right to food in more detail. The Special Rapporteur’s reports are available at: <http://www2.ohchr.org/english/issues/food/index.htm>

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* (the Right to Food Guidelines). The Guidelines recommend actions to be undertaken at the national level in order to build an enabling environment for people to feed themselves with dignity, and to establish appropriate safety nets for those who are unable to do so. The Guidelines invite states to apply them in developing their legislation, strategies, policies and programmes aimed at the realization of the right to food at the domestic level (see Box 2).

### **BOX 2. Right to Food Guidelines**

The value of the Right to Food Guidelines is that they moved away from the theoretical to the practical, with respect to assisting governments in realizing the right to food. The Guidelines:

- cover all necessary elements of a sound food security strategy and process;
- promote a framework for cross-sectoral coordination of activities of relevant government actors;
- translate human rights principles into concrete recommendations for action;
- provide a basis for advocating for more equitable policies and programmes.

The Guidelines can help governments design appropriate policies, strategies and legislation. Although voluntary, because they arise from a consensus among FAO member countries the Guidelines can have a significant influence on state policies.

Guidelines 5, 7, 17 and 18 offer states practical guidance for developing effective institutional and legal frameworks to guarantee the right to adequate food and for establishing independent mechanisms to monitor and evaluate the implementation of these Guidelines towards the realization of this right.

# 1.1

## NORMATIVE CONTENT OF THE RIGHT TO FOOD

The holders of the right to food are individuals. This means, in practice, that every person – woman, man, girl and boy – is entitled to this fundamental human right. The “right to food” encompasses two separate norms contained in Article 11 of the ICESCR (see Box 3). The first, stated in paragraph 1, derives from the right of everyone to “an adequate standard of living, including adequate food” and can be termed “right to adequate food”. The second, proclaimed in paragraph 2 of the same article, is the “fundamental right of everyone to be free from hunger”.

### **BOX 3. International Covenant on Economic, Social and Cultural Rights**

#### **Article 2**

1. Each State Party to the present Covenant undertakes 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 recognised in the present Covenant by all appropriate means, including particularly the adoption of legislative measures.
2. The States Parties to the present Covenant undertake to guarantee that the rights enunciated in the present Covenant will be exercised without discrimination of any kind as to race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.



**BOX 3. International Covenant on Economic, Social and Cultural Rights (cont.)****Article 11**

1. The States Parties to the present Covenant recognize the right of everyone to an adequate standard of living for himself and his family, including adequate food, clothing and housing, and to the continuous improvement of living conditions. The States Parties will take appropriate steps to ensure the realization of this right, recognizing to this effect the essential importance of international co-operation based on free consent.
  
2. The States Parties to the present Covenant, recognizing the fundamental right of everyone to be free from hunger, shall take, individually and through international co-operation, the measures, including specific programmes, which are needed:
  - (a) To improve methods of production, conservation and distribution of food by making full use of technical and scientific knowledge, by disseminating knowledge of the principles of nutrition and by developing or reforming agrarian systems in such a way as to achieve the most efficient development and utilization of natural resources.
  
  - (b) Taking into account the problems of both food-importing and food-exporting countries, to ensure an equitable distribution of world food supplies in relation to need.

There is a substantial difference between the two norms. Freedom from hunger is the only right qualified as “fundamental” by the ICESCR. It is considered an “absolute” standard: the minimum level that should be secured for all whatever the level of development of a given state.<sup>25</sup> The right to be free from hunger is closely related to the right to life. In its GC 6 on the right to life, the Human Rights Committee (HRC), the body in charge of monitoring the implementation of the International Covenant on Civil and Political Rights, elaborated on the “social dimension of the right to life”. The HRC stated that “the protection of the right to life requires that States adopt *positive measures*” and considered that states should take all possible measures “to reduce infant mortality and to increase life expectancy, especially in adopting measures to eliminate malnutrition and

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<sup>25</sup> According to the CESCR, “a State Party in which any significant number of individuals is deprived of essential foodstuffs is, *prima facie*, failing to discharge its obligations under the Covenant. If the Covenant were to be read in such a way as not to establish such a minimum core obligation, it would be largely deprived of its *raison d’être*” (GC 3, para. 10). The notion of the “minimum core” of fundamental rights expresses the idea that the state must give priority to the most urgent needs of individuals.

epidemics”.<sup>26</sup> However, the right to adequate food is much broader – it implies the existence of such an economic, political and social environment that will allow people to achieve food security by their own means.

The recognition of the right to food as part of an adequate standard of living and a fundamental right to be free from hunger acknowledges that hunger and malnutrition are caused not just by a lack of available food, but also and above all by poverty, income disparities and lack of access to health care, education, clean water and sanitary living conditions. It also points to the strong links between the right to food and other human rights. The practical implications of this perspective are substantial. Whereas the concept of freedom from hunger requires the state to provide food to those who are unable to meet their food needs for reasons beyond their control (such as age, disability, economic downturn, famine, disaster or discrimination), the right to food requires a progressive improvement of living conditions that will result in regular and equal access to resources and opportunities so that every individual is enabled to provide for his/her own needs.

In normal circumstances, the majority of persons realize their right to food primarily through their own means – by producing food or by procuring it. The ability to realize the right to food thus depends on access to land, water and other productive resources in addition to access to paid employment or other means of procurement (e.g. social security). In fact, widespread hunger and undernutrition in many countries of the world are not a question of the availability of food but are related to inequities in the distribution of resources and people’s physical or economic access to food. According to the Special Rapporteur on the right to food, “it is clear that reducing hunger does not mean increasing the production of food ... but rather finding ways of increasing access to resources for the poor ...”.<sup>27</sup> Discrimination is most often at the root of such inequities. The right to food is thus multidimensional and complex, and is interwoven with other human rights; the capacity of a person to exercise this right freely depends on the proper functioning of many different institutions and actors, both governmental and non-governmental. Exercise of the right can be affected negatively by problems in production, distribution, pricing and information, as well as by lack of access to land and productive resources, discriminatory practices by the state or non-state actors, by lack of, or insufficient, health care and education, by inadequate sanitary systems, by general poverty or factors such as economic decline, climate change, natural and human-induced catastrophes. Any one or more of these may affect an individual’s ability to access food or may cause malnutrition and hunger and thus infringe on an individual’s right to food.

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26 See Human Rights Committee’s GC 6, para. 5 (emphasis added).

27 See UN Special Rapporteur on the right to food, 2003a.

The multidimensional nature of the right to food was clarified by the CESCR in its GC 12 on the right to food. According to the CESCR, the right to food does not mean simply a minimum daily package of calories, proteins and other specific nutrients needed to ensure freedom from hunger and malnutrition (GC 12, para 6). It means:

*... the right to have regular and permanent access, either directly or by means of financial purchases, to quantitatively and qualitatively adequate and sufficient food corresponding to the cultural traditions of the people to which the consumer belongs, and which ensures a physical and mental, individual or collective, fulfilling and dignified life free of fear.<sup>28</sup>*

This way of conceptualizing the content of the right to food builds on the definition of food security used in the World Food Summit Plan of Action in 1996, although its approach differs (see Box 4). The right to food places the individual human being at its centre, thus complementing the fight against food insecurity and hunger with other human rights and principles, i.e. with dignity, transparency, empowerment and participation.<sup>29</sup>

#### **BOX 4. Food security and the human right to food**

Food security as a concept originated in the 1960s and 1970s, and at that time (and still in certain usages) focused on food supply problems – of assuring the availability and to some degree the price stability of basic foodstuffs at the international and national levels. While defining food security as the “availability at all times of adequate world food supplies of basic foodstuffs ... to sustain a steady expansion of food consumption ... and to offset fluctuations in production and prices”, the Universal Declaration on the Eradication of Hunger and Malnutrition adopted by the World Food Conference (1974) described the food crisis afflicting peoples of the developing countries as an increasing imbalance that is “... not only fraught with grave social and economic implications, but also acutely jeopardizes the most fundamental principles and values associated with the right to life and human dignity enshrined in the Universal Declaration of Human Rights”. A link between food security and human rights was established but it had yet to be developed.

28 See UN Special Rapporteur on the right to food, 2001, p 7.

29 See Mechlem, K. 2004.



#### BOX 4. Food security and the human right to food (cont.)

Over the years, the focus shifted from availability of food supply to pointing out the difficulties in physical and economic access to food. This evolution was strongly influenced by research showing that some of the worst famines occurred in contexts of abundant food supply – and were caused by people’s lack of entitlements to gain access to available food (Drèze and Sen, 1991). By the mid-1990s, food security was redefined around five basic points to be addressed: (i) who should get the food; (ii) when; (iii) how; (iv) how much food; and (v) what kind of food. In November 1996, the World Food Summit Plan of Action stated that: “Food security, at the individual, household, national, regional and global levels is achieved when all people, at all times, have physical and economic access to sufficient, safe and nutritious food to meet their dietary needs and food preferences for an active and healthy life.” This definition established the four pillars of food security: (i) availability; (ii) accessibility; (iii) stability; and (iv) utilization of food.

Food security is a *policy* concept – establishing a goal to be achieved (e.g. halving the number of hungry by 2015). It is needs based and programme oriented. The right to food is a *legal* concept; it is an internationally recognized human right giving people an entitlement to justice and adequate redress if their right is violated.<sup>30</sup>

A difference between the two concepts can be further illustrated through an example of a person who regularly receives food through humanitarian aid: although such a person could be considered food secure, her or his right to food is not realized as her/his dependency on external aid in the long term is incompatible with her/his human dignity (as she/he is not considered a subject of the right, but as an object of the aid) and will not ultimately result in her/him becoming self-sufficient, i.e. able to feed her- or himself through her/his own means.

According to the CESCR, the normative content of the right to food is seen as implying: “the availability of food in a quantity and quality sufficient to satisfy the dietary needs of individuals, free from adverse substances, and acceptable within a given culture; [and] the accessibility of such food in ways that are sustainable and that do not interfere with the enjoyment of other human rights”. States Parties must thus focus their actions on the improvement of living conditions for their people rather than on satisfaction of bare minimum needs in terms of food.

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30 *Ibidem*. See also Eide, W.B. 2001.

In terms of *available quantity*, the notion of food implies enough food for a person to live a normal active existence. Availability refers to the possibilities either of feeding oneself directly from productive land or other natural resources, or for well-functioning distribution, processing and market systems that can move food from the site of production to where it is needed in accordance with demand. For this, there must also be *stability* in the supply of food. *Stability* refers to both available and accessible food. In fact, the right to food also implies that individuals are able to gain access to adequate food, both economically and physically (GC 12, paras 8 and 13). Both stability of the supply and accessibility of food presuppose environmental sustainability, implying that there is a judicious public and community management of resources ensuring the availability of sufficient food for both present and future generations. In the words of the CESCR, the notion of sustainability is linked intrinsically to the notion of adequate food (GC 12, para. 7).

The notion of *adequacy* is particularly significant in relation to the right to food since it serves to underline a number of factors which must be taken into account in determining whether particular foods or diets that are accessible and available can be considered the most appropriate under given circumstances. So, food must be available in quantity and *quality* “sufficient to satisfy the dietary needs of individuals, free from adverse substances, and acceptable within a given culture” (GC 12, para. 7). As for the quality component, the food obtained must fulfil minimum safety standards, without contamination through adulteration, unsatisfactory environmental hygiene or inappropriate handling at different stages throughout the food chain (GC 12, para. 10). Further, the adequacy standard goes beyond the freedom from hunger or unsafe food and encompasses cultural acceptability of food. In the words of the CESCR, the precise meaning of “adequacy” is to a large extent determined by prevailing social, economic, cultural, climatic, ecological and other conditions (GC 12, para. 11). It thus underlines that cultural or consumer acceptability implies the need to take into account *non-nutrient based values* attached to food and food consumption and informed consumer concerns regarding the nature of accessible food supplies (GC 12, para. 11).

This understanding underlines the interdependence of all human rights, the close connection of the right to food, and adequate nutrition and care. In this sense, while the *utilization* dimension of food security<sup>31</sup> (i.e. non-food inputs) is not generally considered as a component of the right to food, it should be seen as being implicitly included in the adequacy component of the right to food. Such inputs are particularly relevant for pregnant and breastfeeding women and for children. The relevant international human rights instruments indeed underline explicitly the necessity of ensuring adequate nutrition and care for pregnant and breastfeeding women and for children.<sup>32</sup>

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31 The utilization pillar brings out the importance of non-food inputs in food security: it refers to the utilization of food through adequate diet, clean water, sanitation and health care to reach a state of nutritional well-being where all physiological needs are met.

32 See Article 12.2 of CEDAW and Article 24 of CRC.

## 1.2 STATE OBLIGATIONS

For each right held by individuals, there are corresponding obligations on the part of others. Under international law, human rights obligations are primarily held by states.

Under Articles 2 and 11 of the ICESCR, the main obligation of a State Party is to take steps (to the maximum of its available resources) to realize progressively the full enjoyment of the right to food by every person within the state's jurisdiction. Moreover, in accordance with an established principle of international law, States Parties can extend existing protections of the right to food; in contrast, lowering the level of protection already achieved would generally amount to an infringement of this right (i.e. the principle of “non-retrogression”).<sup>33</sup>

These general obligations have been interpreted in greater detail by the CESCR in its GC 3 (on the nature of States Parties' obligations) and GC 12 (on the right to food in general). Each of the elements of this obligation is examined in further detail in the next three sections.

### **1.2.1 OBLIGATION TO TAKE STEPS, TO THE MAXIMUM OF AVAILABLE RESOURCES, TO PROGRESSIVELY FULLY REALIZE THE RIGHT TO FOOD**

#### **Taking steps**

Although the full realization of the right to food may take time, States Parties are required to take “steps” towards this end, within a reasonably short time

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<sup>33</sup> In GC 3, the CESCR stated that any deliberately retrogressive measures would require the most careful consideration and would need to be fully justified by reference to the totality of the rights provided for in the Covenant and in the context of the full use of the maximum available resources (see para. 9).

after ratification of the ICESCR. According to the CESCR, these steps should be deliberate, concrete and targeted (GC 3, para. 2). They may include the adoption of legislation or the implementation of administrative, economic, financial, educational or social reforms. It is up to each State Party to decide what kind of measures will be the most appropriate to ensure the realization of the right to food for the persons under its jurisdiction. This flexibility acknowledges the many cultural, historical, legal and economic differences between States Parties having the same legal obligations. It is to be noted, however, that “the adoption of legislative measures” is specifically singled out by the ICESCR (Art. 2.1).

### **To the maximum of available resources**

The full realization of the right to food requires, like many other rights, government to invest resources. Under Article 2.1 of the ICESCR, States Parties are to take the steps necessary to ensure full realization of the right to food for its population “to the maximum of their available resources”.

States Parties are thus not obliged to expend all the resources they have or to spend resources that are not available on satisfying the right to food. Nevertheless, they must allocate some resources to realizing this human right. In its GC 3, the CESCR expressly stated that “even where the available resources are demonstrably inadequate, the obligation remains for a state party to strive to ensure the widest possible enjoyment of the relevant rights under the prevailing circumstances”. For example, the CESCR considered that the “obligations to monitor the extent of the realization, or more especially of the non-realization, of economic, social and cultural rights, and to devise strategies and programmes for their promotion, are not in any way eliminated as a result of resource constraints” (GC 12, para. 11).

In practice, States Parties must ensure that resources that *can* be invested in food are not diverted into other fields or do not disappear through corruption. The realization of the right to food (as well as of other economic, social and cultural rights) can be successful even if resources are limited, provided that government plays a proper role in the allocation of resources.

### **To progressively fully realize the right to food**

By requiring governments to realize the right to food progressively, the ICESCR acknowledges that the full realization of this human right requires time. This means that some measures States Parties must take are more immediate, while others are more long term. States Parties have a duty to “move as expeditiously and effectively as possible” (GC 3, para. 9) towards full realization of the right to food for all.

There are various obligations that must be realized *immediately*<sup>34</sup> and which are not dependent on available resources. The concept of progressive realization does not justify government inaction on the grounds that a state has not reached a certain level of economic development. The obligation not to discriminate takes immediate effect and is not subject to the standard of progressive realization.<sup>35</sup>

Furthermore, every State Party has a minimum core obligation to ensure the satisfaction of, at the very least, the minimum essential level of each right recognized by the ICESCR (GC 3, para. 10). This is also an immediate obligation. Under the right to food, this minimum essential level is freedom from hunger; in practical terms, this means an obligation to provide minimum basic resources to enable individuals to be free from threats to their survival.<sup>36</sup> The legal implication of this approach is that a State Party's failure to take appropriate measures to deal with hunger and malnutrition would constitute not only a violation of its obligations under the right to food (ICESCR) but also a violation of its obligations under the right to life (International Covenant on Civil and Political Rights [ICCPR]). Thus, a state is obliged not to deny access to food and to make sure people do not starve at the very least,<sup>37</sup> and to provide food for those who are in danger of starving.

## 1.2.2 OBLIGATION NOT TO DISCRIMINATE

The universality of human rights means they are applicable to each and every person within a state. No condition of any kind (race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status) may be linked to a person's right to exercise his or her right to food freely (ICESCR, Art. 2.2). This principle of non-discrimination is among the most fundamental elements of international human rights law. This is because there are some persons and groups that have more difficulties in enjoying their human rights.

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34 See GC 12, para. 16. See also The Limburg Principles on the implementation of the International Covenant on Economic, Social and Cultural Rights, reproduced in UN doc. E/CN4./1987/17, Annex (1987), Principle 21. The Limburg Principles were adopted in 1996 by a group of distinguished experts in international law, convened by the International Commission of Jurists, the Faculty of Law of the University of Limburg and the Urban Morgan Institute for Human Rights, University of Cincinnati (Ohio, United States of America).

35 The CESCR considers that a state claiming that it is unable to carry out this obligation must demonstrate that every effort has been made to use all the resources at its disposal in an effort to satisfy, as a matter of priority, these minimum obligations (GC 12, para. 17).

36 According to the HRC, a State Party's failure to take appropriate measures to deal with hunger and malnutrition would constitute not only a violation of its obligations under the ICESCR (right to food) but also its obligations under the ICCPR (right to life). This is because "the protection of the right to life requires that states adopt all possible measures "to reduce infant mortality and to increase life expectancy, especially in adopting measures to eliminate malnutrition and epidemics". See GC 6 of the HRC, para. 5.

37 In addition to the ICESCR, international humanitarian law (the branch of international law governing armed conflicts and other related situations) prohibits starvation of civilians as a method of warfare (see Geneva Conventions of 1949).

In addition to the general guarantee against discrimination established by Article 2.2, the ICESCR underlines the need to ensure equal enjoyment by men and women of all rights guaranteed in the ICESCR separately (Art. 3). Still today, discrimination against women continues to exist in every society, developed and developing alike. The spread of this pledge and the willingness to combat these situations led to the adoption of a separate international treaty to guarantee women the protection of their rights (see Box 5). The Right to Food Guidelines also specifically underline the need to eliminate discrimination against women. The Guidelines invite states to “promote women’s full and equal participation in the economy and, for this purpose, introduce, where it does not exist, and implement gender-sensitive legislation providing women with the right to inherit and possess land and other property. States should also provide women with secure and equal access to, control over, and benefits from productive resources, including credit, land, water and appropriate technologies” (Guideline 8.7).

#### **BOX 5. Convention on the Elimination of All Forms of Discrimination against Women**

The Convention on the Elimination of All Forms of Discrimination against Women (CEDAW) was adopted by the United Nations General Assembly in 1979 to reinforce the provisions of existing international instruments designed to combat the continuing discrimination against women. It identifies many specific areas where there has been discrimination against women – for example in regard to political rights, marriage and the family and employment. In these and other areas the Convention spells out explicit goals and measures that are to be taken to facilitate the creation of a global society in which women enjoy full equality with men and thus fully realize their guaranteed human rights.

To combat gender-based discrimination, the Convention requires States Parties to recognize the important economic and social contribution of women to the family and to society as a whole. It emphasizes that discrimination will hamper economic growth and prosperity. It also expressly recognizes the need for a change in attitudes, through education of both men and women, to accept equality of rights and responsibilities and to overcome prejudices and practices based on stereotyped roles. Underlying the concerns that in situations of poverty women have the least access to food and resources, the CEDAW establishes the right of women to adequate nutrition during pregnancy and lactation (Art. 12) and requires States Parties to take measures to ensure that women, notably in rural areas, also have access to resources, services and economic opportunities (Art. 14).

Another important feature of the Convention is its explicit recognition of the goal of actual, in addition to legal, equality, and of the need for temporary special measures to achieve that goal.

Like the obligation to ensure freedom from hunger, the obligation not to discriminate is of immediate effect. It requires that the level of protection of the right to food is objectively and reasonably the same for everybody, irrespective of race, colour, sex and so on. The list of grounds for discrimination mentioned in Article 2.2 is not exhaustive as is indicated by the words “or other status”.<sup>38</sup>

Although the ICESCR speaks of discrimination “of any kind”, not every distinction in treatment will constitute discrimination if the criteria for such distinction are objective and reasonable, and if the aim is to achieve a legitimate purpose.<sup>39</sup> At the international level, two main human rights treaties relating to prohibition of discrimination expressly recognize that special measures may be necessary to correct existing discrimination and ensure that a given human right is truly enjoyed by discriminated persons or groups (see Box 6). Such special measures will not be considered discriminatory with regard to other persons possibly facing difficulties in fully exercising their right to food.

#### **BOX 6. Special measures and promotion of equality in international human rights treaties**

According to Article 4 of CEDAW, “Adoption by States Parties of temporary special measures aimed at accelerating de facto equality between men and women shall not be considered discrimination as defined in the present Convention, but shall in no way entail as a consequence the maintenance of unequal or separate standards; these measures shall be discontinued when the objectives of equality of opportunity and treatment have been achieved”.

The International Convention on the Elimination of All Forms of Racial Discrimination (ICERD) requires States Parties “when the circumstances so warrant, [to] take, in the social, economic, cultural and other fields, special and concrete measures to ensure the adequate development and protection of certain racial groups or individuals belonging to them, for the purpose of guaranteeing them the full and equal enjoyment of human rights and fundamental freedoms” (Art. 2.2).

In its GC on non-discrimination, the HRC recognizes that “not every differentiation of treatment will constitute discrimination, if the criteria for such differentiation are reasonable and objective and if the aim is to achieve a purpose which is legitimate under the Covenant” (GC 18, para. 10). Whether such different treatment will constitute discrimination or not will thus depend on the specific circumstances of each case.

38 These may be, for example, age, disability or HIV/AIDS.

39 See the GC 18 of the HRC, which is also relevant, *mutatis mutandis*, for the interpretation of Article 2.2 of the ICESCR.

In the context of persons with disabilities, the CESCR also noted that because appropriate measures need to be taken to undo existing discrimination and to establish equitable opportunities for persons with disabilities, such measures should not be considered discriminatory as long as they are based on the principle of equality and are employed only to the extent necessary to achieve that principle.<sup>40</sup> Thus, in realizing the right to food, governments may make distinctions for a legitimate purpose, such as correcting *de facto* discrimination or eliminating conditions that cause or help to perpetuate discrimination.

The process of eliminating discrimination and promoting equality in the enjoyment of the right to food for all entails more than affirming the equality of rights and specifying government obligations through legislation. In many states, stereotyped attitudes and social prejudices, customary and cultural practices, traditions, attitudes and religious beliefs create ongoing barriers for certain categories of persons to develop capacities that would allow them to feed themselves by their own means. Customary laws and practices may play a larger role in developing countries where they may condition everyday life and practices more strongly. Eliminating *de facto* discrimination will thus require changing behavioural patterns prejudicial to rights,<sup>41</sup> which is a government obligation well supported in international law (see Box 7).

#### **BOX 7. Discrimination and the role of stereotypes, prejudices and cultural practices**

CEDAW recognizes clearly that abuses and exclusions affecting women and girls are integral to social structures; it therefore requires States Parties “to take all appropriate measures to modify the social and cultural patterns of conduct of men and women, with a view to achieving the elimination of prejudices, customs and all other practices which are based on the idea of the inferiority or the superiority of either of the sexes or on stereotyped roles for men and women” (Art. 5).

The first Protocol to the African Charter on Human and Peoples’ Rights on the Rights of Women in Africa is also explicit in this sense. It requires State Parties “to commit themselves to modify the social and cultural patterns of conduct of women and men through public education, information, education and communication strategies, with a view to achieving elimination of harmful cultural and traditional practices”.<sup>42</sup>

40 See CESCR, GC 5 on persons with disabilities.

41 See Landgren, K. 2005, p 233.

42 The Protocol was adopted on 11 July 2003 and entered into force on 25 November 2005.



### BOX 7. Discrimination and the role of stereotypes, prejudices and cultural practices (cont.)

The Convention on the Rights of the Child (CRC) calls on States Parties to take “all effective and appropriate measures with a view to abolishing traditional practices prejudicial to the health of children” (Art. 24.3), and the Committee on the Rights of the Child underlines specifically the importance of modifying societal practices and patterns toward these ends.<sup>43</sup>

### 1.2.3 OBLIGATION TO RESPECT, PROTECT AND FULFIL

To clarify the specific nature of state obligations and to assist States Parties in their implementation at national level, in GC 12 on the right to food, the CESCR stated that the right to food, like any other human right, imposes three types of obligations: (i) obligation to respect; (ii) obligation to protect; and (iii) obligation to fulfil the right to food.

The typology of state obligations illustrates that compliance with the right to food – as with each and every human right – requires measures varying from passive non-interference to active ensuring of the satisfaction of individual needs, all depending on the concrete circumstances.

The obligation to **respect** requires States Parties to refrain from taking any measure – through actions, policies or the failure to act of its own agencies and public officials – that may result in preventing or denying individuals or groups to provide food for themselves. The obligation to **protect** requires the adoption of specific legislative or other measures regulating third parties’ activities so as to ensure that they do not negatively affect peoples’ enjoyment of the right to food. The obligation to **fulfil** means that States Parties must take positive measures to facilitate and provide for individuals’ enjoyment of their rights. Facilitating the realization of the right to food requires more far-reaching measures on the part of the government in that it has actively to seek to identify vulnerable populations and implement policies and programmes to improve these people’s access to food and their capacity to feed themselves. The obligation to fulfil the right to food by providing food directly will only apply at times and for persons or groups that are not able to exercise their right to food by their own means. The obligation to provide also includes the obligation to ensure, as a minimum, that no one in a country suffers from hunger. In a number of its recent General Comments, the CESCR considered that the

43 See for example Landgren, K. 2005, p. 233.

obligation to fulfil also incorporates an obligation to promote.<sup>44</sup> The state should promote awareness of human rights among its own agents and private actors. In recent years, the need to clarify state obligations and responsibilities for actions taken by themselves and also by other actors outside their borders has become stronger.

#### 1.2.4 OBLIGATION OF INTERNATIONAL COOPERATION AND ASSISTANCE

In view of countries' vastly different economic powers, international cooperation and assistance are crucial to realizing the right to food of all people.<sup>45</sup> Articles 2.1 and 11 of the ICESCR refer to international cooperation and assistance as among the means to achieve the full realization of the right to food. In GC 12, the CESCR underlined the essential role of international cooperation in achieving the full realization of the right to food (para. 36).

The obligation to cooperate requires States Parties not to permit – or to conduct – activities within their jurisdiction without regard to the rights of other states. States Parties should refrain from any act that could deprive another state of the ability to realize the right to food for its inhabitants. As a general matter, the obligation to cooperate also implies a duty on States Parties to refrain from unilateral measures that are not in accordance with international law. Such measures include the use of food as an instrument of political pressure, making food aid conditional on economic or political issues, setting up blockades hindering food supplies reaching another country and the imposition of sanctions that affect food supplies of the population (GC 12, para. 37).<sup>46</sup> The obligation to cooperate also requires those countries facing serious resource constraints to seek international assistance in situations where widespread starvation would otherwise occur (GC 12, para. 17).

According to the CESCR, the obligation of international assistance requires that States Parties, according to their available resources, facilitate realization of the right to food in other countries, for example through financial and technical assistance, and through disaster relief and humanitarian assistance in times of emergency,

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44 See CESCR, GC 14 on the right to the highest attainable standard of health, or GC 15 on the right to water.

45 In light of (1) the relevant provisions of the UN Charter (notably Articles 1, 55 and 56); (2) a large number of bilateral, regional or multilateral treaties concluded with the aim of specifically establishing and reinforcing cooperation among the states concerned; and (3) an even more voluminous quantity of non-binding legal instruments asserting the obligation of cooperation, it can be said that the general cooperation in all sectors – thus including the human right to food – is the expression of a truly universal *opinio juris* (See Dupuy, P.M. 2000). Under international law, then, it thus represents a binding obligation on all states.

46 For more information on this issue, see Donati, F. & Vidar, M. 2008.

including assistance to refugees and internally displaced persons (GC 12, para. 38). Naturally, assistance should be provided in a manner consistent with the ICESCR and other human rights as well as relevant humanitarian law standards.<sup>47</sup>

It is increasingly held among experts in economic, social and cultural rights that three sets of steps also apply to States Parties' international obligations.<sup>48</sup> Such understanding implies that where state action in another country undermines directly the ability of that country's population to realize their right to food (failure to respect) or where failure to regulate domestic actors results in right to food abuse abroad (failure to protect), States Parties should be held to account.<sup>49</sup>

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47 See Cotula, L. & Vidar, M. 2003.

48 See Coomans, F. 2004. For more information on international legal dimensions of the right to food see Donati & Vidar, 2008 and Skogly, S. & Gibney, M. 2002.

49 See UN Special Rapporteur on the right to food. 2004.

## 1.3

# RIGHT TO FOOD IN RELATION TO OTHER HUMAN RIGHTS

All human rights are universal, indivisible and interdependent and interrelated.<sup>50</sup> Although many consider that the right to food needs to be properly secured before one can turn to the luxury of the right to vote or to the privilege of freedom of expression, today all governments generally accept that there should be no prioritization among different types of rights.<sup>51</sup> Different human rights are seen to be mutually reinforcing: better nutrition, health and education will lead to improvements in civil and political freedoms and the rule of law. Similarly, freedom of expression and association can ensure that the best decisions are taken to protect rights to food, health and education.

As noted above, the full realization of the right to food at the national level requires not only dealing with factors that determine overall food security in a country (i.e. ensuring availability and accessibility of food, and planning for shortages, emergencies and distribution problems), it equally requires ensuring progress in the exercise of other human rights. These include, for example, those rights related to land and property, to health, education and work; those concerning participation in decision-making, freedom of association and freedom of expression and information in addition to eliminating inequalities and improving underlying conditions of life that may hamper the achievement of food security.<sup>52</sup> The notion of these interrelationships can help governments with limited resources to set priorities for action, and every individual to help promote the right to food and other human rights.<sup>53</sup>

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50 Vienna Declaration and Programme of Action of the World Conference on Human Rights, 1993. UN doc. K/CONF.157/23, 12 July 1993.

51 See Clapham, A. 2007.

52 For an analysis of the interrelationship between different human rights and the right to food, see Vidar, M. 2005.

53 *Ibidem*, p. 142.

The interrelatedness between the right to food and other human rights is also at the basis of international consensus on the requirement for states to ensure that decision-making processes (from policy formulation to law making down to administrative acts) to implement the right to food and their outcomes comply with participation, accountability, non-discrimination, transparency, human dignity, empowerment and rule of law (following the “PANTHER” framework developed by the FAO Right to Food Unit).

Full, free and meaningful participation is a human right as well as a practical way of gaining consensus. Effective participation enables persons and groups to share meaningfully in decisions that affect their livelihood and their capacity to feed themselves; it also promotes transparency and accountability in decision-making. The principle of accountability stresses that government and all its officials must be accountable to supervisors and to the people they serve. People should be able to challenge both the process and the substance of decisions that affect their livelihood. Non-discrimination, as discussed above, may require that persons and groups in fundamentally different situations are treated differently.

Transparency is closely related to the right to freedom of information. The government must ensure that information about right to food activities, policies, laws and budgets, is published in ways that are accessible to those who need to know it, that it uses language that can be understood easily and that it is disseminated through appropriate media. The principle of human dignity requires public authorities to ensure that measures affecting people’s livelihoods and the capacity to realize their right to food are carried out in a way that respects them and their dignity. Empowerment means a change in power relations within a society and between a government and its people; it requires authorities to give people a choice and to enable them to influence and exert control over decisions affecting their livelihood.

Finally, respect for the rule of law means that every member of society, including decision-makers, must obey the law. The most important application of the rule of law is the principle that governmental authority is legitimately exercised only in accordance with written, publicly disclosed laws adopted and enforced in accordance with established procedural steps that are referred to as due process. Accountability and access to justice (through tribunals, human rights institutions or other means of conflict resolution) are essential for the rule of law to be upheld.<sup>54</sup>

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54 Despite long-standing debates on the “justiciability” of the economic, social and cultural rights, it is now generally accepted that violations of these rights can be brought before both, national and international judicial bodies (see below, section 3.14).

The implementation of the right to food into domestic law will equally have to be based on and conform to these principles (see below, section 3.2.5).

Parts Two to Four of the present Guide, which follow below, will address each of the three legislative strategies for the incorporation of the right to food into the national legal system in turn.

# **PART TWO**

## **CONSTITUTIONAL RECOGNITION**

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## PART TWO

# CONSTITUTIONAL RECOGNITION

Whereas the ICESCR refers to “legislative measures” in general to implement human rights recognized therein, the Right to Food Guidelines mention “state constitutions” specifically.<sup>55</sup> Constitutions usually contain a declaration of fundamental human rights that are indispensable for guiding and limiting government action and inaction. The superiority of a constitution implies that every law in a country must conform to the constitutional provisions and, in cases of conflict, the constitutional norm will always prevail. Thus, the inclusion of the human right to food in the national constitution gives the strongest possible basis for the right. Constitutional recognition of the right to food also provides a safeguard against the withdrawal of this fundamental right for reasons of political expediency; in most countries, in comparison to ordinary legislation, modifying the constitution requires special procedures, which ensures greater permanency.<sup>56</sup>

The judiciary interprets the legality and legitimacy of governmental action or inaction in relation to fundamental rights.<sup>57</sup> Many constitutions – in particular those recently adopted or amended – provide for the right to claim protection of guaranteed rights through judicial proceedings, including in the form of individual

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55 States are invited to “include provisions in their domestic law, which may include their *constitutions, bills of rights or legislation*, to directly implement the progressive realization of the right to adequate food” (Guideline 7.2, emphasis added).

56 See Liebenberg S. 2001.

57 See Steiner & Alston, 2000, p. 990.

constitutional complaints before constitutional courts.<sup>58</sup> A great number of constitutions also establish or provide for the establishment of independent institutions, such as national human rights commissions or ombudspersons that are charged with the monitoring and enforcement of guaranteed human rights and freedoms.

Many national constitutions do take account of the right to food or some of its aspects. Recognition of the right usually falls in three possible categories: (i) explicit recognition, as a human right in itself or as part of another, broader human right; (ii) recognition as a directive principle of state policy; and (iii) implicit recognition, through broad interpretation of other human rights.

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58 For example, Latin American countries provide for the institution of “*amparo*” or similar remedies, meaning that every person may apply to the organs of the judiciary including the Constitutional Court, and request the adoption of urgent measures to halt, prevent the commission of or immediately remedy the consequences of an unlawful act by a public authority violating any of the constitutional rights and which may cause imminent, serious and irreparable harm (Argentina, Bolivia, Brazil, Chile, Colombia, Costa Rica, Ecuador, El Salvador, Guatemala, Honduras, Mexico, Nicaragua, Panama, Paraguay, Venezuela [Bolivarian Republic of]). In Colombia the *Acción de Tutela*, in Chile the *Acción de Protección* and in Brazil the *Acção de Segurança* have also the same function as the *Acción de Amparo*. Some of the constitutional clauses of *amparo* only provide the justiciability to fundamental rights, while others such as the Guatemalan, Ecuadorian or Venezuelan constitution include also the justiciability of human rights recognized in international law treaties. A similar mechanism exists in some other states (Belarus, Bulgaria, Eritrea, Mozambique, Uzbekistan). Equally, constitutions in the majority of Central and Eastern European states, some African and Asian states provide for individual constitutional complaints, meaning that any person has the right to apply directly to the Constitutional or Supreme Court in case of an alleged violation of one of the constitutionally guaranteed rights and freedoms (Azerbaijan, Benin, Croatia, India, Nepal, Slovenia, South Africa). In Nepal, Pakistan and the Turks and Caicos Islands there is also a possibility of public interest litigation allowing direct access to justice for the protection of guaranteed rights. In India, this possibility has been developed through judicial practice.

## 2.1 EXPLICIT RECOGNITION

Direct recognition of the right to food as an individual human right for all persons<sup>59</sup> or for specific categories of population such as children<sup>60</sup> is rarely seen in state constitutions, although there are some examples. A few of them are given in Box 8.

### BOX 8. Direct recognition of the right to food – examples from state practice

... for all

#### Bolivia

**Article 16.** Every person has the right to water and food. The State has the obligation to guarantee food security for all through a healthy, adequate and sufficient food.<sup>61</sup>

#### Ecuador

**Article 13.** The Right to Food includes the free and permanent access to sufficient innocuous and nourishing food for a healthy and quality feeding, in accordance with the culture, traditions and customs of the peoples. The Ecuadorian State will recognize and guarantee the right to food sovereignty.



59 Bolivia (Art. 16), Guyana (Art. 40), Haiti (Art. 22), South Africa (Art. 27.1). The Constitution of Nicaragua (Art. 63) provides for the right of every person to be free from hunger.

60 Brazil (Art. 227), Colombia (Art. 44), Cuba (Art. 9), Guatemala (Art. 51), Honduras (Art. 123), Panama (Art. 52), Paraguay (Art. 54), and more specifically, indigenous children: Costa Rica (Art. 82), Mexico (Art. 4) and South Africa (Art. 28(1.c)) and prisoners and detainees: South Africa (Art. 35.2.e).

61 The new, revised Constitution of Bolivia has been recently adopted and entered into force in February 2009.

**Box 8. Direct recognition of the right to food – examples from state practice (cont.)****South Africa**

**Article 27.1.** Everyone has the right to have access to [...] b. sufficient food and water; and c. social security, including, if they are unable to support themselves and their dependants, appropriate social assistance. 2. The State must take reasonable legislative and other measures, within its available resources, to achieve the progressive realization of each of these rights.

**... for children****Colombia**

**Article 44.** Children have fundamental rights to: life, integrity, health and social security, adequate food.

More often, constitutional provisions referring to the right to food take other forms with clauses elaborating, for example:

- ◆ A human right to an adequate standard of living or quality of life, with food as one of its components (see Box 9).<sup>62</sup>

**BOX 9. Right to food as part of the right to an adequate standard of living/quality of life – examples from state practice****Belarus**

**Article 21.2.** Every individual shall exercise the right to a dignified standard of living, including appropriate food, clothing, housing and likewise a continuous improvement of necessary living conditions.

**Republic of Moldova**

**Article 47.1** The State is obliged to take action aimed at ensuring that every person has a decent standard of living, whereby good health and welfare based on available food, clothing, shelter, medical care, and social services are secured for that person and his/her family.

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62 The Congo (Art. 34.1), the Republic of Moldova (Art. 47.1), Ukraine (Art. 48).

- ◆ *A right to a minimum wage*, capable of satisfying basic living needs notably food (see Box 10).<sup>63</sup>

#### **BOX 10. Right to food as part of the right to a minimum wage – examples from state practice**

##### **Brazil**

**Article 7.** The following are rights of urban and rural workers, among others, that aim to improve their social conditions: ...

**IV** – nationally unified minimum wage, established by law, capable of satisfying their basic living needs and those of their families with housing, food, education, health, leisure, clothing, hygiene, transportation and social security, with periodical adjustments to maintain its purchasing power.

- ◆ *A right to development*, including access to food (see box 11).

#### **BOX 11. Right to food as part of the right to development – examples from state practice**

##### **Malawi**

**Article 30.2.** The State shall take all necessary measures for the realization of the right to development. Such measures shall include, amongst other things, equality of opportunity for all in their access to basic resources, education, health services, food, shelter, employment and infrastructure.

As mentioned earlier, the legal consequence of the superiority of the constitution in the hierarchy of national legal norms is that all legislative or sublegislative norms have to conform to it; in the case of a clear-cut conflict between a constitutional provision and a law, the constitutional provision will prevail. Direct recognition of the right to food in the substantive part of the constitution has a far-reaching effect on all state institutions (administrative authorities, legislature and judiciary).

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63 Brazil (Art. 7), Suriname (Art. 24).

Administration of public services and treatment of the most vulnerable members of society can be held to higher standards by permitting relatively powerless people to hold government to account for the actions that infringed their right to food and to seek an appropriate remedy through judicial action. An example of a judicial case before the Constitutional Court of South Africa, where the court addressed the question of whether the measures taken by the state could be considered as conforming to the obligation of the state to realize the right to adequate housing guaranteed under the state constitution is given in Box 12.

### **BOX 12. Human rights and the Constitutional Court – example from South Africa**

The applicant, Ms Grootboom, a member of a large group of 390 adults and 510 children, lived in appalling circumstances in an informal settlement. The land area was privately owned and earmarked for construction of low-cost housing for the poor as part of a government housing programme. The state evicted the community with no provision for alternative accommodation and thus left them without shelter. She filed a lawsuit to enforce their right to adequate housing, protected by the South African Constitution before the Cape High Court, which ordered the Government to provide them with basic housing.

Upon appeal, the Constitutional Court considered in its decision that measures aimed to promote cheap housing (and in that sense to realize the right to housing) violated the constitutional right to housing of people who had illegally occupied an area of land and who were forcibly evicted from it in order to implement the housing programme. Although these people had no legal claim on the land, the housing programme failed to consider their immediate and “desperate” need for shelter.<sup>64</sup>

In another recent case, Mr Khoza and a number of other persons, who were permanent residents in South Africa, complained against legislative provisions, which limited entitlement to social grants for the aged to South African citizens, thus preventing children of non-South African citizens in the same position to obtain childcare grants available to South African children (regardless of the citizenship status of the children themselves). The Constitutional Court held that the exclusion of permanent residents who were not South African citizens from social welfare benefits was an unreasonable and unjustifiable interference with the constitutional right to social security guaranteed to “everyone” under Section 27 of the Constitution.



<sup>64</sup> *Government of South Africa vs. Grootboom*, CCT38/00, Judgment of 21 September 2000, para. 23.

### **Box 12. Human rights and the Constitutional Court – example from South Africa (cont.)**

This was linked to the guarantee of equality in Section 9 of the Constitution. Noting that permanent residents were in a position largely analogous to South African citizens, and that extension of benefits to them would not have a significant budgetary impact, the Court considered that a limitation on their rights that affected their dignity and equality in material respects could not be justified.<sup>65</sup> The Legal Resources Centre, which was responsible for bringing the case, estimated that the judgment would impact on at least 250 000 people in South Africa. The judgment has largely been given effect by the state; the legislation at issue in *Khoza* has since been repealed and replaced by the Social Assistance Act of 2004.

*Source: International Network for Economic Social and Cultural Rights (ESCR-net), available at: [www.escr-net.org/caselaw/](http://www.escr-net.org/caselaw/)*

Provided that public officials and national courts are knowledgeable of the constitutional provisions and apply them in their work, direct recognition of the right to food in the substantive part of the constitution will ensure (at least in theory) that the right to food is taken into account in all areas of state activity affecting the enjoyment of this fundamental human right.

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65 *Khosa and Others vs. Minister of Social Development*, CCT 53/03, Judgment of 1 October 2004.

## 2.2

# RECOGNITION AS A DIRECTIVE PRINCIPLE OF STATE POLICY

Many countries that do not recognize the right to food explicitly in their substantive provisions or bills of rights nonetheless refer to food or food security or to raising the level of nutrition and standard of living in the provisions that set out the objectives or directive principles of state policy<sup>66</sup> (see Box 13). Directive principles are statements of principle. They often represent the values a society aspires to although at the time of drafting they may not reflect a broad societal reality. Most often, these constitutional provisions guide governmental action, in particular in the socio-economic field.

### BOX 13. Recognition as a directive principle of state policy – examples from state practice

#### Nigeria

**16. (2)** The State shall direct its policy towards ensuring:

/.../

**(d)** that suitable and adequate shelter, suitable and adequate food, reasonable national minimum living wage, old age care and pensions, and unemployment, sick benefits and welfare of the disabled are provided for all citizens.



66 Bangladesh (Arts 15 and 18), Ethiopia (Art. 90), India (Art. 47), Iran (Arts 3.12 and 43), Malawi (Art. 13.10), Nepal (Art. 33.h), Nigeria (Art. 16.2d), Pakistan (Art. 38), Panama (Art. 110.1), Sierra Leone (Art. 8.3a), Sri Lanka (Art. 22, 27.c), Uganda (Art. 14.2).



### BOX 13. Recognition as a directive principle of state policy – examples from state practice (cont.)

#### Sri Lanka

**Article 27.1** The State is pledged to establish in Sri Lanka a democratic socialist society, the objectives of which include –

(a) the full realization of the fundamental rights and freedoms of all persons;

...

(c) the realization by all citizens of an adequate standard of living for themselves and their families, including adequate food, clothing and housing, the continuous improvement of living conditions and the full enjoyment of leisure and social and cultural opportunities ..

The use of directive principles varies from country to country. In Germany, the so-called “basic institutional principles” have been used to interpret the bill of rights and to limit certain rights in order to achieve the objectives of a “social state”.<sup>67</sup> The German Federal Constitutional Court and Federal Administrative Courts have interpreted the “social state clause” in order to recognize a right to a social minimum, and a correlative state duty to provide it, that includes food-related obligations.<sup>68</sup> Similarly, in India, although the directive principles began as unenforceable guidelines, an active Supreme Court has transformed them into strong constitutional provisions and tools to achieve socio-economic goals. In a number of cases, the Supreme Court of India interpreted the right to life to include the right to food based on the constitutional provisions on directive principles of the state policy. Box 14 gives a short overview of some of them.

### BOX 14. Using directive principles of state policy to interpret the right to life – example from India

Following starvation deaths that occurred in the State of Rajasthan, in 2001, the People’s Union for Civil Liberties (PUCL) introduced a petition before the Supreme Court



67 The German Constitutional Court has ruled that the purpose of the “social” clause is to enable the state to take steps to protect the weak and infirm (BVerfGE 5, 10), to enable and encourage the state to implement measures aimed at combating unemployment, to provide social benefits to the population and to address social inequalities in general (BVerfGE 1).

68 See Courtis, 2007.

**BOX 14. Using directive principles of state policy to interpret the right to life – example from India (cont.)**

claiming the enforcement of various food schemes and the Famine Code (permitting the release of grain stocks in times of famine). They grounded their arguments on the right to food, deriving it from the constitutionally guaranteed right to life.

Over seven years, various interim orders were made by the court; through its orders, the Supreme Court interpreted the constitutional right to life in light of the directive principles and the state's duty to raise the level of nutrition and the standard of living of its people. Finding that the prevention of hunger and starvation “is one of the prime responsibilities of the Government – whether Central or the State”, the Supreme Court ordered the central and several state governments to take a number of measures regarding the realization of the right to food. The Court ordered, among others, that: the Famine Code be implemented for three months; grain allocation for the food for work scheme be doubled and financial support for schemes be increased; ration shop licensees must stay open and provide the grain to families below the poverty line at the set price; publicity be given to the rights of families below the poverty line to grain; all individuals without means of support (older persons, widows, disabled adults) are to be granted an *Antyodaya Anna Yojana* ration card for free grain; state governments should introduce one hot meal in schools; and has suggested modifications to the National Maternity Benefits Schemes. The court issued further orders in 2006, 2007 and January 2008.<sup>69</sup>

In another case, *Jain vs. State of Karnataka*, the Court further held that the “right to life includes the right to live with human dignity and all that goes along with it, namely the bare necessities of life such as adequate nutrition ...”.<sup>70</sup> In yet another case, the court reasserted its view that the right to life implies the right to food, water, decent environment, education, medical health and shelter. According to the Court: “These are basic human rights known to any civilised society. All civil, political, social and cultural rights cannot be exercised without these basic human rights.”<sup>71</sup>

In contrast, there has been very limited judicial reference to the directive principles in Ireland. The Irish Human Rights Commission has stated that “the neglect of these provisions, even to the extent of not using Article 45 on Directive Principles on Social Policy in interpreting other human rights has meant that this part of the constitution has not been able to adapt and evolve over the intervening decades”.<sup>72</sup>

69 See Writ Petition (Civil) No. 196 of 2001; the full text of all interim orders issued by the Supreme Court in this case can be found at the Web site of the Right to Food Campaign India ([www.righttofoodindia.org](http://www.righttofoodindia.org)).

70 See *Jain vs. State of Karnataka*, AIR (1992) S.C.C. 1858.

71 See *Chamelli Singh & Ors. State of U.P. & Anr.*, (1996) 2 S.C.C. 549.

72 See Irish Human Rights Commission. 2005, p. 77.

The effects of incorporating the right to food or aspects of it into constitutional provisions on principles of state policy (in contrast to including it into a section on fundamental rights) thus may depend on the readiness of judges to construct more general rights by relying on them. The government position towards economic and social rights in general may also play a role here; where they are viewed as aspirational goals, their position is weak. Where they are viewed as enforceable individual rights and where the overall environment is supportive of human rights claims, courts may take a more active role.

## 2.3

# IMPLICIT RECOGNITION THROUGH BROAD INTERPRETATION OF OTHER HUMAN RIGHTS

There are many countries whose constitutions do not refer to “food” or “nutrition” explicitly, but which guarantee other human rights in which the right to food is partly or fully implicit.<sup>73</sup> These include the right to an adequate or decent standard of living<sup>74</sup> or to well-being;<sup>75</sup> the right to a means necessary to live a dignified life;<sup>76</sup> the right to be provided with a standard of living not below the subsistence level;<sup>77</sup> and the right to a minimum wage ensuring existence compatible with human dignity.<sup>78</sup> This can also be said in the case of the right to social security, assistance for the destitute or special assistance and protection of (orphaned) children;<sup>79</sup> aid for (working) mothers

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73 In addition, some countries with no written constitution (such as Australia, Israel, New Zealand and the United Kingdom) recognize some of these economic and social rights (such as the right to a minimum wage and to social security benefits) through specific national legislation and case law.

74 Armenia (Art. 34), Bolivia (Art. 158), Cambodia (Art. 63), Costa Rica (Art. 50), Czech Republic (Art. 30), Ethiopia (Art. 89), Guatemala (Art. 119), Pakistan (Art. 38a), Romania (Art. 47(1), Turkey (Art. 61 – right is limited to widows, orphans of those killed in war, disabled and war veterans).

75 Azerbaijan (Art. 16), El Salvador (Art. 1), Equatorial Guinea (item 25), Eritrea (Art. 21.7), Guinea (Art. 15), Peru (Art. 2).

76 Belgium (Art. 23), Cyprus (Art. 9), El Salvador (Art. 101), Finland (Art. 19), Ghana (Art. 36), Switzerland (Art. 12), Thailand (Art. 79), Venezuela (Bolivarian Republic of) (Art. 299).

77 Georgia (Art. 32), Germany (arts 1, 20, 28), Kyrgyzstan (Art. 27), Netherlands (Art. 20(1)).

78 Andorra (Art. 29), Argentina (Art. 14bis 1)), Belarus (Art. 42), Bolivia (Art. 7.e), Costa Rica (Art. 57), Croatia (Art. 55), Cuba (Art. 9), Ecuador (Art. 35), El Salvador (Art. 70.2), Honduras (Art. 128.5), Italy (Art. 36), Lesotho (Art. 30), Madagascar (Art. 29), Mexico (Art. 123), Nigeria (Art. 16d), Paraguay (Art. 92), Peru (Art. 24), Portugal (Art. 59), Romania (Art. 43), Slovakia (Art. 35), Spain (Art. 35), Venezuela (Bolivarian Republic of) (Art. 91).

79 For example, Republic of Moldova (Art. 50(2)), Spain (Art. 39(2)).

before and after childbirth, for the disabled and for the elderly. Some constitutions even stipulate special protection in the case of loss of the family breadwinner.<sup>80</sup>

Thus, the absence of direct recognition of the right to food in a state constitution does not mean that the right to food is not protected *at all* in the country. Depending on a country's legal tradition, other human rights can be interpreted as including the right to food. A combination of other constitutional provisions together with general state policy commitments or directive principles may be used to advance the implementation of this right. For instance, there may be state policies on the promotion of well-being, the right to work and the right to social security (in cases of unemployment or an inability to work) that can be relied upon. As previously mentioned, in India, the fundamental right to life has been expanded by the courts with reference to directive principles. This creates a dynamic relationship between the Fundamental Rights and Directive Principles of the Constitution, and an avenue to enforce the latter as individual rights (see Box 14 above). In other cases, courts can expansively interpret civil (and not just economic and social) rights, some of which are widely guaranteed under domestic law, such as the right to life, the right not to be subjected to cruel or degrading treatment and the right to human dignity, even without referring to directive principles of state policy. Some examples of such an expansive interpretation are given in Box 15.

### BOX 15. Implicit recognition – examples from state practice

#### Right to life

In the case of *G vs. An Bord Uchtála* before the **Irish** courts, justices referred to the right to life as necessarily implying “the right to be born, the right to preserve and defend, and to have preserved and defended, that life and the right to maintain that life at a proper human standard in matters of food, clothing and habitation.”<sup>81</sup>

#### Prohibition of degrading or inhuman treatment

According to one **US** federal appellate court, food provided to prisoners that is “inadequate in amount, spoiled or nutritionally inadequate violates the Eighth Amendment to the Constitution that prohibits cruel and unusual punishment.”<sup>82</sup>

80 For example, Kazakhstan (Art. 28(1)), Russian Federation (Art. 39(1)), Slovakia (Art. 39(1)).

81 See Irish Human Rights Commission. 2005, p. 107.

82 See *Antonelli vs. Sheahan*, 81 F.3d 1422, 1432 (7th Cir. 1996) concerning alleged provision of “rancid food” and “nutritionally deficient diet”; *Strope vs. Sebelius*, US Court of Appeals, 06-3144 (D.C. No. 05-CV-3284-SAC) (10th Cir. 2006) concerning alleged retaliation of prison officials against inmate complaining about the quality and adequacy of the food. See also *Cooper vs. Sheriff, Lubbock County*, 929 F.2d 1078, 1083 (5th Cir. 1991) concerning alleged refusal of officials to feed inmates for 12 consecutive days.

**BOX 15. Implicit recognition – examples from state practice (cont.)**

In a recent criminal case involving a person whose prison rations were reduced as a form of punishment for escaping from custody, the High Court of *Fiji* referred to Article 11.1 of the ICESCR and considered that such treatment amounts to degrading and inhuman treatment prohibited by the Constitution. The Court wrote that “[a]ny reduction in rations ... was not conforming to the Republic of Fiji undertaking to provide its people with adequate food.... To reduce prison rations as a form of punishment ... contravenes section 25(1) of the Constitution as amounting to degrading and inhumane treatment”.<sup>83</sup>

In Europe, in a recent ruling concerning access of asylum seekers to welfare benefits, the House of Lords of the *United Kingdom* considered that legislation conditioning asylum seekers’ access to basic amenities such as food and shelter on their having made an asylum claim as soon as reasonably practicable after entering the United Kingdom could amount to “inhuman and degrading treatment” prohibited under Article 3 of the European Convention on Human Rights.<sup>84</sup>

The experience of a number of countries has shown that governments can indeed be held to account for ensuring the effective exercise of the right to food under constitutional provisions on other human rights.

However, the extent to which indirect invocation of other human rights (civil and political rights or other economic and social rights) can lead to effective protection of the right to food at the national level will ultimately depend on judicial interpretation of the state constitution and whether a given human right (e.g. the right to life) will be broadly interpreted so as to also include the right to food. This may not always be the case (see Box 16) and it may not always cover all dimensions of the right to food.

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83 See *Rarasea vs. The State*, Criminal Appeal No. HAA0027.2000 of 12 May 2000.

84 See *Regina vs. Secretary of State for the Home Department ex parte Adam, Regina vs. Secretary of State for the Home Department ex parte Limbuela, and Regina vs. Secretary of State for the Home Department ex parte Tesema* (conjoined appeals), House of Lords, [2005] UKHL 66.

**Box 16. Narrow interpretation of state obligations – example from Canada**

Ms Gosselin petitioned the Supreme Court of **Canada** claiming that the Quebec Regulation Respecting Social Aid that reduced welfare payments for able-bodied adult recipients under 30 under certain conditions was violating her constitutional right to life and the security of the person. In a long-awaited decision, the Supreme Court was unwilling to accept that the deprivation of assistance necessary for basic requirements of security and dignity violated the right to life guaranteed by the Canadian Charter of Rights and Freedoms. The Chief Justice concluded that the relevant constitutional provision cannot be held as the “basis for a positive state obligation to guarantee adequate living standards”, going on to state that “the courts cannot substitute their judgment in social and economic matters for that of legislative bodies”. However, an almost unanimous court (8 out of 9) left open the possibility that in another case “a positive obligation to sustain life, liberty or security of person may be made out in special circumstances”.<sup>85</sup>

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85 *Gosselin vs. Québec (Attorney General)*, [2002] 4 S.C.R. 429. For more information on this case see Schafer, C. 2003.

## 2.4 RECOMMENDATIONS

The effects of the constitutional guarantee of the right to food in a particular country will depend on a number of factors: (i) how the right is phrased; (ii) how the right is described and recognized; (iii) how aware state authorities and courts are of the right; and finally (iv) how eager they are to enforce the right.

While constitutional principles on state policy or the protection of the right to food through broad interpretation of other human rights can be employed to strengthen its implementation at the national level, this does not guarantee that this fundamental human right will be taken into account by state authorities in their work and actions. From an individual's viewpoint, the possibility of obtaining protection and redress against infringements of his or her right to food will depend on the willingness of national judges to enforce this human right and also the individual's ability to approach governmental bodies at different levels to obtain administrative redress of such rights, armed with a constitutional and/or legislative norm. A factor that can contribute to the more open attitudes of judges is the level of detail with which a given human right was described. In some state constitutions those rights considered particularly important are drafted in a more detailed way.<sup>86</sup>

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86 Portugal has a constitution with rather detailed provisions on economic, social and cultural rights: for example, Article 63 on social rights and duties states "1. Everyone is entitled to social security. 2. It is the duty of the State to organise, co-ordinate and subsidise a unified and decentralised social security system, with the participation of the trade unions and other associations representing workers and associations representing other beneficiaries. 3. The social security system provides protection for citizens in sickness or old age or when disabled, widowed, orphaned or unemployed, and in all other situations in which the means of subsistence or the capacity to work have been lost or impaired. 4. All periods in work, no matter in which sectors of activity this work was performed, are taken into account in calculating the amount of old age and disability pensions, as determined by law. 5. The State shall support and supervise, as laid down by law, the activity and functioning of private institutions of social solidarity and other non-profit institutions of recognized public interest that pursue the objectives of social security contained in this Article /.../" (see COE. 2004).



A direct and clear constitutional recognition of the right to food would act as a yardstick against which to measure the action or inaction by government actors. It could thus facilitate the accountability of public authorities in matters that are fundamental to the lives of most citizens, and it would avoid the uncertainty of relying on judicial decision-making and have the most practical effect in protecting the rights of the people who are most marginalized and deprived in an unequal society. It would also provide a safeguard against the withdrawal of the right. Specifically incorporating the right to food into the main text of the constitution in an unequivocal form (“every person has the right to ...”) would have the advantage of clearly setting the right as being fundamental and thus act “as a final shield for the citizen against the influence of strong groups within the political system”.<sup>87</sup>

An explicit recognition of the right to food would also provide the clear legal basis for adopting a framework law on the right to food. In a multisectoral field such as food, effective exercise of human rights would be facilitated if clear competences and implementation responsibilities, as well as specific financial resources, were allocated through law.

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87 See Irish Human Rights Commission. 2005, Chapter 4.3.1.



# PART THREE

## FRAMEWORK LAW

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## PART THREE

# FRAMEWORK LAW

Whether the right to food is recognized directly in a state constitution or can be derived implicitly from other constitutionally recognized human rights, framework laws are useful measures to articulate the right to food in more detail and to provide a means of enforcement at the administrative, judicial and quasi-judicial levels. For example, in several countries, rights and freedoms of national minorities have been established through special framework laws.<sup>88</sup> In other countries, a trend can be seen towards securing various benefits and services in the fields of, among others, social security, health and education as individual rights through framework laws.<sup>89</sup>

Whereas constitutional provisions are termed quite broadly, a framework law on the right to food can clarify the scope and content of the right, set out the obligations of state authorities, establish the necessary institutional mechanisms and give the legal basis for subsidiary legislation and other necessary measures to be taken by the competent authorities. In this way, a framework law can provide a high level of protection for the human right to food in a country and facilitate its effective implementation.

By clarifying the normative content of the right to food, a framework law would also provide individuals with a legal entitlement that they can enforce before the competent administrative and judicial authorities. In this way, it can also be the basis for strengthening the role of the judiciary in implementing the right to food

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88 This is notably the case in countries of Central and Eastern Europe (e.g. Croatia, Hungary, Lithuania, Romania, Ukraine).

89 Notably in North European countries. In Finland, for instance, the right to social assistance and the right to certain services for persons with severe disabilities have been defined as individual rights in Acts of Parliament (see Scheinin, M. 1995).

in a country. In practice, in many countries, national judges will more readily apply provisions of laws than rely directly on constitutional provisions. In addition, the existence of clear legal provisions on the right to food will empower right holders and civil society to require certain actions from their government and to hold it to account for the way it acts or fails to act. The term *exigibilidade* (in Portuguese) or *exigibilidad* (in Spanish) is increasingly used in many Latin American countries to designate the various means and mechanisms of enforcing rights before the competent public institutions – administrative, political or judicial – and for demanding action. This concept thus includes but is not limited to legal action. Various forms of social and political *exigibilidade* include political demonstrations and protests as well as other forms of political participation such as referendums, popular legislative initiatives, popular consultations and public hearings through which people can demand and exert pressure for appropriate changes in state policies and legislation. The concept of *exigibilidade* also includes the right to have a timely and adequate response and concomitant action by competent public authorities. In the case of a judicial *exigibilidade*, this also comprises adequate redress where a violation of a recognized human right has been established.

There are many other advantages to implementing the right to food through a framework law.

Among these is enhanced accountability of the government for its actions or inactions affecting the realization of the right to food (since the framework law clearly sets out the obligations of the various government actors). Given sufficient awareness, an adequate legislative framework can also assist public officials in avoiding possible infringements of the right to food in the first place. The framework law can also establish or provide the basis for the establishment of the institution that will take the lead in the coordination of its enforcement. It can play a key role in defining the entitlement to the minimum amount of food that persons have and that the state is required to provide immediately. Furthermore, a framework law can provide a legal basis for adopting special measures needed to correct the existing inequalities within society with respect to access to food or to means for its procurement. Finally, specific legislation implementing the right to food can stipulate the financial arrangements needed for its realization in practice.

The content of the legislation will depend on the nature of the obstacles existing within any given state, and will change over time. States Parties are expected, however, to develop a legislative agenda addressing the issues as they exist in their own country at any given point in time, with a view to securing access by all to adequate food.<sup>90</sup>

In recent years, a number of countries have begun drafting legislation designed to promote the realization of the right to food – including Argentina, Brazil, Bolivia, Ecuador, Guatemala, Honduras, Indonesia, Mexico, Malawi, Mali, Nicaragua,

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90 See Eide, A. 2002, p. 31.

Peru, South Africa, Uganda and Venezuela (Bolivarian Republic of), among others. While several other countries have also taken initiatives related to the realization of the right to food, they do not seem to have undertaken – as yet – specific legislative activities with this aim. A comparative analysis of these initiatives indicates that provisions referring to food *in terms of right* are being incorporated mainly into legislation on food and nutrition security,<sup>91</sup> laws specifically targeting certain groups of population and more general laws on food sovereignty and security. While proclaiming the realization of the right to access food or means of its procurement as their main purpose, most of the examined legislation mainly focuses on establishing or providing for the establishment of the institutions in charge of the adoption and implementation of the state policy on food and nutrition security. More detailed definitions of state obligations to respect, protect and fulfil the right to food and the legal remedies in case of an alleged violation of this right have not yet been sufficiently manifested in all the examined laws.

Following a discussion of the need for legal status and the preparatory process related to adoption of a framework law, the next sections will outline the elements that a more comprehensive framework law should contain. Of course, a single country may decide to address and include all or only some of them or to add others that are more specifically needed in view of its own needs and circumstances. The examples from the existing national laws or draft bills where relevant and appropriate will be given in boxes. They are used for illustrative purposes only; they do not represent suggested terminology or wording to be used.

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91 Although some other countries also have national legislation on food and nutrition security, only legislation that actually refers to the “right to food” or define “food security” in terms of rights either in their objectives or purpose, or in their substantive provisions, has been taken into account for the purpose of the present Guide.

## 3.1

# ADOPTION OF A FRAMEWORK LAW

There is probably no country in the world that can claim that it has fully realized the right to food for every person within its territory. The latest figures published by FAO on the state of hunger in the world are alarming. At the same time, according to FAO and the World Health Organization (WHO), the number of overweight or obese persons is constantly increasing.

As we have seen, some countries have enshrined the right to food explicitly in their national constitutions, while others recognize the right to food as part of other human rights. Some countries use statutory legislation to guarantee the right to basic necessities, mainly through social security legislation, defining the right in terms of an adequate standard of living. In such circumstances, public authorities have obligations under the legislation and their action or inaction can be reviewed by courts. Other countries have an active judiciary with a good awareness of human rights and the right to food, and have held public authorities accountable for violations of the right. However, some aspects of the right to food such as adequacy of food (in particular, in terms of its cultural appropriateness) may not be at all or not sufficiently protected.

Other countries, parties to the ICESCR, have not included the human right to food in their national constitution or statutory law and/or have judiciary that is unwilling to broadly interpret guaranteed human rights. This goes against the recommendation of the CESCR that the rights and freedoms guaranteed by the Covenant should be incorporated into domestic law (GC 3).

For all these reasons, there is little disagreement that most countries, developed as well as developing, would benefit from the enactment of a framework law on the right to food. The form of the framework law, its legal status and substance, will vary from country to country, although many broad recommendations can be provided. Each is explored in the next sections.



### 3.1.1 DECIDING ON THE FORM AND LEGAL STATUS

In its GC 12, the CESCR invited States Parties to adopt a framework law as the main instrument to implement the right to food. The term “framework law” refers to a legislative technique used to address cross-sectoral issues and facilitate a cohesive, coordinated and holistic approach to them. Insofar as it establishes a general frame for action, framework legislation does not regulate the areas it covers in detail. Instead, it lays down general principles and obligations but 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. Such measures include subsidiary instruments, regulations and administrative decisions, changes in state policies and financial measures. In designing the measures required for implementation, the authorities have to act in compliance with the principles and conditions set out in the framework law.

There may, however, be countries where this particular legislative technique is not known or not commonly used. These countries might opt for drafting a special law on the right to food containing more detailed provisions on all relevant aspects and dimensions of its content or introduce this novel concept while at the same time drafting also the implementing subsidiary legislation and regulations. Even in such cases, information provided in this Guide may be useful to the extent it gives guidance on the key elements that any national legislation on the right to food should address.

Because it is designed to cover the whole subject area and enshrine the human right to food, the framework law will become the reference standard for food issues in the country. The position of the framework law in the national legal order will therefore be of crucial importance for its future interpretation and enforcement, because of its interaction with other sectoral legislation affecting the enjoyment of the right. In those legal systems that provide for a category of laws superior to ordinary legislation,<sup>92</sup> the framework law on the right to food should be given that form. This will ensure that in case of a conflict with a provision of another, possibly more specific, law, the framework law’s provisions will prevail. For example, inadequate regulatory norms regarding gas emissions (resulting in severe environmental pollution and thus in the reduced availability of food resources) or an enactment of new, strict requirements for cod fishing in certain areas (resulting in quotas or a limited number of fishing licences and thus in the reduced accessibility of fish resources) may affect individuals’ capacity to enjoy their right to food.

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92 In some countries, a difference exists between various categories of laws whereby some laws have a higher status than ordinary laws (often called “constitutional” or “organic” laws). This form is usually chosen to stress the social importance of the matter to be regulated, and because the adoption and subsequent modifications of such a “superior” law generally require a stronger majority in parliament, which ensures its greater stability. In some other countries, laws regulating individual human rights and laws implementing international treaty obligations are given higher status. In some constitutions human rights are recognized to have the same hierarchy as the constitution or a supra-constitutional hierarchy (e.g. Ecuador, Colombia, Guatemala, Venezuela [Bolivarian Republic of]).

In other words, the existence of the framework law would facilitate the difficult task of striking a fair balance between different interests at stake when taking decisions: for example, balancing general environmental interests and individuals' effective enjoyment of their human right to food. Provided the framework law has been given a higher legal status, in both examples the concerned individuals could rely on the framework law on the right to food to claim not only that the competent public authorities had the duty to ensure that their action or inaction did not interfere with their right to food, but also that they were under the positive obligation to take steps to ensure that no breach of this right occurred. This would be possible even when such action or inaction of public authorities was fully consistent with relevant legal provisions.

Where the state constitution recognizes the right to food, limitations of the sectoral legislation could of course be challenged by relying on the relevant constitutional provisions. The outcome of such a claim would depend, however, on the interpretation given by the judge called to pronounce. Provided it is given appropriate legal status, the framework law on the right to food would provide more guidance to the national judge, who may be more at ease with applying clear provisions of law than constitutional principles.

The legal status of a framework law in federal and other decentralized states may raise special concerns. Such problems include the breach of central powers: where the subnational authorities (state/provincial/regional) have authority for the right to food (e.g. in Canada), adopting a national framework law on the right to food by central government could be seen as *ultra vires* federal/national powers.<sup>93</sup> Conversely, if variegated framework laws are adopted at the subnational level by particular subnational authorities (with some being unlikely to adopt any such law), the possibility is created of very different levels of protection regarding the right to food in a country.<sup>94</sup> Ultimately, however, the level of protection would have to be measured against a country's international obligations.

In a country where the federal/national government does not have the constitutional authority for incorporation of international treaties alone, some method of obtaining the agreement of and action by regional governments will therefore be necessary. From the perspective of general international law, internal divisions of power within a state provide no excuse for a failure to implement a ratified international treaty.<sup>95</sup> With regard to rights established by the ICCPR, the HRC considered that establishing federal–regional cooperation and mechanisms for implementation and monitoring is a *duty* of federal states in order to meet their international

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93 For example, in Canada, jurisdiction over the right to food is within provincial authorities; the adoption of a national framework law on the right to food would therefore be *ultra vires* the federal powers (comment by Vincent Calderhead (Nova Scotia Legal Aid), made on an earlier draft of this Guide).

94 Personal comment by Vincent Calderhead (Nova Scotia Legal Aid), made on an earlier draft of this Guide).

95 See Art. 27, Vienna Convention on the Law of Treaties.

human rights obligations.<sup>96</sup> An argument can be made that this applies equally to obligations arising under ICESCR given the indivisibility and interdependency of all human rights (see above, Part One).

### 3.1.2 ASSESSING THE RIGHT TO FOOD CONTEXT

Before the drafting process starts, it will be useful to identify and assess the existing national environment within which the future framework law on the right to food will be adopted and implemented. Among other issues, this means an examination of a state's international commitments, institutions and legislation.<sup>97</sup>

Ideally, work will begin with a general right to food assessment, i.e. evaluation of the state of the realization of the right to food in the country. This requires identifying and characterizing food-insecure and vulnerable persons and groups that do not fully enjoy their right to food in addition to the underlying reasons for the situation. The *Guide to conducting a right to food assessment*,<sup>98</sup> prepared by FAO's Right to Food Unit, focuses in some detail on four core elements for a typical right to food assessment:

1. Identification and characterization of food-insecure, vulnerable and marginalized groups that do not enjoy the right to adequate food (and likely other economic, social and cultural rights).
2. Understanding the underlying reasons why each group is food-insecure, vulnerable and/or marginalized.
3. Understanding the legal and institutional environment within which policy and programme measures need to be implemented, and potential risks that could jeopardize the enjoyment of the right to adequate food.
4. Understanding the implementation processes and the impacts of existing (or proposed) policy and programme measures, and appreciating the need for policy and programme redesign to facilitate the realization of the right to adequate food.

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96 See HRC. 2004, para. 12: "The State party is reminded of its responsibilities in relation to article 50 (federal states clause) of the Covenant. It should establish proper mechanisms between the federal and Lander levels to ensure the full applicability of the Covenant."

97 Ideally, the national policy on the right to food will have been determined before preparation of the legislation commences. In practice, this is rarely the case, and policy development and preparation of legislation generally proceed in tandem.

98 See FAO. 2009.

Next, the assessment should identify the country's international obligations, i.e. its commitments arising from ratification of international treaties. This is relevant because the framework law will have to be designed to reflect those international obligations. Depending on the country, the international instruments to be taken into account may include human rights treaties such as ICESCR, ICCPR, CEDAW and CRC, the International Labour Organization (ILO) conventions or regional human rights treaties. Other international instruments, including those that are not legally binding, may be relevant. These include those adopted by international organizations of which the country is a member (e.g. FAO Right to Food Guidelines, Codex Alimentarius or Code of Conduct for Responsible Fisheries, WHO Global Strategy for Infant and Young Child Feeding and the International Code of Marketing of Breast-milk Substitutes).

The assessment should then proceed to an examination of the constellation of legal norms relevant for the free enjoyment of the right to food in the country. This will provide an overview of the general legislative context into which the new law will have to be integrated.<sup>99</sup> The overview of the existing legal provisions relevant to the right to food should cover the national constitution and ordinary sectoral laws, as well as customary law and practice where relevant.

It will be equally important to identify institutions that may be affected by the new framework law. Where they exist, human rights institutions play an important role in supporting the realization of human rights and they are likely to have a role in any framework law. It will be useful to find out what kind of human rights institutions exist (ombudspersons, human rights commissions, etc.), whether their mandate encompasses the right to food, and which tasks and powers they have (e.g. whether they submit *amicus curiae* briefs in court proceedings, etc.). Other institutions will also be relevant, including those having a mandate to deal with food, trade, social security and the like.

### 3.1.3 DESIGNING A PARTICIPATORY DRAFTING PROCESS

Depending on the country's constitutional and legal system, the initiative to draft a new law can originate from various sources. While in most countries the majority of draft laws are written by government and then submitted to parliament, other possible sources include parliament, a parliamentary committee, a law reform commission, non-governmental organizations (NGOs) or citizens' groups and the president of the state. Whatever its origin, two conditions are necessary for its successful implementation: first, the framework law on the right to food must have the broad support of all relevant parts of society including the government, the general public and the private sector. Second, it must be supported by institutions with sufficient capacities to ensure its enforcement.

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<sup>99</sup> It will also provide a snapshot of the areas that may need to be amended to support the realization of the right to food. The more detailed identification of these areas will take place during the compatibility review (see Part Four).

As to the actual drafting of law, in some countries, the ministry of justice, attorney general or parliamentary draftsman carries out this function; in others, a specially constituted drafting committee may be appointed by the legislature. The relevant ministry or one of its boards or councils may be given the task. Still other countries have a law commission or a similar body to carry out this function. In some countries, civil society organizations CSOs elaborate proposals and bring them to government and legislative bodies.

What matters ultimately is not which body initiates or drafts the legislation, but rather that the resulting draft garners the widest possible support. One way to ensure this is to involve as many stakeholder groups as possible in the drafting process. This fosters a sense of ownership and increases the acceptance of new legislation by society – both those who will be affected by it and those that will be called on to enforce it. Two examples of a participatory drafting process are given in Box 17.

#### **BOX 17. Organizing a participatory drafting process – examples from state practice**

In **Nicaragua**, the need for new legislation on food and nutrition security was identified by a group of members of Parliament who sought a holistic response to a problem of food and nutrition security in the country and submitted a proposal for a draft law on food and nutrition security in 1997. A second proposal was submitted to the Parliamentary Assembly in 2000, along with a detailed study on the state of food and nutrition security and an overview of Nicaragua’s relevant international commitments. In 2006, a special parliamentary commission prepared a new version of a draft Law on Food and Nutritional Sovereignty and Security. Since then, discussions of the draft continue with active participation of many NGOs dealing with food security and human rights, grassroots associations and a number of national and international experts, including FAO. The final draft has been submitted to the Parliamentary Assembly in October 2008.

In **Brazil**, the adoption of the National Food and Nutritional Security Framework Law<sup>100</sup> in 2006 is a result of a movement strongly alimented by public pressure and actions at grassroots level. As of 2003, hunger became a federal government priority. The newly elected President Lula da Silva introduced the “Zero Hunger Program”; this brought together several governmental and non-governmental

100 This is the English translation of the title of the law. The original title (in Portuguese) is the following: *Lei cria o Sistema Nacional de Segurança Alimentar e Nutricional – SISAN com vistas em assegurar o direito humano à alimentação adequada e dá outras providências*, or law establishing the national food and nutritional security system ensuring the human rights to adequate food and other measures.

### **BOX 17. Organizing a participatory drafting process – examples from state practice (cont.)**

initiatives aimed at promoting the human right to food. In the same year, the National Council on Food and Nutrition Security (CONSEA) was re-established with the primary responsibility of advising the President of the Republic on right to food related issues. The recommendations of the second National Food and Nutrition Security Conference organized by the CONSEA in 2004 charged the latter with drafting a framework law on the right to food. The draft law was sent to parliament in October 2005 and given priority. The law was adopted a year later, following intense negotiations that involved government as well as civil society groups.

*Source: Information presented by Senator Zeledon during a right to food workshop, Nicaragua, January 2008; see also FAO. 2007a. Rome.*

A sufficiently broad expertise will ensure that the draft legislation is precise, comprehensive and appropriate, i.e. that it takes into account all relevant interests and contains provisions that reflect local circumstances.<sup>101</sup> The composition of the drafting body should thus reflect various interests likely to be affected by the implementation of the law. This includes all the relevant governmental departments and agencies, such as those working in agriculture, social development, health, labour, education, trade and economy, finance and environmental protection, as well as private sector and consumer groups.

Active involvement of all governmental departments that may be affected by the future framework law will assist in identifying the institution that should take the lead in enforcing the framework law. Early consultation among affected government departments will also assist in identifying possible problems early in the development of the draft, and can help identify the groups and organizations outside the government that should be involved in the drafting process. It will also sensitize government authorities to the law they will be called upon to enforce.

Government stakeholders should be balanced by private actors, who should also participate actively in the drafting process. A law on the right to food can affect many different constituencies. Broad participation ensures that a wide range

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<sup>101</sup> See also WHO. 2005. This resource book discusses in some detail useful strategies to facilitate the development, adoption and implementation of the laws on mental health. While it does not relate to the right to food or any of its aspects, the text contains some useful information as to the procedural aspects of drafting framework legislation.

of interests and concerns related to the realization of the right to food are taken into consideration in the draft law. It helps law and policy-makers to identify all the possible consequences and impacts that enforcement of the framework law may have. It can also reveal weaknesses, gaps and conflicts in the existing legislation, or other possible obstacles to the full enjoyment of the right to food. A well-designed and implemented consultation process can also contribute to improving the credibility and legitimacy of government action, winning the support of groups involved in the decision-making process and increasing acceptance by those affected.

The list of non-governmental stakeholders will vary by country but is likely to include some of the following: affected populations (e.g. women, indigenous and local communities, children, people with disabilities, persons living with HIV/AIDS); concerned groups (farmers' associations, trade unions); CSOs, (NGOs); private sector actors (e.g. agricultural or other agro-biodiversity-oriented businesses); and representatives of the academic community. Where they exist, human rights institutions (i.e. ombudspersons and human rights commissions) should also be actively involved in the process as they will be unique sources of information and expertise. Finding the most appropriate approach to gather and recognize their opinions is crucial to reflecting their points of view. There are various approaches that can be used to consult stakeholders and collect views. These include departmental advisory bodies, public discussion papers, multistakeholder negotiations, surveys, public hearings (with sufficient advance notice and publicity), focus group discussions, roundtables, workshops, role-play, community research and similar. More deliberative mechanisms and oral consultation in general may prove more useful as they involve discussion and debate, and can facilitate forming and changing opinions. Such oral consultations may also be an opportunity to recognize and confront prejudices, discrimination and attitudes at the origin of the inability of persons to enjoy their right to food. Oral consultations may also provide legislators with the opportunity to explain the contents of the framework law.

Which approach to use will depend on each country's legal and institutional system in addition to the nature of the group being consulted, the resources and time that are available. Whatever approach is chosen, consultation must be based on principles of openness, transparency, integrity and mutual respect. This requires that, before the consultation takes place, concerned stakeholders are provided with sufficient background information needed to understand the issues and participate in the consultation in an effective manner. Those consulted must also be in a position to influence policy formulation effectively and they must be given sufficient time to comment. It is equally important, especially in countries with indigenous population groups, that participants are able to use their own language.

It may also be useful to consult and involve foreign or/and international experts who can contribute their knowledge of other countries' experiences and international standards, including case law of the international human rights mechanisms

(e.g. African Commission, European Court of Human Rights, Inter-American Court and Commission).

Parallel to this “official” planning and consultation process, a broad civil society coalition could be established independently, aimed at ensuring broader societal and political acceptance of the objectives to be pursued and achieved through a framework law. Food First Information and Action Network (FIAN), a well-established right to food NGO, proposes four phases of civil society consultation:

1. Developing public awareness about the right to food and the pertinent issues, through a broad campaign of sensitization and information.
2. Stock-taking: all social groups that have an interest in the implementation of the right to food are called upon to assess the realization of this right in the country when measured against the three-level state obligations (to respect, to protect and to fulfil).
3. The legislative process: again, all those concerned should have their say by commenting on draft versions of the law.
4. Once the law has been passed, civil society is called upon to monitor the law’s application.<sup>102</sup>

### 3.1.4 IMPACT ANALYSIS

The next step is to forecast the budgetary, economic, social and administrative impacts of the new law, in order to increase the chances of the law’s successful implementation.<sup>103</sup> The effectiveness of the framework law may be undercut by the failure of government officials or implementing institutions to devote sufficient resources or energy to its implementation. While in some cases this may stem from a true lack of capacities, in others this may be the consequence of a lack of firm political will. The process of identifying the parties that will be affected (governmental and non-governmental) and their widespread participation in a drafting process will contribute significantly to an understanding of its relevance and thus also to its better acceptance and enforcement.

Ideally, costs and benefits should be quantified. Quantitative analysis, however, is not always possible – either because it is costly and time consuming to obtain accurate measures of costs or because some costs and especially benefits in the field of human rights are inherently unquantifiable. For example, the feeling of security in one’s ability to acquire enough food every day cannot be measured.

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102 See Künnemann, R. 2002.

103 This section draws on the relevant parts of Vapnek, J. & Spreij, M. 2005, pp. 160–165.



On the other hand, as inadequate as the tool sometimes is, costing of legislation has become standard practice in Brazil and South Africa and has begun in other countries through Millennium Development Goal support. Advantages include securing governmental and legislative buy-in early for adequate budgetary allocations, making realistic assessments of achievability of a right and what it would take to realize it fully, spelling out the finer details of such an achievement in terms of institutional funding, subsidies, and so on. One possible solution for addressing the problem of limited resources of a country is to pool them from across the sectors responsible for the implementation of the various dimensions covered by the future law (e.g. agriculture, labour, education, justice). Indeed, as previously underlined, within a country, many different state agencies will have some implementing responsibilities with regard to accessibility, availability, stability, adequacy or utilization of the right to food. The advantages of cooperation, coordination of the relevant activities and their convergence are obvious.

An important question is how high a priority to assign to a potential change. It is often possible to achieve promising results in a less than ideal environment. This calls for a realistic approach to the development of new legislation and new institutional structures. On the other hand, it is important to keep the longer view in mind: in most countries, the full realization of the right to food will be achieved progressively. This should be reflected in the framework law provisions.

## 3.2 GENERAL PROVISIONS OF THE LAW

According to GC 12, a framework law on the right to food should include “provisions on its purpose; the targets or goals to be achieved and the time-frame to be set for the achievement of those targets; the means by which the purpose could be achieved described in broad terms, in particular the intended collaboration with civil society and the private sector and with international organizations; institutional responsibility for the process; and the national mechanisms for its monitoring, as well as possible recourse procedures” (GC 12, para. 29). These are only some of the elements that will be covered by a framework law: because the law will be tailored to the particular circumstances of a given country and its legal system, it can contain provisions covering a variety of other issues. Some of these are discussed in the sections that follow. The examples from the existing national laws or draft bills are for illustrative purposes only; they do not represent suggested terminology or recommended wording.

### 3.2.1 PREAMBLE

The preamble of the framework law would set the context for its enactment, outlining the reasoning of the government in deciding to elaborate the law. The preamble could also usefully refer to the applicable international instruments on the right to food, such as the ICESCR, the CRC, the CEDAW and possibly the Right to Food Guidelines. For example, the Law on Food and Nutritional Security of Ecuador as well as the Law on Food and Nutrition Security of Guatemala refer, in their Preambles, to the Universal Declaration of Human Rights, the ICESCR (Ecuador, Guatemala) and to GC 12 (Guatemala).

### 3.2.2 TITLE AND OBJECTIVES

In order to distinguish the framework law from other laws on food, such as laws on food safety and quality, it would be advisable to call it “Law on the Right to Food” or similar. The term “framework” need not appear so long as the contents and structure

correspond to this particular legislative technique. Most of the existing laws and drafts do not have the right to food in the title, but food security, which is also acceptable.

The stated objective or purpose of the law guides the competent authorities' actions in its implementation and assists in the interpretation of the law's provisions. The objective of any framework law on the right to food should be the full realization of the human right to adequate food. While a state cannot be expected to achieve the same nutritional level for its population as one that starts from a previously higher level, each is required to make an effort to improve the state of the realization of the right to food for its people. This objective has been included in most of the recently adopted national legislation, although it has not always been referred to in these precise terms (see Box 18).

#### **BOX 18. Objective of a framework law – examples from state practice**

**Argentina** adopted its Law that sets up the National Programme for Food and Nutrition Security in 2003 “to implement a non-derogable duty of the State to guarantee the right to food for all citizens” (Art. 1).

**Brazil's** National Food and Nutritional Security Framework Law of 2006 “establishes the definitions, principles, guidelines, objectives and composition of the National System of Food and Nutritional Security, through which the public power, with the participation of the organized civil society, will formulate and implement policies, plans, programmes and actions in order to guarantee the human right to adequate food” (Art. 1).

The Law on Food and Nutritional Security of **Ecuador** of 2006 establishes as a policy of the state and priority action of the government the “food and nutritional security understood as a human right that guarantees the stability of supply, physical and economic access of every person to a healthy, sufficient, safe and nutritious food adequate in quality and in accordance to the culture, customs and preferences of the population, for a healthy and active life” (Art. 1).

The draft Planning Law on Food Sovereignty and Food and Nutritional Security of **Mexico** (November 2005) lists among its objectives the establishment of state policy that “guarantees the human right to adequate food and nutrition for all” (Art. 2).

In **Nicaragua**, the purpose of the draft Law on Food and Nutritional Sovereignty and Security (July 2008) is to “guarantee the right of all Nicaraguans sufficient, safe and nutritious food necessary for their vital needs, and that is physically, economically and socially accessible and conform to the culture thus ensuring availability and stability of food through development by the State and public policies linked to sovereignty and food and nutrition security for its implementation” (Art. 1).



### BOX 18. Objective of a framework law – examples from state practice (cont.)

The draft Law on the Right to Adequate Food of **Peru** (November 2007) states as its purpose “the establishment of the framework for the exercise of the right to adequate food as one of the fundamental human rights recognized in the Constitution and international treaties ratified by the State” (Art. 1)

The draft Bill for a Food and Nutrition Act of **Uganda** (September 2008) states as its purpose “to provide for the enjoyment of the right to food /.../” (Preamble).

In addition to the general objective of the law, a number of specific objectives specifying the right to food policy goals to be achieved through the framework law could also be elaborated. Such objectives will reflect the results of the right to food assessment and what the priorities of a country should be with regard to this right. For example, if lack of access to natural resources and/or extensive discriminatory practices have been identified as being among the main obstacles to the enjoyment of the right to food in a country, a framework law could list undertaking agrarian reform, eliminating and preventing discrimination (i.e. identifying individuals, communities and groups discriminated against and adopting appropriate special measures) or raising level of education, training and access to opportunities for the most vulnerable individuals. Where the situations is particularly difficult, eradication of hunger and malnutrition may be determined as a specific objective to pursue as a priority, or ensuring that emergency situations that threaten mass access to food are anticipated, mitigated and addressed with equity and speed (see Box 19).

### BOX 19. Specific objectives of the framework law – examples from state practice

The objectives of **Guatemala**’s Law on the National Food and Nutritional Security System are the eradication of malnutrition, the availability of basic necessities for the most vulnerable part of population and the promotion of the socio-economic development of the country.

The draft Law on Food Sovereignty and Food and Nutritional Security of **Mexico** lists among its objectives the establishment of state policy that guarantees the achievement of food sovereignty and the set-up of a network of economic security for national producers with support, incentives and strategic interventions for increasing domestic food production, processing and distribution.

### BOX 19. Specific objectives of the framework law – examples from state practice (cont.)

**South Africa's** National Food Security Draft Bill has among its objectives “to provide ... for the procurement and maintaining of emergency food supplies ..., to provide for cooperative food security governance ..., to provide for institutions that will promote co-operative governance and procedures for co-ordinating food security functions exercised by organs of state [and] to provide for the environment and capacity to ensure the creation and maintaining of an honest and responsible food trading system ...”.

The **Ugandan** draft Bill for a Food and Nutrition Act states among its objectives “a) to recognize, promote, protect and fulfil the right to food as a fundamental human right; /.../ c) to plan, budget and implement the Uganda Food and Nutrition Policy using a rights-based approach and to ensure the participation of rights holders and the accountability of duty bearers; d) to ensure that food is treated as a national strategic resource; /.../”

### 3.2.3 SCOPE

The framework law will need to outline its scope, i.e. who is governed by the law and what activities and subject matters it covers.

Under international human rights law, states are the duty bearers with respect to the realization of the right to food (as well as other human rights). Within a state, the obligations under the right to food are binding on all branches of government – executive, legislative and judicial – and other public or governmental authorities, at whatever level (national, regional or local).<sup>104</sup> In states with a federal structure, human rights recognized by a state often extend to all its parts. Thus, the framework law will apply to all these state authorities in the context of their activities affecting availability of food, stability of food supply, access to food, access to means for its procurement, adequacy and cultural appropriateness of available and accessible food.

Human rights obligations do not or not yet, as such, bind non-state actors as a matter of international law. However, the obligation to protect human rights to which they have committed themselves requires states to ensure that the activities of private persons or entities do not impair the enjoyment of the right to food of individuals. Indeed, the international human rights treaty bodies have generally confirmed that adopting appropriate legislation to prevent and address third-party abuse of human rights is among states' minimum obligations under the treaties in order to fulfil the

<sup>104</sup> In practice, the right to food can only be effectively ensured if all branches of government adopt necessary measures that fall within their sphere of competence.

duty to protect.<sup>105</sup> The framework law should thus specifically require competent state authorities to adopt appropriate legislation or regulation of corporate activities under their sphere of competence. It could also impose specific duties on private persons or entities directly, barring them from hindering others' enjoyment of the right to food.

The holders of the right to food are individuals. In general, rules concerning the fundamental rights of the human person are *universal* obligations,<sup>106</sup> that is, they apply to all individuals, regardless of nationality or statelessness; this includes asylum seekers, refugees, migrant workers and other persons who may find themselves in the territory or subject to the jurisdiction of the particular state.<sup>107</sup> This should be stated explicitly in the framework law.

The scope of right holders is typically considered to be limited to persons within the state territory and subject to its jurisdiction. While this is the explicit wording of Article 2.1 of the ICCPR, this view has been transferred also to economic, social and cultural rights although the ICESCR does not mention territory or jurisdiction as delimiting criteria for the scope and application of the treaty.<sup>108</sup> In 2004, the HRC held that ICCPR rights can have extraterritorial application, that is towards individuals outside the territory of a state.<sup>109</sup> The HRC's position was endorsed in part by the International Court of Justice (ICJ)<sup>110</sup> with regard to ICESCR application. After noting that Article 2 of the ICESCR does not contain a provision circumscribing the scope of States Parties' obligations, the ICJ found that "it is not to be excluded that it applies both to territories over which a State party has sovereignty and to those over which that State exercises territorial jurisdiction".<sup>111</sup> The CESCR has been more specific on this topic; in its GC 15 on the right to water, it stated that "steps should be taken by States Parties to prevent their own citizens and companies from violating the right to water of individuals and communities in other countries" (para. 33). Despite this, the geographic scope of the ICESCR remains a disputed issue.

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105 See Ruggie, J.G. 2007, para. 41.

106 The United Nations Charter contains an obligation to promote universal respect for, and observance of, human rights and fundamental freedoms (art. 55.c).

107 See the HRC GC 31 on the nature of the general obligations imposed on States parties, paras. 9 and 10.

108 See Skogly, S. & Gibney, M. 2002.

109 The HRC noted in the GC 31, para. 10, that "a State party must respect and ensure the rights laid down in the Covenant to anyone within the power or effective control of that State Party, even if not situated within the territory of the State Party".

110 Advisory Opinion on *Legal Consequences on the Construction of a Wall in the Occupied Palestinian Territory*. ICJ Advisory Opinion, 9 July 2004. In that case, the ICJ considered that the construction of the wall by the Israeli Government resulted, among other consequences, in the destruction of agricultural land, and means of subsistence for the Palestinian population, which constituted a breach of Israeli's obligations under the ICESCR, notably the right to an adequate standard of living, including adequate food, the right to work, the right to health and the right to education.

111 *Ibidem*.

With regard to private entities or state-owned enterprises, while it cannot be said that there is – as yet – an express duty to exercise extraterritorial jurisdiction over these actors, States Parties are encouraged to regulate corporate acts both within and outside their borders.<sup>112</sup> Such state action seems ever more necessary today, in a world of increased globalization and interdependence in which poorer and less powerful states may be unable to take the necessary steps to protect their own people from the activities of third parties – in particular, private companies and transnational corporations based in other countries. From both a moral and practical point of view, all countries should ensure that their policies do not contribute to violations of the right to food in other countries. This can also be seen as a minimum requirement, or minimum content of international cooperation.<sup>113</sup>

If the intent of the country drafting and adopting a framework law on the right to food is to address this issue and also regulate the acts undertaken abroad, including activities of private actors, this should be reflected in the provisions on scope of the law as well as in the substantive provisions related to state obligations. This issue, however, will not be examined in further detail as the present Guide focuses on the right to food implementation within a country's territory.

### 3.2.4 DEFINITIONS

The definitions section ensures an agreed, specific meaning of certain terms that may recur throughout the text. The list of definitions in the framework law is not a glossary of human rights or food-related terms in general, but rather explicates only those terms that appear in the law. At base, the definitions section serves as a reference point for terminology about which doubts may arise in the enforcement of the law. On the other hand, some definitions may be unnecessary if a country has an Interpretation Act that serves to define some terms uniformly for the purposes of interpreting all of the country's legislation.<sup>114</sup>

In many cases, drafters will not need to invent new terms and definitions; the framework legislation can employ definitions from a number of international instruments related to human rights (such as the ICESCR or the Right to Food Guidelines) or to definitions proposed by the relevant international agencies dealing with food such as FAO, WHO, WFP or Food Insecurity and Vulnerability Information Mapping Systems (FIVIMS). It could also draw on legislative examples

from other states. Using human rights terminology and categories contained in the international standards on the right to food helps to maintain coherence between the law and these international standards and to avoid conceptual confusions.

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112 See Ruggie, 2007, para. 87.

113 See Donati, F. & Vidar, M., 2008, pp. 59–60.

114 See Vapnek & Spreij, 2005, p. 167.

Moreover, it can help judges who have to interpret the law systematically or apply it in specific cases of violations of the right to food.

The choice of terms to be defined in a law will of course depend on the specific circumstances and needs of a country in question. This section discusses only the most significant terms that may be included in the definitions section: food, food security, nutrition security, adequacy, vulnerability or vulnerable groups, hunger and undernutrition and public authority. The Guide does not propose definitions of these terms; it only indicates the various dimensions of these terms that should be taken into account when defining them.

Some other terms, such as the right to adequate food, have important substantive implications for the framework law, and therefore are addressed later in this part rather than in the definitions section.

### a) Food

Naturally, the definition of “food” is of primary importance for the enforcement of the framework law. While the CESCR discusses access to drinking water as a separate human right (GC 15) – the approach, which also seems to be the trend followed by many within a human rights community – according to the UN Special Rapporteur on the right to food, the concept of “food” should also include liquid and semi-liquid nourishment as well as drinking water.<sup>115</sup> This is because drinking water is as important as solid food for a person to be able to enjoy the right to food. An example of the definition of “food” is given in Box 20. On the other hand, some countries may wish not to include drinking water where, for instance, separate national legislation requires that a certain amount of water be provided free of charge to every member of a household (see below, section 4).

#### BOX 20. Definition of “food” at the national level – examples from state practice

According to the National Food Security draft Bill of **South Africa**, food means “everything originating from biological sources and water, whether processed or not, which is designated as eatables and beverages for human consumption, including food additive material, food raw material and other materials used in the process of preparation, processing and or the making of eatables or beverage” (art. 1).

According to the draft Bill for a Food and Nutrition Act of **Uganda**, “food” includes liquid and semi liquid nourishment and drinking water and everything that originates from biological sources and water, whether processed or not, which is designated as an eatable or beverage for human consumption, including food additive material, food raw material and other materials used in the process of preparation, processing and or the making of an eatable or beverage” (Art. 2.1).

115 UN Special Rapporteur on the right to food, 2001, para. 11.



## b) Food security

“Food security” is another term that should be defined in a framework law. When defining this term, states should refer to the internationally agreed definition given by the World Food Summit Declaration in 1996, and reaffirmed by the Right to Food Guidelines, which states that “Food security exists when all people, at all times, have physical and economic access to sufficient, safe and nutritious food to meet their dietary needs and food preferences for an active and healthy life.”<sup>116</sup> Food security is said to have four main pillars:

1. *Availability*: The availability of sufficient quantities of food of appropriate quality, supplied through domestic production or imports (including food aid).
2. *Access*: Access by individuals to adequate resources (entitlements) for acquiring appropriate foods for a nutritious diet. Entitlements are defined as the set of all commodity bundles over which a person can establish command given the legal, political, economic and social arrangements of the community in which they live (including traditional rights such as access to common resources).
3. *Utilization*: Utilization of food through adequate diet, clean water, sanitation and health care to reach a state of nutritional well-being where all physiological needs are met.
4. *Stability*: To be food secure, a population, household or individual must have access to adequate food at all times. They should not risk losing access to food as a consequence of sudden shocks (e.g. an economic or climatic crisis) or cyclical events (e.g. seasonal food insecurity). The concept of stability can therefore refer to both the availability and access dimensions of food security.

## c) Nutrition security

Nutrition security means that not only can people consume a healthy diet, but that other, non-food related issues, such as health and care, are also assured. To use nutrients efficiently, a person must be well cared for and relatively free of disease. Nutrition security thus depends, among other factors, on food security, disease prevention and control, health care and adequate provision of care at individual, household and community levels. Nutrition security is reflected in the utilization pillar of food security, which brings out the importance of its non-food inputs.

Several countries that have incorporated the human rights approach to food security into their relevant laws or are envisaging doing so refer to “*food and nutrition*”

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116 This definition takes up a definition given by the World Food Summit Declaration in 1996. For more detailed information, including definition of the four pillars of food security, see, for example, [ftp://ftp.fao.org/es/ESA/policybriefs/pb\\_02.pdf](ftp://ftp.fao.org/es/ESA/policybriefs/pb_02.pdf)

*security*.”<sup>117</sup> This can be understood as a broad interpretation of the right to food, i.e. as including also the nutrition aspect. Because ideally both food *and* nutrition security should be ensured for a person to be able to enjoy fully his or her right to food, it might be useful if a framework law defined these two terms separately. In this regard, it will also be relevant, when nutrition security is included, to assess carefully the implications this may have for the scope of the framework law.

#### **d) Adequacy**

As noted earlier, this guide proposes a substantive, self-explanatory provision on the right to adequate food. Nevertheless, it might be useful to include the concept of adequacy in the definitions aspect of a framework law. The concept of adequacy is an element of the normative content of the right to food and it overlaps partly with the utilization pillar of food security. The concept is particularly significant in relation to the right to food since it underlines a number of factors that must be taken into account in determining whether particular foods or diets that are accessible can be considered the most appropriate under given circumstances for the purposes of the realization of the right to food. The precise meaning of adequacy is to a large extent determined by prevailing social, economic, cultural, climatic, ecological and other conditions (GC 12, para. 7). Food is considered to be adequate in terms of a number of variables, such as food safety, nutritional quality, quantity and cultural acceptability.

#### **e) Vulnerability or vulnerable groups**

Although the full realization of the right to food will be a longer-term process, governments must take immediate measures to ensure that those persons that are particularly disadvantaged can access food or the means for its procurement. Such measures may be needed for the period of time for which the vulnerability exists (in the case of vulnerability provoked by natural factors such as drought or earthquakes) or for longer. The framework law can either list “vulnerable groups” in the law or give a definition of “vulnerability”. Listing vulnerable groups in the framework law may not be the most appropriate option, as it risks leaving out of its coverage persons or groups that may become vulnerable. Therefore, while some groups are immutable (e.g. indigenous peoples, ethnic, linguistic or religious minorities, persons with disabilities, individuals living with HIV/AIDS, refugees and internally displaced people, women and children), others may have shifting memberships (e.g. the urban poor, the rural landless or smallholder farmers, urban casual workers, street hawkers, rural seasonal workers, subsistence farmers with less than one hectare in mountainous areas and so on). On the other hand, the advantage of listing vulnerable groups would be that it would force the state to think of entitlements for every single one of these categories and develop them through subsidiary legislation.

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117 Brazil, Ecuador, Guatemala and Nicaragua.

Another possibility is to define “vulnerability” by referring to factors that place persons at risk of becoming food insecure. People who are vulnerable (either because of structural factors, e.g. unemployment, declining soil quality, HIV/AIDS, etc. or because of a high risk of external factors, e.g. drought, floods, currency devaluation) generally have a high probability of becoming food insecure and of being unable to enjoy their right to food. Food insecure people are those people who are not able to meet their minimum food needs. For long-term action to eradicate hunger and realize the right to food for all, it is important then to tackle those factors that create vulnerability. This is the approach adopted by the FIVIMS programme, which has also developed a methodology for vulnerability assessment. Box 21 gives a few examples of these two approaches from state practice.

### BOX 21. Vulnerability – examples from state practice

In **Guatemala**, the Regulation to the Law on the National Food and Nutritional Security System (of 2006) defines vulnerability to food insecurity as the “probability of an acute diminished access to food, due to environmental, social or economic risks and reduced capacity to cope with them”.

The **Peruvian** Decree establishing the Multisectoral Commission on Food Security (of 2002) defines “vulnerability or risk of food insecurity” as a “combination of factors that determine a tendency to suffer from inadequate nutrition or to an interrupted food supply due to a problem in the provision of food”.

According to the draft Bill for a Food and Nutrition Act of **Uganda**, “‘vulnerable’ includes infants, children, school going children, pregnant and nursing mothers, the elderly, refugees, internally displaced persons, people with disabilities, sick persons with chronic diseases such as HIV/AIDS, victims of conflict, rural people in precarious livelihood situations, marginalised populations in urban areas, groups at risk of social marginalisation and discrimination and any other group that may be identified from time to time”.

For the purposes of FIVIMS, “vulnerability” refers to the full range of factors that place people at risk of becoming food insecure. These can be external or internal. External factors include: trends such as depletion of natural resources from which the population makes its living; environmental degradation or food price inflation; shocks such as natural disasters and conflict; and seasonality, such as seasonal changes in food production and food prices. Internal factors that determine the capacity of people to cope with difficulties include the characteristics of people themselves, the general conditions in which they live and the dynamics of their households. The degree of vulnerability of individuals, households or groups of

people is determined by their exposure to the risk factors and their ability to cope with or withstand stressful situations.

FIVIMS also define “food insecurity”: it is a situation that exists when people lack secure access to sufficient amounts of safe and nutritious food for normal growth and development and an active and healthy life. It may be caused by the unavailability of food, insufficient purchasing power, inappropriate distribution, or inadequate use of food at the household level. Food insecurity, poor conditions of health and sanitation, and inappropriate care and feeding practices are the major causes of poor nutritional status. Food insecurity may be chronic, seasonal or transitory.<sup>118</sup>

#### **f) Hunger and undernutrition**

Understanding the “map” of hunger in a country and its determinants in terms of who are the hungry and undernourished, how its various manifestations affect different groups of people and the underlying reasons, is crucial for designing effective measures to realize the right to food.

No internationally recognized definition of hunger exists. For many, the words “hunger”, “starvation” and “famine” are synonymous. However, it is today widely accepted that hunger goes beyond a minimum calorific package sufficient to prevent death by starvation. The term “starvation” refers to the most extreme form of hunger; death by starvation is the end result of a chronic, long-lasting and severe period of hunger. It is ultimate evidence of a continued right to food violation. To the nutrition community, the term “hunger” includes “hidden hunger” or having inadequate amounts of micronutrients in the body, i.e. iodine deficiency, iron deficiency, zinc deficiency, vitamin A deficiency, etc., and the access to a healthy and balanced diet that leads to optimum nutrition status.

Hunger is thus best defined as covering a spectrum of situations, from starvation, i.e. not having enough food of any sort to eat, to undernutrition, i.e. having enough food to eat, but of inadequate quality.<sup>119</sup> In a similar way, the International Food Policy Research Institute (IFPRI) developed the Global Hunger Index to capture various dimensions of hunger defined as: insufficient availability of food, shortfalls in nutritional status and premature mortality caused directly or indirectly by undernutrition.

Over an extended period, hunger, in the sense of insufficient availability of food or insufficient adequate food, is likely to lead to undernourishment and is usually the

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118 See [www.fivims.net](http://www.fivims.net).

119 See United Nations System Standing Committee on Nutrition (UN SCN), 2005.

consequence of extreme food insecurity.<sup>120</sup> Undernutrition is a general term that indicates a lack of some or all nutritional elements necessary for human health. It concerns not only the quantity and quality of food (not having enough food or the wrong types of food), but also the body's response to a wide range of infections that result in malabsorption of nutrients or the inability to use nutrients properly to maintain health. The World Food Programme<sup>121</sup> defines undernutrition as a state in which the physical function of an individual is impaired to the point where he or she can no longer maintain natural bodily capacities such as growth, pregnancy, lactation, learning, physical work and resisting and recovering from disease. Children are its most visible victims.

Providing a definition of hunger and undernutrition in the framework law will be of crucial importance, most notably for the implementation of the entitlement to a minimum amount of food that persons have under the human right to food, and which the state is required to provide immediately (see below, section 3.5.4.a).

#### **g) Public authority**

Certain public authorities will be assigned specific implementation responsibilities in the framework law, but all public authorities within a state – which exercise activities that can affect individual enjoyment of the right to food – will have to act in accordance with the framework law and strive to take the right to food into account in their day-to-day work (in addition to other human rights protected in the domestic legal system). This should be the case whether officials are delivering a service directly to the public (e.g. education, health, social protection) or devising new policies or procedures (e.g. agriculture, land rights, markets or trade) that can affect the availability, accessibility or adequacy of food. All public authorities are under an obligation not to violate the right to food. Therefore, it could be useful to define “public authority” in the framework law.

In general international law, the conduct of any organ of the state constitutes an act of state, provided that it acted in its official capacity, regardless of its position, whether superior or subordinate.<sup>122</sup> In light of the trend observed in many countries towards outsourcing government activities to the private sector, the definition should make clear whether a public authority must be a government employee or whether the term also covers private actors performing delegated public functions. Box 22 gives three examples of definition of public authority from state practice.

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120 See Kennedy, E. 2003.

121 See [http://www.wfp.org/aboutwfp/introduction/hunger\\_what.asp?section=1&sub\\_section=1](http://www.wfp.org/aboutwfp/introduction/hunger_what.asp?section=1&sub_section=1)  
See also <http://www.unicef.org/progressforchildren/2006n4/> and <http://www.worldhunger.org>

122 See, for example, International Committee of the Red Cross (ICRC), 1977.

**BOX 22. Public authority – examples from state practice**

Under the 1998 Human Rights Act of the **United Kingdom of Great Britain and Northern Ireland**, the “public authority” includes (a) a court or tribunal, and (b) any person certain of whose functions are functions of a public nature (Art. 6).

Under the **Indian** Right to Information Act, “public authority” includes “any body controlled or substantially financed by funds provided directly or indirectly by the appropriate government”. This includes not only bodies owned and controlled by the state, but even NGOs that are substantially funded by the government.

In accordance with the draft Bill for a Food and Nutrition Act of **Uganda**, “public authority” means “a Ministry, department, parastatal agency, local government or public officer in which or in whom any law vests functions of control or management of matters related to food or nutrition”.

**3.2.5 PRINCIPLES**

A section on fundamental principles that will govern actions of all governmental bodies implementing their obligations under the right to food should be included in the framework law. For example, the law could require that:

- ◆ All public authorities, in the exercise of their functions, apply the stated principles.
- ◆ All subsidiary legislation and measures are elaborated in accordance with the established principles.

Provisions to this effect have been included in some of the existing legislation (see Box 23). The subsections that follow examine in some detail some of the most important principles, following the PANTHER framework (see above, section 1.3).

### BOX 23. Principles – examples from state practice

According to the National Food and Nutritional Security Framework Law of **Brazil**, such a system shall be based on the following principles: universality and equity in access to adequate food with no discrimination of any kind; preservation of freedom and dignity of every human being; social participation in formulation, implementation, monitoring and control of policies and plans related to food and nutrition security in every sector of government; transparency of programmes, acts and public and private resources as well as criteria for their allocation (Art. 8).

The Law on the National Food and Nutritional Security System of **Guatemala** states the main principles guiding different institutions in their performance of actions aiming at the promotion of food and nutrition security of the population. These are the principles of solidarity, transparency, protection, equity, integrity, sustainability, food sovereignty, precaution, decentralisation and citizens' participation.

In its provisions on principles that will guide its implementation, the draft Law on Food and Nutritional Sovereignty and Security of **Nicaragua** mentions, among others, the principles of participation, non-discrimination, transparency, equity, sustainability and decentralization (Art. 3).

## a) Participation

The principle of participation means that people should be able to determine their own well-being and participate in the planning, design, monitoring and evaluation of decisions affecting them. Individuals must be able to take part in the conduct of public affairs, including the adoption and implementation of state policies.<sup>123</sup> Such participation should be active, free and meaningful whether it is exercised directly or through intermediary organizations representing specific interests. It should also be supported by capacity-building where necessary. Civil society participation in the institutions overseeing the realization of the right to food in a country is discussed in some detail later on in the Guide (see below, section 3.13).

In the context of the administration of the framework law on the right to food, this principle requires all public authorities and, notably, those in charge of specific responsibilities (e.g. minimum food entitlements, special measures

123 The right to participation is guaranteed by several international human rights instruments. See, for example, Article 25 of the International Covenant on Civil and Political Rights ("Every citizen shall have the right and the opportunity ... to take part in the conduct of public affairs... [This includes] all aspects of public administration, and the formulation and implementation of policy.").

for disadvantaged groups, see section 3.5.4 below), to establish appropriate procedures and mechanisms allowing civil society and other concerned stakeholders to participate actively in the process of making and implementing decisions that may affect their right to food (see Box 24).

#### **BOX 24. Principle of participation – examples from state practice**

The Law on the National Food and Nutritional Security System of **Guatemala** requires the state to “promote the coordinated participation of the people in the formulation, implementation and monitoring of the National Policy on Food and Nutrition Security as well as of the sectoral policies flowing from it” (Art. 4.j). The government is more specifically required to “promote consultation with organized civil society in order to propose solutions and define strategies aiming at guaranteeing food and nutrition security” (Art. 5).

The draft Law on the Right to Adequate Food of **Peru** requires the state to “guarantee citizens’ participation in the formulation, implementation and monitoring of the state policies aiming at the realization of the right to adequate food” (Art. IX).

### **b) Accountability**

Accountability is one of the main principles of democratic government and means that public officials should be answerable to their superiors and to the people they serve for their actions. Application of the principle of accountability in the context of the framework law requires clear assignment of responsibilities and functions to public authorities for implementation of the framework law and any subsequent measures to be taken. In addition, the expected results must be spelled out clearly and appropriate procedures established (see Box 25)

#### **BOX 25. Principle of accountability – examples from state practice**

The draft Law on the Right to Adequate Food of **Peru** provides that the state will “guarantee the transparency and accountability in policies designed to realize the right to food” (Art. XI).

The Law on the National Food and Nutritional Security System of **Guatemala** requires that any intervention is based on objective information and methods and that it is regularly and continually monitored and assessed, thus promoting transparency in public action, social audit and addressing the real needs of the population (Art. 4).



### c) Non-discrimination

The principle of non-discrimination is among the most fundamental elements of international human rights law. It requires that the level of protection of a given human right are objectively and reasonably the same for everybody irrespective of sex, age, race, colour, religion or any other ground. In addition to specifically prohibiting discrimination on any ground, this principle requires specific measures aimed at correcting *de facto* discrimination or eliminating conditions that cause or help to perpetuate discrimination as well as measures promoting equality (see section 3.4. below). In the context of the framework law, this will mean paying particular attention to those groups that cannot enjoy their rights as fully as others (see Box 26).

#### BOX 26. Principle of non-discrimination – examples from state practice

The draft Law on the Right to Adequate Food of **Peru** states that “it is up to the State to respect, protect and fulfil the right to adequate food with no discrimination of any kind” (art. IV). It also specifically requires the state to “especially protect the most vulnerable groups of persons facing food and nutrition insecurity” (Art. V).

**Brazil's** National Food and Nutritional Security Framework Law requires that the system it establishes is based on “universal and equitable access to adequate food, with no discrimination of any kind” (Art. 8.I).

### d) Transparency

Transparency refers to open access by the public to timely and reliable information on the decisions and performance of public authorities. Holders of public office should be as open as possible about all the decisions and actions that they take that may affect the free exercise of the right to food (see box 27)

#### BOX 27. Principle of transparency – examples from state practice

The National Food and Nutritional Security Framework Law of **Brazil** requires that the system established in the Law is based on “transparency of the programmes, actions and resources – both public and private – as well as of criteria for their allocation” (Art. 8.IV).



**BOX 27. Principle of transparency – examples from state practice (cont.)**

The Law on the National Food and Nutritional Security System of **Guatemala** requires that “interventions are based on objective information and methods, and monitoring mechanisms and regular evaluation be established, thus ensuring transparency in public management, social audit and taking into account the needs of the population” (Art. 4.b)

Applying the principle of transparency within the context of the framework law means that right holders must be provided with essential information about the decision-making process and who is accountable and responsible for what (see below, section 3.7.). Right holders may also be given the power to demand information on the processes that feed into the achievement of the particular entitlement; this often provides an easy and low-cost corrective check to maladministration.

**e) Human dignity**

Human dignity refers to the absolute and inherent worth that a person has simply because they are human, not by virtue of any social status or particular powers. The framework law should recognize in an unequivocal form that every person has a right to food. To comply with this principle in the implementation of the framework law, the state, through its public officials, must treat persons equally and respect their human worth and dignity (see Box 28).

**BOX 28. Principle of respect for human dignity – examples from state practice**

The National Food and Nutritional Security Framework Law of **Brazil** requires that the National Food and Nutrition Security System it establishes is based on “preservation of autonomy and respect of human dignity” (Art. 8.II).

The Law on the National Food and Nutritional Security System of **Guatemala** provides that “activities aiming at achieving food and nutrition security must give priority to the protection of dignity of the people of Guatemala” (Art. 4.a).

### **f) Empowerment**

The principle of empowerment means that people should have the power, capacities, capabilities and access needed to change their own lives, including the power to seek from the state remedies for violations of their human rights. In a way, this principle is the logical consequence from all the preceding principles.

In the context of the framework law, the empowerment principle would entail including specific provisions on awareness raising, capacity-building and right to food education.

### **g) Rule of law and access to justice**

The rule of law means that governmental authority is legitimately exercised only in accordance with written, publicly disclosed and accessible laws adopted and enforced in conformity with established procedures. The principle is intended as a safeguard against arbitrary use of state authority and lawless acts of both organizations and individuals. In the context of the human right to food, the principle of the rule of law implies that the framework law itself as well as any subsidiary legislation to be adopted for ensuring its implementation must be clear, fair and accessible.

The rule of law also means that no person or body can breach the law with impunity. Therefore, access to justice for the enforcement of the right to food will be of particular importance. Access to justice includes the right to an “effective remedy” for anyone whose rights are violated as well as the guarantee of due process in all legal proceedings.<sup>124</sup> The framework law could establish a special appeals process and reaffirm the right of all those whose rights are violated to seek redress from the courts. Establishing a special appeals process may be particularly useful in countries where access to justice is a problem (notably for poor people, women, minority groups and others who suffer discrimination) and where judges are not sufficiently trained in human rights. The appropriate structures (e.g. designated human rights chamber of a court, or human rights judge(s)) and procedures could be put in place at various state levels in particular, at *local level* (e.g. municipal or district).

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<sup>124</sup> See, for example, Article 8 of the UDHR, Article 2.3 of the ICCPR and Articles 6 and 13 of the ECHR. The CESCR has made it clear that this important principle of international human rights law also applies to economic, social and cultural rights. In its GC 9 on the domestic application of the Covenant, the CESCR underlined the “need to ensure justiciability ... when determining the best way to give domestic legal effect to the Covenant rights” (para. 7). It also considered that “the adoption of rigid classification of economic, social and cultural rights which puts them, by definition, beyond the reach of the courts would thus be arbitrary and incompatible with the principle that the two sets of rights are indivisible and interdependent” (para. 10).

### 3.3

## SUBSTANTIVE PROVISIONS ESTABLISHING THE RIGHT TO FOOD

An explicit norm on the right to food is the necessary basis for elaborating its content, for demanding its realization and also for monitoring it. As mentioned earlier, the right to food is a complex right; it implies the entitlement to the bare necessities of life needed for survival as well as the entitlement to a safe, balanced and adequate diet central to a healthy and active life. While in practice the magnitude and content of concrete entitlements that a person can rely on under this right will vary according to the specific circumstances of that individual and the extent of the economic development of the country, it must never fall below the entitlement to the minimum amount of food consistent with the imperative of human dignity.

To make the right to food operational, substantive provisions of any framework law must structure the norm on the right to food into two degrees of its realization – (i) the right to adequate food and (ii) freedom from hunger – and clarify their content and main components. The fully fledged norm on the right to adequate food demands that all dimensions/components of the right be identified and reflected in provisions of the law. The minimum level of the realization of the right to food – freedom from hunger – requires that a minimum standard of the satisfaction of nutritional needs is determined by the framework law itself. By doing so, governments would legally reaffirm their commitment to progressively fully realize this fundamental human right and would establish conditions to ensure access to food needed for everyone to be free from hunger. The following sections will give some guidance as how this could be achieved in the framework law.

### 3.3.1 RIGHT TO ADEQUATE FOOD

Drawing on international human rights law, the framework law should first expressly state, in the unequivocal form, that:

- ◆ Every person has the right to adequate food.

Such recognition may, however, not be sufficient in itself. As stated above, the framework law should usefully specify in more detail various dimensions of this right. This would facilitate the role of administrative and judicial authorities in applying, interpreting and enforcing this human right and would also allow individuals to better understand their entitlements under this right and claim them in case of denial.

A number of recently adopted and draft human rights-based laws on food and nutrition security moved in this direction, although in some cases the recognized right is not denominated “the right to food” but the right to “food and nutrition security” (see Box 29). The terminology is not as important as ensuring in the framework law that the recognition of the right, its content and main components do correspond to relevant international standards.

#### BOX 29. Establishing the right to food and defining its content – examples from state practice

The National Food and Nutritional Security Framework Law of **Brazil** states that “adequate food” means “realization of the right of everyone to regular and permanent access to qualitatively and quantitatively sufficient food without compromising access to other basic necessities, taking as a basis food practices that promote health, respect cultural diversity and which are environmentally, economically and socially sustainable” (Art. 3).

The Law on Food and Nutritional Security of **Ecuador** establishes as a policy of the state and priority action of the government “food and nutrition security as a human right that guarantees the capacity of supply, physical and economic access of every person to a healthy, sufficient, safe and nutritious food adequate in quality and conforming to the culture, customs and preferences of the population, for a healthy and active life” (Art. 1).

In **Guatemala**, in the Law on the National Food and Nutritional Security System, “food and nutrition security” means “the right of every person to have regular and permanent physical, economic and social access to food which is adequate, in quality and quantity, and with cultural relevancy, and which is preferably of national origin as well as to its adequate biological use to maintain a healthy and active life” (Art. 1).



**BOX 29. Establishing the right to food and defining its content – examples from state practice (cont.)**

The draft Framework Law on Food of **Honduras** establishes “the human right of every person to access safe and nutritious food, in conformity with the right to adequate food and the fundamental right of every person to be free from hunger, in order to be able to fully develop and maintain his or her physical and mental capacity” (Art. 10).

In accordance with the draft Law on the Right to Adequate Food of **Peru**: “The right to adequate food is a human right of persons, either in an individual or collective form, to have physical and economic access at all times to adequate, safe and nutritious food of cultural relevance, so that the food can be appropriately used to meet their nutritional requirements, maintain a healthy life and achieve their comprehensive development. This human right comprises access to, and the availability, use and stability of, adequate food supplies” (Art. 2).

The draft Bill for a Food and Nutrition Act of **Uganda** explicitly recognizes that “Every person has a right to food and to be free from hunger and under-nutrition” (Art. 5.1)

The framework law could state for example that:

- ◆ Every person has the right to live in conditions that enable her or him to:
  - i. either feed her or himself directly from productive land or other natural resources or rely on well functioning distribution, processing and market systems, or both;
  - ii. be financially able not only to acquire a sufficient quantity and quality of food, but also to satisfy her or his other basic needs;
  - iii. be safe from risk of losing access to food as a consequence of sudden shocks (e.g. an economic or climatic crisis) or cyclical events (e.g. seasonal food insecurity);
  - iv. have the opportunity of good food utilization through access to an adequate diet, clean water, sanitation and health care to reach a state of nutritional well-being where all physiological needs are met; and
  - v. access foods or diets that are the most appropriate under given circumstances in terms of their nutritional value and cultural acceptability.

Pregnant and lactating women and young children are particularly affected by under- and malnutrition. Inadequate consumption of sufficient quantity and quality of food, combined with health, sanitary and educational factors pose a challenge to the realization of their right to food. As mentioned earlier in this Guide, the utilization aspect of food security, i.e. clean water, sanitation and health care, is particularly important for these two groups of persons (see above, section 1.1). This should be particularly the case in countries that have ratified the CEDAW and the CRC; these provisions would thus also contribute to a better implementation of these international human rights treaties. The framework law should therefore also include a separate, express provision stating that:

- ◆ Every girl and boy has a right to food and nutrition adequate for her or his age, allowing her or him to grow and develop.
- ◆ Every woman has a right to food and adequate nutrition during pregnancy and lactation.

The implications of a broad recognition of the right to food and detailed elaboration on its various dimensions through a framework law are substantial. First, they make clear that the right to food cannot be satisfied fully by the adoption of policies and programmes designed to provide a minimum daily nutritional intake (i.e. through various food safety nets). It is the balance of nutrients in a diet, absorptive capacity of the body, quality of living environment, nature of a person's work, and gender, among other factors, that determine a person's requirements with regard to the right to food. States must therefore act towards creating conditions that enable people either to produce food or to buy it. Such conditions can be created only by taking more far-reaching measures aimed at removing causes of hunger and poverty, eliminating inequalities, improving access to knowledge, resources, skills and opportunities needed to provide food for themselves. Second, they imply corresponding obligations on state authorities; these will be discussed further in section 3.5.

Third, such legislative provisions would also facilitate adjudication and enforcement of this fundamental human right by ensuring that the decisions, actions or inaction of government are measured from the subjective perspective of the claimant of the right. For example, while the right to food does not imply an entitlement to a piece of land allowing one to feed oneself by one's own means, the lack of action on the part of the state to facilitate access to land or an action leading to limiting such access can, in some specific circumstances and for some categories of persons, amount to a violation of his or her right to food.

### 3.3.2 FUNDAMENTAL RIGHT TO BE FREE FROM HUNGER

As the right to food encompasses freedom from hunger, the framework law should also expressly establish the fundamental right of every person to be free from hunger.

Under this right, state authorities must ensure that no one is purposefully deprived of food or left to starve by actions or omissions of public officials; they must take positive measures to protect persons suffering from hunger or who are at risk of suffering from hunger. Because freedom from hunger is an immediate obligation, the framework law should also establish the specific entitlement to a minimum amount of food that persons have and that the state is required to provide.

The Penal Code of most countries will have provisions relating to the protection of the life and the security of person. Purposeful deprivation of food would generally fall under such provisions. Should this be the case, it might be better not to duplicate such provisions in the framework law, as this could lead to diminished, rather than increased, responsibility.

To give substance to this provision, it will be necessary to establish clearly the content of the right to freedom from hunger. As mentioned earlier, notwithstanding the frequent use of the term “hunger”, this concept is not entirely clear and its definition has not been the subject of consensus; it is commonly used for situations of serious food deprivation as well as for different forms of undernutrition, including a shortfall in access to sufficient food or in essential components of nutritionally necessary food, making an impact on the normal physical or mental capacity of the person (see above, section 3.2.4.f). This explains why there is not yet a general agreement at the international level on the exact meaning of “freedom from hunger” in legal terms. At the same time, it is today widely accepted that it goes beyond a minimum calorific package sufficient to prevent death by starvation. Setting a standard at the level of “starvation” only would clearly go against human dignity. Moreover, because prolonged hunger most often leads to undernutrition, which is a less ambiguous concept, the minimum food entitlements should be defined in terms of freedom from hunger and undernutrition. While very brief spells of shortfalls in dietary requirements would probably not be characterized as hunger, when they last for a sufficient time to induce physical or mental weaknesses, or to slow down the growth of the child, this would constitute hunger.<sup>125</sup>

The framework law should thus state expressly that:

- ◆ Every person has the right to be free from hunger.
- ◆ Every person suffering from hunger or undernutrition or at risk of suffering from hunger or undernutrition is entitled to a minimum amount of food according to his or her age, sex, health status and occupation.

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125 See Eide, A. 2007.



The draft Bill for a Food and Nutrition Act of Uganda provides an example that goes in this direction. It expressly states that “where a person is identified as vulnerable under this Act and suffers or is at risk of suffering from hunger or undernutrition, the State shall provide that person with a minimum amount of food” (Art. 5(4)).

In order to realize the fundamental right to be free from hunger through implementing legislation on the entitlement to a minimum amount of food, it might be worth spelling out expressly the appropriate criteria for determining the specific content of the minimum amount of food. Section 3.5 below discusses possible framework provisions on government obligations to provide the minimum amount of food.

### 3.3.3 PROVISIONS ON LIMITATIONS OF THE RIGHT TO FOOD

For various reasons, a state may have to take decisions or apply laws and regulations in a way that can interfere with the right to food of individuals, in the interest of achieving a compelling public interest. The ICESCR contains a general limitation clause, whereby States Parties may subject the rights affirmed by the Covenant “only to such limitations as are determined by law only in so far as this may be compatible with the nature of these rights and solely for the purpose of promoting the general welfare in a democratic society” (Art. 4). Therefore, it would be useful if the framework law specifically provided that:

- ◆ No limitation to the exercise of the right to adequate food may be allowed unless it is provided by law, is necessary for the purpose of a compelling public interest and is compatible with the nature of the right to food.

This last phrase – compatible with the nature of the right – is crucial; it requires striking a fair balance between the interests of the community as a whole (general well-being of the country) and the individual’s effective enjoyment of his or her right to food. This means that when a measure affecting a person or group’s free exercise of the right to food is necessary for the purpose of serving a compelling public interest, it must be balanced by accompanying measures preventing or minimizing interference with a people’s capacity to feed themselves through their own efforts and by their own means. It is equally important that such accompanying measures be determined through a transparent and participatory process.

A commonly cited example of state interference would be a decision to dispossess a certain number of persons of the land they use for subsistence farming (thus depriving them of their means of subsistence) in order to construct a road or extract natural resources, these latter having been deemed measures promoting the general welfare of the country. In a democratic country, the relevant legislation regulating evictions or land dispossessions normally provides, among other issues, for adequate compensation, including resettlement of the population concerned

on a land or territory of an equivalent value and quality. If a public authority evicted a person or group of persons from the land they used for subsistence farming without providing adequate compensation in the form of alternative equivalent land, from a human rights perspective this would not only be a violation of people's property or land rights under national law but also a violation of their right to food (under the "accessibility" component) even if executed in conformity with the relevant national law related to expropriation.

Another scenario could be a timber-logging project undertaken on the territory traditionally used by a local community for food gathering. A responsible public authority's decision to authorize the logging without taking necessary measures to mitigate its effects on the availability of food for the affected local population could make the persons concerned unable to feed themselves adequately, and thus constitute a violation of their right to food.

Although states are allowed to limit the free exercise of human rights provided that certain requirements are complied with, they must comply with the "principle of non-retrogression". This means that government may extend protection beyond what international standards, constitution or law require, but it cannot as a rule reduce that protection once made. The CESCR has stated that any deliberately retrogressive measures with regard to a guaranteed human right would require the most careful consideration and would need to be fully justified by reference to the totality of the rights provided for in the ICESCR and in the context of the full use of the maximum available resources (GC 3, para. 9).

## 3.4 PROVISIONS ON THE RIGHT TO NON-DISCRIMINATION

The right to food must be realized without discrimination “of any kind as to race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status” (Art. 2, ICESCR). While the causes and consequences of discrimination vary from country to country, one constant is that discrimination against women is widespread. Thus, the framework law should include a general non-discrimination clause (see subsection 3.4.1 below) as well as a specific clause prohibiting discrimination against women (see subsection 3.4.2 below) in matters affecting the realization of the right to food in a country. Also important are provisions that enable the substantive equality of groups, rather than merely formal equality under the law. The framework law should thus also contain provisions on required positive action allowing compensating for effects of past discrimination and establishing true equality (see subsection 3.4.3).

### 3.4.1 GENERAL NON-DISCRIMINATION CLAUSE

In many countries, national constitutions already contain a general prohibition on discrimination, on the basis of a long list of grounds (most often drafted along the lines of Article 2 of the ICESCR).<sup>126</sup> Yet in practice inequality persists. Problems are particularly apparent in the areas of: access to and control over land and natural resources; access to employment opportunities and health care, level of wages; access to education; and opportunities to participate in the public and economic life of the country. In some cases, the reason is that some types of discrimination

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126 “The States Parties to the present Covenant undertake to guarantee that the rights enunciated in the present Covenant will be exercised without discrimination of any kind as to race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status”.

are not subject to legal remedies, leading to a sort of legalized discrimination (a typical example is a limited right to access to property for women or limited opportunities for indigenous populations to control their territories effectively). Another reason is that national constitutions generally limit the prohibition of discrimination to acts of public authorities, thereby leaving unquestioned inequalities within the private sphere.<sup>127</sup> Including a general clause on prohibition of discrimination in matters affecting the realization of the right to food in a country in a framework law can facilitate the application of this fundamental principle also in those various areas.

Discrimination can be direct or indirect, and both should be prohibited. *Direct discrimination* occurs where one person is treated less favourably than another is, has been or would be treated in a comparable situation, because of any of the grounds previously referred to (e.g. sex, age, religion) while *indirect discrimination* occurs where an apparently neutral provision, criterion or practice would put persons having a particular religion or belief, a particular disability, a particular age or other status at a disadvantage compared with other persons. An example of indirect discrimination is requiring all persons who apply for a certain job to sit a test in a particular language even though that language is not necessary for the job (thus excluding persons or groups who are not or not sufficiently familiar with that language from acceding to that job). The list of discriminatory grounds in the framework law should be left open, rather than attempting to list all possible grounds of discrimination. This could be achieved by not listing any grounds, or by adding “on any ground” or “based on any other status” after a short illustrative list of discriminatory grounds.

The framework law should thus state that:

- ◆ Any distinction, exclusion or restriction made on the basis of race, colour, sex, age, language, religion, political or other opinion, national or social origin, property, birth or other status, which has the effect or purpose of impairing or limiting the capacity of an individual to exercise his or her right to food is unlawful and will be sanctioned in accordance with the law.

Such provisions should be included in the main text of the framework law even when the principle of non-discrimination has been listed among fundamental legal principles that will guide the law enforcement (see above, section 3.2.5). This is because the non-discrimination principle should be followed and respected not only for any process and outcome regarding the implementation of the right to food and the framework law itself but also and above all it should be established as a self-standing legal provision, infringement of which could constitute a violation of the right to food and is subject to appropriate sanction. Box 30 gives two examples of such legal provisions.

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127 See Tomaševski, K. 1995, p. 258.

**BOX 30. Prohibition of discrimination – examples from state practice**

According to Article 2 of the **Guatemalan** Law on the National Food and Nutritional Security System, “discrimination in access to food as well as to means and rights to its procurement, on the basis of race, ethnic origin, colour, sex, language, age, religion, public opinion or other social status, aimed at annulling or obstructing equality in the enjoyment or exercise of the right to food and nutrition security constitutes a violation of the present law”.

According to the draft Law on the Right to Adequate Food of **Peru**, “discrimination on the grounds of ethnicity, colour, gender, language, age, religion, political or other opinions, social background, economic status, birth or any other social condition, in respect of access to food and to the means and rights to obtain it having the aim or effect of preventing or impeding the equal enjoyment of the right to adequate food is a violation of this right, which may be demanded in courts of law and before the administrative authorities through the channels provided by legislation” (Art. 3).

The prohibition of discrimination should apply to all public authorities as well as to all natural or legal persons in the public sector (see above, section 3.2.4.g). With regard to the private sector, it should be ensured that also private actors are bound by the provision prohibiting discrimination at least in certain areas of activity. These should include employment, access to public places and facilities, and provision of goods and services. The framework law should thus also place public authorities under an obligation to:

- ◆ Take all appropriate and necessary measures, in particular legislative measures, to ensure that private actors do not apply discriminative practices in their activities in the specific areas.

Effective implementation of this clause will require undertaking a compatibility review of the relevant legislation, such as labour laws, food safety laws, food labelling and marketing laws and regulations. (see Part Four below).

**3.4.2 CLAUSE PROHIBITING DISCRIMINATION AGAINST WOMEN**

In all countries of the world, women fare significantly and sometimes dramatically worse than men according to virtually every indicator of social well-being and status.<sup>128</sup> This is also because discrimination against women is not based

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128 See Steiner & Alston, 2000, p. 163.

solely on their sex; it extends to marriage, pregnancy and potential pregnancy, motherhood, childcare and the stereotyping of men's and women's roles in a society. Discrimination against women in many societies results in low socio-economic and educational status and little power over household decisions. One of the consequences of such status is also within-household misdistribution of food leading to undernutrition of women and female children.

The framework law should thus specifically require public authorities:

- ◆ To eliminate and prevent all forms of discrimination against women with regard to the guaranteed right to food, including less favourable treatment of women for reasons of pregnancy and maternity, and to promote equality of opportunities between men and women.

It goes without saying that this obligation should cover discriminatory practices by natural or legal persons, in all areas that could influence the free enjoyment of the right to food.

### **3.4.3 SPECIAL MEASURES TO REMEDY EFFECTS OF DISCRIMINATION**

In many cases, the inability of persons to feed themselves through their own efforts and by their own means is a result of inequalities in access to opportunities. In practice, achieving true equality in access to opportunities will often necessitate special measures (through specific laws, programmes or activities) aiming at eliminating conditions that perpetuate difficulties in realizing the right to food that people face due to discriminatory practices. As noted above (section 1.2.2), under relevant international human rights norms, such special measures will not be considered discriminatory with regard to other persons possibly facing difficulties in fully exercising their right to food when they have been taken to undo existing discrimination and to establish equitable opportunities. The framework law should therefore include specific provisions to this effect. It could specifically state that:

- ◆ The prohibition of discrimination shall not be read to include government action to remedy past effects of discrimination against particular individuals or groups and promote equality of opportunities with regard to the right to food.

Special measures will be particularly needed for persons or groups who most often suffer from discrimination: women, indigenous peoples and minorities, children, immigrants and migrant workers and refugees. In some countries, stronger protection may be needed for persons belonging to specific communities, such as the Dalit community in India, or living in certain geographical areas. Box 31 gives an example of such special measures from state practice.

**BOX 31. Special measures for discriminated groups – example from India**

Integrated Child Development Services (ICDS) is the major national programme in India that addresses the needs of children under the age of six years. It seeks to provide young children with an integrated package of services such as supplementary nutrition, health care and pre-school education. Because the health and nutrition needs of a child cannot be addressed in isolation from those of his or her mother, the programme also extends to adolescent girls, pregnant women and nursing mothers. While the project started in 1975, its implementation has not been satisfactory. The public interest litigation known as *PUCL vs. Union of India* (see Box 14) related to the lack of enforcement of the ICDS programme. Through the interim orders issued by the Supreme Court of India in this litigation, the court directed the government not only to implement the scheme fully, but also to “universalize” the programme. This means that every hamlet should have a functional ICDS centre (also called *Anganwadi*) and that the full range of ICDS should be extended to every child under six, every pregnant or nursing mother, and every adolescent girl. However, considering the time needed to implement the programme in practice and ensure its universal application, in its Interim Order of 13 December 2006, the Supreme Court ordered the government to give priority to the installation of new ICDS centres in those hamlets or habitations where the most discriminated communities live, namely the Scheduled Castes and Scheduled Tribes.

*Source: See Secretariat of the Right to Food Campaign. 2006.*

While special measures shall be adopted through subsidiary legislation or regulations, the framework law itself should require competent public authorities to:

- ◆ Adopt regulations related to special measures or introduce in Parliament a proposal for legislation to prevent or compensate for disadvantages due to discriminatory practices with regard to the enjoyment of their right to food for specific groups of persons.
- ◆ Ensure that such special measures shall not entail the maintenance of unequal or separate standards and shall discontinue when the objectives have been achieved.

The list of persons or groups that should be covered as a priority should be expressly included in the framework law or a state body in charge of setting such a list designated.

## 3.5

# PROVISIONS ON GOVERNMENTAL OBLIGATIONS

The main function of a rights-based approach to food security is to address the accountability of the state for its actions or omissions.<sup>129</sup> Where there is a right there must be corresponding obligations. The framework law will thus next have to set out in detail the applicable government obligations. As outlined earlier, under relevant international human rights law, States Parties to the ICESCR must take steps to the maximum of available resources to progressively realize the right to food, i.e. to ensure that every person is capable of feeding him- or herself in dignity.

It has been noted above that a state must take three sets of steps: (i) to respect the right to food; (ii) to protect it; and (iii) to fulfil it.<sup>130</sup> The obligation to fulfil encompasses two substeps: the obligation to facilitate and the obligation to provide (see above, Part One). The framework law should specify all these levels of obligations.

There are two main ways in which this could be done. First, the framework law could simply state that it is the obligation of the government to respect, protect and fulfil the right to food. This has been done, for example, in the recently adopted Brazilian legislation (see Box 32).

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129 See Eide, A., 2002, p. 30.

130 The so-called tripartite typology of obligations (to respect, to protect and to fulfil) has been used at the international level to clarify and better understand state obligations under the right to food (and other economic, social and cultural rights). At the national level, in the implementation of specific measures, the distinction will often be blurred. Thus, for example, the same measure taken in two different countries (e.g. ensuring minimum food entitlements) can be described in different terms, depending on the particular circumstances in the country. A state that has already enacted minimum food entitlements through social security legislation will need to continue to respect them, while a state that has not done so will have to establish it (thus, implement its obligation to fulfil). See Koch, E. 2005, p. 6.



**BOX 32. Legal provisions on general governmental obligations under the right to food – example from Brazil**

In **Brazil**, the National Food and Nutritional Security Framework Law expressly states that “it is a duty of public authorities to respect, protect, promote, prove, inform, monitor, supervise and evaluate the human right to adequate food as well as to guarantee mechanisms for its enforcement” (Art. 2.2).

These obligations would then be given more precise content through subsidiary legislation and by national courts and tribunals interpreting the law’s provisions in a wide range of practical situations.

Second, the framework law could define what each of these obligations implies for public authorities in charge of the implementation of the right to food. While such provisions should remain rather general, a country may nevertheless also decide to spell out other, more specific obligations of the most relevant public authorities dealing with matters affecting the realization of the right to food under each of general obligations (respect, protect and fulfil). Box 33 gives an example of such more specific legal provisions from state practice.

**BOX 33. Legal provisions on state obligations under the right to food – examples from state practice**

According to Article 4 of the draft Law on the Right to Adequate Food of **Peru**:

1. The State shall respect the right to adequate food and refrain from adopting any measures whose result is to prevent the free exercise of this right.
2. The State shall protect the right to adequate food by adopting measures to ensure that no natural person or corporation restricts or prevents the free enjoyment of this right.



**BOX 33. Legal provisions on state obligations under the right to food – examples from state practice (cont.)**

3. The State shall gradually implement the right to adequate food, foster and establish conditions for social and economic progress, and adopt specific immediate measures to:
  - A) Eradicate chronic malnutrition and anaemia and other diseases connected with malnutrition and food and nutrition insecurity throughout the whole population, according to their life cycle and in particular during pregnancy and the first two years of life.
  - b) Promote a food and nutrition culture which reappraises local knowledge and makes it possible to develop food and hygiene best practices.
  - c) Improve the availability of food, preferably by encouraging competition and the sustainability of the offering of food of national origin.
  - d) Strengthen economic access to nutritious, safe food in adequate quantities by the population prone to suffering from food and nutrition insecurity.
  - e) Create appropriate areas in which to set up local and regional food markets, particularly in the poor urban and rural areas.
4. Food assistance provided by the State shall endeavour to ensure food and nutrition security in the perspective of the free exercise of the right to food. This shall be a temporary measure and be implemented in a planned manner, according to objectives, expected results and indicators which objectively demonstrate the annual progress made in achieving food and nutrition security in every area of intervention.
5. In order to comply with its obligations, the State shall adopt a national strategy to guarantee food and nutrition security based on the right to adequate food and shall draft corresponding policies at the national, regional and local levels.

According to Article 5(3) of the draft Bill for a Food and Nutrition Act of **Uganda**:

For the enjoyment of the right to food, the State shall ensure –

- A) Respect for the right to food by the duty bearers and refrain from actions that undermine access to food.



**BOX 33. Legal provisions on state obligations under the right to food – examples from state practice (cont.)**

- B) The availability, accessibility and affordability of food by all people in Uganda by making provision of sufficient access to production resources, income and support and maintaining an enabling environment in which household can attain food security through their own efforts.
- C) The provision and maintenance of sustainable food systems and protect the right to food from encroachment by any public authority or any person.

Possible framework law provisions on governmental obligations to respect, protect and fulfil will be discussed in some detail in the following subsections. The obligation to fulfil should not only be equated with providing food (or the money to buy food) directly. It also includes assisting people in providing *for themselves* (i.e. taking measures that will facilitate their access to sufficient and adequate food). These two dimensions of the obligation to fulfil will be explored under separate subsections.

### 3.5.1 OBLIGATION TO RESPECT

The framework law could first define the obligation to respect the right to food. Generally, the obligation to respect human rights requires a state to respect the human dignity and worth of persons under its jurisdiction and therefore not to interfere with or impair their rights. This obligation to respect has often been described as a “hands-off” duty – so that an individual’s situation is not made worse by depriving him or her of the enjoyment of a given right.<sup>131</sup> The provisions of the framework law could state expressly that:

- ◆ It is unlawful for a public authority<sup>132</sup> to deprive any person of food or means for its procurement.
- ◆ It is unlawful for a public authority to apply laws and regulations or to pursue a policy or practice in a way that could result in preventing the enjoyment of or infringing the human right to food.

<sup>131</sup> See Steiner & Alston, 2000, p. 182.

<sup>132</sup> As noted earlier, “public authority” should be defined to include not only any state official (governmental officials at all levels, central and local, police, school teachers, etc.) but also any legal person exercising functions of a public nature.

- ◆ It is unlawful to repeal formally or suspend legislation necessary for the continued enjoyment of the right to food.

As mentioned above in section 3.3.2, using purposeful measures to deprive someone of all access to food might constitute a violation of the right to life and security of that person, and thus fall under the provisions of the penal code of a country. This provision would not be meant to replace or diminish the protection of criminal law, but to cover cases that might otherwise not fall thereunder.

The reference to laws, regulations, policies and practices would naturally include all those affecting the availability, stability, physical or economic accessibility and adequacy of food. Among others, this means legislation and activities regulating: production and distribution of food; food quality and safety; access to, control and use of land, water and biological resources; and labour and education. Thus, for example, in a country where sharecropping<sup>133</sup> is practised widely and contributes to enabling people to enjoy their right to food, prohibiting it by law could lead to violating the right to food of the farmers concerned (under the “accessibility” component). Another example would be a government altering legislation or policies guaranteeing minimum prices for certain products or to certain categories of farmers, as these might affect the continued enjoyment of the right to food (GC 12, para. 19).

Respecting the right to food will, in some cases, require balancing various interests and rights. This might be the case, for example, in the field of food safety. In many countries today, street food provides both a means of livelihood and a readily accessible and affordable source of food for many people. Due to the hygienic conditions in which such food is prepared and sold, countries have started enacting special laws or regulations aimed at ensuring the respect of safety requirements. While such regulation of street food is necessary to ensure the quality and safety of food that is sold, setting requirements too high may deprive some people of an affordable source of food as well as limit some sellers’ means of livelihood, and thus possibly violate their right to food.

This means that when taking decisions or drafting regulations, the competent authorities will have to think not only about what requirements are the most suitable to reach the purpose of the regulation, but also whether the implementation of the regulation or decision can affect somebody’s human right to food. Among the relevant criteria will be the importance of the public interest at stake and the likelihood and intensity of harm. When harm is likely (i.e. deprivation of an affordable source of food or someone’s means of livelihood), human rights law requires that the principle of proportionality is respected. In other words, the authority must be sure that the measure affecting an individual’s right is necessary in the interests of the community or society as a whole and proportionate to that interest (see also above, section 3.3.3).

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<sup>133</sup> Sharecropping is a practice whereby a landless farmer is allowed by a landowner to cultivate part of his or her land, in return for a share in the resulting crop.

As noted above, further to this general obligation to respect the right to food, a country may decide to include more detailed provisions on other obligations of public authorities aiming at preserving the existing right to food. For example, the framework law could explicitly require the competent public authority to recognize customary land rights of indigenous or tribal peoples through legislation, to recognize the peoples' right to seek an income by which they can satisfy their food and other needs through their own free choice of work or to abstain from projects that would undermine peoples' existing access to food or means for its procurement.<sup>134</sup>

### 3.5.2 OBLIGATION TO PROTECT

A state also has the role of protector with respect to human rights, which are widely acknowledged to be expressions of objective values. Thus, the state's influence is not limited to the sphere of relationships between the individual and the state but extends also to relationships among individuals or between individuals and private entities.<sup>135</sup> Therefore, whereas the obligation to respect human rights, as just seen, guarantees the individual's protection against the state, the obligation to protect human rights guarantees the individual's protection against threats and risks stemming from private actors or societal forces that are controllable by state action.

The protective role of the state applies to all activities that could affect an individual's enjoyment of the right to food (for example, where a third party reduces food availability or supply, prevents access to food sources, or alters food quality and safety). Some activities calling for heightened scrutiny for the risk of affecting the enjoyment of the right to food include mining, timber extraction, exploitation of other biological resources, construction works, waste management or food marketing. Marketing of food products for children is among the activities that call for protective action of the state as a priority (e.g. competent state authorities should ensure that adequate legislation is in place to ensure that breastmilk substitutes are not promoted but instead strongly regulated and the established rules respected in practice). The obligation to protect can have additional dimensions such as regulating food prices and subsidies, and the rationing of essentials while ensuring producers a fair price.<sup>136</sup> The primary way to comply with the obligation to protect is through effective regulation and remedies for established infringements.

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134 See Eide, A. 2007, p. 150.

135 See Grimm, D. 2005, p. 149.

136 See Eide, A. 2002, p. 38.

The framework law should thus require the competent public authorities to:

- ◆ Criminalize the deliberate deprivation of food by adopting appropriate modifications to the penal code.
- ◆ Take preventive measures necessary to protect persons whose capacity to access sufficient and adequate food or means for its procurement is endangered by acts of others.
- ◆ Review the relevant administrative and legislative framework ensuring that activities within their competence undertaken by private actors do not infringe the right to food of others.
- ◆ Adopt the necessary administrative and legislative framework regulating activities that could affect somebody's enjoyment of the right to food and that are not yet regulated.

The framework law could also designate the authority in charge of listing the areas of activity to be reviewed or regulated as a priority. The right to food authority could be the most appropriate body to be charged with this task (see below, section 3.11). In certain circumstances, failure of a public authority to regulate a given private activity adequately might be considered a violation of the right to food of the affected persons, although how the authority goes about regulating the activity is its own choice. For example, in the field of extractive activities, it might establish a period of public comment before activities can begin; it could elaborate rules and criteria applicable to the grant of concessions (such as geographical limitations or the use of certain methods and technologies); it could establish details for food production, food labelling and food sale (to ensure that available food is adequate). The relevant legislative or regulatory framework should also provide for appropriate sanctions in case of non-compliance. All of these measures are designed to protect the affected populations and guarantee their right to food (see also below, section 4.3).

The obligation to protect extends beyond the duty to put in place effective administrative or legislative provisions. The competent public authorities should also regularly verify whether the adopted regulations are respected and followed by the private sector when undertaking regulated activities. This includes carrying out regular monitoring and control, documenting activities and, in cases of non-compliance, initiating processes leading to punishment under the law.

### **3.5.3 OBLIGATION TO FULFIL (FACILITATE)**

To a large extent, the obligation to fulfil the right to food can be met by adequate facilitation measures, i.e. by the creation of living conditions that allow individuals to feed themselves by their own means. Facilitating the realization of the right to

food thus requires more far-reaching measures on the part of state authorities intended to strengthen people's access and utilization of resources and means to ensure their livelihood, including food security. The exact measures to be taken depend on the situation in the particular country. ICESCR Article 11.2 gives some guidance: it requires states to improve measures of production, conservation and distribution of food by making full use of technical and scientific knowledge and by developing or reforming agrarian systems. Other possible measures include land reform and other means to improve access to natural resources, such as those recommended in Right to Food Guideline 8.

The framework law should thus place public authorities under an obligation to:

- ◆ Act, including by adopting or pursuing appropriate policies and measures, in a manner to foster and promote the human right to food and to create and maintain conditions under which every person can freely and regularly enjoy her or his right to food.

This general obligation could be complemented by more specific obligations of particular public authorities. The framework law can, for example, require the competent public authorities to sustain and expand food production in a country, to strengthen production of healthy and nutritious food, to organize training and education programmes on advantages and importance of diet diversification, and to require that food distributed to the most vulnerable through government social assistance programmes be obtained exclusively through local procurement. Other possible obligations can include establishing incentives for microcredit institutions or adopting measures to support domestic production of certain basic crops (see Box 34).

#### **BOX 34. Obligation to facilitate – examples from state practice**

According to Article 13 of *Honduras's* draft Framework Law on Food, “the State shall guarantee physical and economic access of all to safe and nutritious food, through control of autonomous productive process, through promotion and renewed value of traditional and other practices and technologies, which ensure the conservation of biodiversity, support local and domestic production, through ensuring access to land, to forests, to water from rivers, lakes and sea, and through other resources needed to produce or procure food as well as through development of just and equitable markets”. It goes on to specify that “the obligation of the State to fulfil the right to food means that the State must in the first place facilitate access to and security of resources for persons, families and communities who are not able to feed themselves by their own means, in particular access to land and other productive resources which will enable them to provide for themselves” (Art. 18) (*unofficial translation*).



**BOX 34. Obligation to facilitate – examples from state practice (cont.)**

Article 4.3 of the draft Law on the Right to Adequate Food of **Peru** states: “The State shall gradually implement the right to adequate food, foster and establish conditions for social and economic progress, and adopt specific immediate measures to: ...b) Promote a food and nutrition culture which reappraises local knowledge and makes it possible to develop food and hygiene best practices; c) Improve the availability of food, preferably by encouraging competition and the sustainability of the offering of food of national origin; d) Strengthen economic access to nutritious, safe food in adequate quantities by the population prone to suffering from food and nutrition insecurity; e) Create appropriate areas in which to set up local and regional food markets, particularly in the poor urban and rural areas.”

**3.5.4 OBLIGATION TO FULFIL (PROVIDE)**

Whenever individuals are unable to feed themselves either because they have lost their pre-existing sources of food security due to a sudden and unexpected event or because they cannot ensure their food security due to sickness, disability or other reasons beyond their control, public authorities are obliged to take care of them directly. In such situations, the state should provide food in a quantity and quality that ensures food and nutrition security. As a minimum the state is always required to provide a quantity of food that ensures freedom from hunger.

The obligation to provide encompasses several types of assistance depending mainly on the level of vulnerability (to food insecurity) of persons in a country; it covers situations of lack of any or enough food as well as of lack of adequate food in terms of safety and nutrition requirements.

Box 35 gives an example of providing measures from state practice.

**BOX 35. Providing right to food to children – example from India**

In **India**, there is no specific adopted or draft law on the right to food. However, on the basis of the relevant constitutional provisions, the Supreme Court of India recently issued a number of interim orders requiring government to take specific action to comply with its obligations to fulfil the right to food of its people.





**BOX 35. Providing right to food to children – example from India (cont.)**

The Court wrote that “Every child in every government-assisted primary school should be given a prepared midday meal; with a minimum content of 300 calories and 8–12 grams of protein each day of school; for a minimum of 200 days a year” (Interim Order of 2001). In a later Interim Order, the Court stated that attempts must be made for “better infrastructure, improved facilities (safe drinking water etc.), closer monitoring (regular inspection etc.) and other quality safeguards such as the improvement of the contents of the meal so as to provide a *nutritious meal* to the children of the primary schools”. It also required that the meals are provided free of charge. As to the cost of implementation, the Central Government is asked to “allocate funds to meet with the conversion costs of food-grains into cooked midday meals”.

These Orders were issued within the framework of the *PUCL v. Union of India and Others* case initiated in 2001. The case relates to a number of governmental social protection schemes, including the National Programme of Nutritional Support to Primary Education, also known as the “midday meal scheme”. As a result of these orders, children or their parents from the concerned schools can demand school meals as a matter of right and the government can be held accountable for not providing it. While these Orders contributed to introducing a hot midday meal in Indian schools already, they could usefully be formalized by transforming them into law.

The framework law should thus place a public authority under a general obligation to:

- ◆ Adopt and put in place measures to provide food or means for its procurement to persons who cannot take care of their own needs, due to reasons beyond their control, in particular for children whose parents die or disappear or otherwise no longer take care of them.

In addition to such a general provision on the obligation to provide, especially in countries where financial resources are limited, the framework law should also usefully include provisions on certain priority measures, which will ensure the provision of a minimum amount of food for every person suffering from hunger and undernutrition, and the prioritization of the most vulnerable.

These are further explored in the following subsections.

**a) Obligation to provide minimum amount of food**

The framework law should define the minimum amount of food entitlement that the state is required to provide to ensure the right of every person to be free from hunger (see above, section 3.3.2). Because framework laws do not enter into details, the actual content of “minimum amount of food”, and the details of eligibility

requirements and procedure for delivery will have to be established in subsidiary instruments, legislation or regulation. The latter might be preferable since, unlike a parliamentary-level law, regulations can be more easily changed and updated. It would in any case be useful if the framework law also set down key elements underlying the minimum food entitlements as well as the basic conditions for its implementation.

**First**, the framework law should:

- ◆ Designate the competent public authority.
- ◆ Establish its legal responsibility for regular, reliable and timely delivery of the “minimum amount of food” to any person who is suffering from hunger or undernutrition or is at risk from suffering from hunger or undernutrition.
- ◆ Require the competent public authority to introduce in parliament a proposal for subsidiary legislation or regulation on the minimum amount of food by a fixed deadline.

Governmental institutions responsible for dealing with social issues, social development or the fight against poverty exist in almost every country, although their competencies and powers vary. The decision regarding which governmental level or agency to designate is particularly important for federal states and states with strong regional autonomy. One option is to decentralize the responsibility for providing the minimum food entitlements. In recent years, the idea of decentralizing responsibility for social issues has been gaining currency (see Box 36).

### **BOX 36. Decentralizing implementation of food entitlements – examples from state practice**

The Law on the National Programme for Food and Nutrition Security of **Argentina** promotes decentralized implementation by creating a national framework to which the provinces adhere through a pact. Article 8 of the law stipulates the role of the municipalities as the responsible agencies to deliver and strengthen food distribution and supply, to promote participation and to ensure that beneficiaries are entered into the registry created by the provincial government. Article 5 prescribes that, at both central and provincial level, agencies responsible for implementation shall establish regular monitoring mechanisms to ensure that the programme is properly targeting those in need.

In **Colombia**, the State Constitution decentralized social expenditures to departments and municipalities and mandated that about 60 percent of spending be distributed to them according to the number of people with unsatisfied basic needs (Art. 357). A subsequent law defined the distribution formula to be applied. Departments and, especially municipalities, which receive a great part of total social transfers on the basis of the number of poor people living in their territories, are mandated to locate and find those people to target them with the funds received.

**BOX 36. Decentralizing implementation of food entitlements – examples from state practice (cont.)**

In **India**, the implementation of the Public Distribution System established through the Essential Commodities Act (1955) is delegated to states. According to the Chhattisgarh Public Distribution System Order of 2004, state government shall formulate guidelines for the purpose of identification of families entitled to receive ration cards, while it is up to local government bodies to finalize the lists of the beneficiaries within their respective jurisdiction, as well as to review the lists.

The tendency for decentralization is based not only on a trend towards local autonomy but also on the assumption that local authorities are closer to individuals and thus better able to assess their needs and preferences. Local officials and members of local community councils are involved in extensive local networks of social interaction. This assists in targeting the appropriate beneficiaries and also improves accountability because local persons are known in the community.<sup>137</sup> Indeed, in the practices of countries as varied as Argentina, Belgium, Canada, Colombia, Denmark, France, Germany, Republic of Korea, Sweden and the United Kingdom, local rather than central authorities determine and/or assess the eligibility of recipients and implement delivery of social assistance support (although the amount of the support is often determined and fully or partly funded by the central authorities).

There are also some challenges for implementation of food entitlements at local level: in some cases, the causes of a person's deprivation are often deeply rooted in local social divisions and the way the community operates and regulates access to resources. Therefore, giving all responsibility to local authorities may induce local elites to monopolize the benefits and it may encourage corruption as it is more difficult for the central government to monitor implementation.<sup>138</sup> If decentralization is adopted, particular attention must be paid to which tasks are decentralized: for example, local authorities might be given responsibility only for identifying recipients (assessing their eligibility and managing the registries) or for actual delivery of benefits as well. They could also be empowered to set the criteria by which eligibility and the assistance level are assessed. A clear division of competencies and a detailed description of implementation procedures, monitoring and evaluation activities will assist in holding the relevant government units accountable for compliance with the established rules and the effective delivery of the minimum amount of food.

137 See Conning, J. & Kevane, M. 2002.

138 See Alderman, H. 1998.

**Second**, the framework law should specify the scope of the “minimum amount of food” entitlement. As noted above, the entitlement to a minimum amount of food should be defined in terms of freedom from hunger and undernutrition (see above, section 3.3.2). This means that the minimum amount of food should cover the minimum dietary necessities of an individual allowing him or her to live in dignity, free from hunger and undernutrition. In this regard, it may be useful to spell out in the implementing legislation or regulation that the dietary necessities are those that are required for a person to function physically and mentally, maintain a normal resistance to illness, and for a child to grow in a normal way. When the access and composition falls significantly short of these requirements, hunger exists. The content of the minimum amount of food could also include a certain amount of water.<sup>139</sup>

Once the scope has been determined, a state should decide whether to provide the minimum amount of food in kind (i.e. by providing food products), through cash-like instruments (food stamps, coupons) or through cash transfer.<sup>140</sup> Whatever means is chosen, it must be adequate to relieve persons from hunger and undernutrition. Therefore, before deciding, a country should take into account all factors that will influence the effectiveness of the implementation of this right. Useful information on advantages and inconveniences of in-kind or cash or cash-like transfer can be found in the literature on food safety nets.<sup>141</sup>

The minimum amount of food should be defined on an individual basis; this means that each *individual* member of the community, not each household taken as a whole, or its head, is entitled to receive it. It should be determined in accordance with age, sex, health status and occupation of the individual. It can be delivered in kind, in an equivalent monetary value, vouchers or may include other features. While it will be for the implementing legislation or regulation to define the appropriate procedure and criteria for determining the specific content of minimum amount of food, the framework law should require that:

- ◆ Subsidiary legislation or regulation on the minimum amount of food shall determine the exact quantity of calories, proteins and micronutrients to which the minimum amount of food should correspond, according to age, sex, health status and occupation of a person.

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139 How much water constitutes a “basic human need” is a matter under debate. WHO, the World Bank and the United States Agency for International Development recommend between 20 and 40 litres per person per day – including water for cooking, bathing and basic cleaning – which must be located within a reasonable distance (interpreted as less than 200 m from the household). See UNDP/IFAD. 2006. Chapter 2, p. 63).

140 For more detailed information see FAO. 2006a.

141 See for example, FAO. 2006b; See also Coady, D., Grosh, M. & Hoddinott, J. 2004.

These values should be determined for the listed categories of persons, in function of the specific situation in a country. These categories may include, in particular, children (according to age groups – up to six months of age/ between six months and three years, three to six years, school-age children), adolescents (boys/girls), adults (men/women), pregnant and lactating women, persons with disabilities, persons with illnesses, etc.

Another option, especially for the purpose of cash transfer when the minimum amount of food is to be delivered in cash, is to define a food basket for different categories of persons, on the basis of which to calculate the relevant amount (see Box 37).

### **BOX 37. Defining minimum food basket – example from Belarus**

In **Belarus**, the Law on the Minimum of Subsistence and its implementing regulation (No. 1016) determine the average minimum of subsistence given as a financial benefit. This minimum of subsistence is calculated for an individual and for a number of social-demographic groups (employable population, pensioners and children) based on the pricing of the last month of every quarter of the year for a certain basket of goods including food.

In addition, Regulation No. 1477 of 1999 recognizes the right to receive food products free of charge for families with children (for their first two years of life), under certain conditions linked to the financial status of potential recipients.

There should also be the obligation for a regular review of the minimum amount of food entitlement with reference to internationally developed methodologies and standards.

**Third**, the framework law should state whether there should be a procedure for applying to receive the established minimum amount of food or not and, if so, how the selection criteria should be determined. One option is to deliver the minimum food via pre-selection of recipients, where those persons who consider themselves entitled to receive benefits would be required to report their income status or inability to provide for themselves. There should also be a provision ensuring that the final decision on whether to provide the benefits is not left to the discretion of the administrative authority; benefits should automatically be delivered in every case fulfilling the eligibility criteria, with no discrimination of any kind.

In some countries where a substantial portion of population lives in poverty or below the poverty line, requiring people to apply to receive minimum food entitlements will simply not be realistic. Furthermore, in many countries, there may be strong cultural reticence, even among the poorest, to speak and acknowledge hunger or undernutrition. It may thus be more appropriate that the minimum food entitlement will be delivered *ex-officio*, i.e. on the initiative of the competent authority. In such cases, the legislation can require the authorities at a local level to establish and maintain registers of recipients residing within their jurisdiction, listing socio-economic criteria and the state of their nutrition and health. Box 38 gives two examples for selecting beneficiaries for food assistance on the basis of the registers prepared by the government.

### **BOX 38. Selecting beneficiaries for social programmes – examples from state practice**

Legislation in 1993 in **Colombia** established a technical, objective, equitable and uniform mechanism for selecting beneficiaries of social programmes in Colombia. The system is designed to be used by all levels of government. It includes a set of norms and procedures defined at central level and operated at municipal level to gather information necessary to calculate the welfare index and select beneficiaries for the numerous social programmes.<sup>142</sup>

In **India**, the Chhattisgarh Public Distribution System Order of 2004 provides for the responsibility of the state government to formulate suitable guidelines for the purpose of identification of families living below the poverty line, including the *Antyodaya* families (the poorest families identified by state government). The beneficiary families are to be identified by the local bodies. State government is in charge of issuing ration cards after the application of the beneficiary family. The ration cards are to be issued jointly in the names of both the eldest male and female members of the family.

It is equally important that if an application procedure is established, it be fair, simple and easily accessible to all. In many countries and communities, the potential recipients will be persons with limited qualifications (literacy, schooling) living in isolated or remote areas, and thus often unable to apply for the available benefits. The legislation should require the authority to provide help and information to any person applying to receive the established

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142 See Castañeda, T. 2003.

benefits. Furthermore, the application process should not involve any costs for the potential beneficiaries.

The framework law should thus state that subsidiary legislation or regulation will determine:

- ◆ A simple and accessible application or certification procedure.
- ◆ Transparent, fair and non-discriminatory eligibility or certification criteria.

The subsidiary legislation on the minimum amount of food will indicate who will receive the minimum amount of food entitlement and possibly who must apply for it. In a number of countries, food-based transfer programmes targeting households but actually delivering benefits to the chosen adult person resulted in a very uneven distribution within households.<sup>143</sup> This led to designating the responsible female in a household as the person in charge of distributing benefits, based on empirical evidence that women spend income differently than men; in particular, women are more likely to spend income on nutrition and children's health.<sup>144</sup>

**Fourth**, the framework law should also require that subsidiary legislation:

- ◆ Establishes fair, independent and accessible recourse procedures for complaints and appropriate remedies in case of a determined violation of the right to food.
- ◆ Provides for an appropriate monitoring and evaluation mechanism and for the duty of the designated competent authority to report to the national authority on the right to food on a regular basis.
- ◆ Requires the minister of finance or the relevant minister to include in the state budget a specific line allocating resources necessary for the implementation of this fundamental right.

Such provisions should lead to ensuring the accountability of the authorities in charge of delivering the minimum amount of food to the entitled persons. Complaint mechanisms and procedures should be in place at all administrative levels and should be accessible to even the most marginalized and isolated persons. Administrative decisions regarding minimum food entitlements should be subject to judicial review before the competent courts or equivalent independent bodies (see Box 39).

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143 See FAO. 2006b, p. 27.

144 See Haddad, L., Hoddinott J. & Alderman, H., eds. 1997.

### BOX 39. Ensuring accountability of bodies delivering food entitlements – examples from state practice

The *United States of America* Food Stamp Act of 1977 provides that “The State agency of each participating State shall assume responsibility for the certification of applicant households and for the issuance of coupons .... There shall be kept such records as may be necessary to ascertain whether the program is being conducted in compliance with the provisions of this Act and the regulations issued pursuant to this Act. Such records shall be available for inspection and audit at any reasonable time ...”

In *India*, according to the Chhattisgarh Public Distribution System Order of 2004, in case of any irregularity found in the identification of beneficiaries and the issuance of the ration card and people ineligible for any particular scheme, action will be taken under the provisions of the Essential Commodities Act.

The monitoring and evaluation mechanisms (either legal or administrative) are equally important for guaranteeing regular and timely delivery of the established entitlement, as well as for preventing irregularities, notably in the certification or application process.

As to the cost of the implementation of the minimum food entitlement, it will depend on which benefits, if any, the minimum essential food is to replace. Many countries facing situations of extreme poverty and hunger have put in place the so-called “food-based safety programmes”, which provide food products or cash-like instruments that may be used to purchase food and which target specific groups of the population believed to be the most vulnerable.<sup>145</sup> The minimum amount of food entitlement will thus have to be determined in relation to other benefits provided under various governmental programmes within a country. For states that are unable to cover the cost of the full implementation of a universal right to minimum essential food, implementation can be phased in: the programme should start from the most vulnerable groups of the population (hungry and undernourished), and progressively expand to include also persons at risk of suffering from hunger and undernutrition.

Other elements that should be addressed in more detail in the implementing, subsidiary legislation include: how to calculate the minimum amount of food needed for an individual to be free from hunger and undernutrition; whether and in which

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<sup>145</sup> For some examples of different types of food safety nets, see, for example, FAO. 2006a, pp. 141–153.



way community organizations or NGOs should participate in the identification of entitlement holders; how the competent authority must identify beneficiaries and notify them and otherwise educate the public about the entitlements; how to provide the food (in kind, cash-like instruments or cash transfer); and for how long the minimum food entitlements will be provided.

### **b) Provisions on prioritizing the most vulnerable persons and groups**

Under international human rights law, states have a duty to prioritize the most vulnerable persons when resources are limited. While special measures to prevent discrimination or remedy its past effects will be of use to many, in other cases – where persons are disadvantaged due to other reasons and circumstances – different support measures will be necessary. As mentioned earlier in this Guide, such measures may be most particularly needed for (a) physiologically vulnerable persons, such as persons suffering from HIV/AIDS and their families, children, pregnant women and lactating mothers, disabled persons, persons suffering from sickness or elderly, (b) geographically disadvantaged persons e.g. persons living in remote and isolated, very poor or underdeveloped areas, and (c) economically vulnerable persons such as landless people, street children, urban poor or unemployed persons. It is to be noted that such measures should be the first to be designed and applied at the national level.

States must therefore primarily seek to identify such persons and groups actively; the Right to Food Guidelines invite states to “establish Food Insecurity and Vulnerability Information and Mapping Systems (FIVIMS), in order to identify groups and households particularly vulnerable to food insecurity along with the reasons for their food insecurity”. They should thus “systematically undertake disaggregated analysis on the food insecurity, vulnerability and nutritional status of different groups in society, with particular attention to assessing any form of discrimination that may manifest itself in greater food insecurity and vulnerability to food insecurity, or in a higher prevalence of malnutrition among specific population groups, or both, with a view to removing and preventing such causes of food insecurity or malnutrition”. The Guidelines also invite states to “develop and identify corrective measures to be implemented both immediately and progressively to provide access to adequate food” (Guidelines 13.1 and 2).

Precise identification of the most vulnerable persons, who they are, where they are located and the particular causes of their vulnerability will be crucially important for designing and implementing appropriate support measures to improve those particular situations and ensure these persons can enjoy their right to food. In most countries, institutions are in place that are charged with doing this work, such as, for example, national statistic services, or special governmental units for food security monitoring or early warning agencies (see below, section 3.12).

Again, specific support measures for the identified vulnerable persons and groups will have to be further regulated and implemented through subsidiary legislation or regulations. Examples of measures to be developed, in addition to targeted transfer schemes, may include: establishing more favourable conditions for women's access to microcredit; ensuring breastfeeding facilities to support women's access to employment; fixing maximum prices for specific food products or for certain segments of the population; implementing employment schemes in areas where there are consistently factors putting people at risk of becoming food-insecure; and tying government procurement to local production or disadvantaged regions. Some examples from the existing state practice are given in Box 40.

#### **BOX 40. Support measures for the most vulnerable – examples from state practice**

***Farm settlements for the landless*** – In the *Philippines*, the Republic Act No. 6657 of 1988 on Agrarian Reform provides for the distribution of land to qualified landless people. According to Section 40.2 of the Act, “sparsely occupied agricultural lands of the public domain shall be surveyed, proclaimed and developed as farm settlements for qualified landless people based on an organized programme to ensure their orderly and early development”.

***A daily balanced meal for the low-wage workers*** – In *Venezuela (Bolivarian Republic of)* the Law on Food for Workers (2004) provides for the right to a partial or whole daily balanced meal (to be determined by the National Nutrition Institute) for workers in the public and private sector whose average salary does not exceed two minimum monthly urban salaries and who work for an employer with fifty or more workers (Art. 2).

***One hundred days of guaranteed employment for poor rural households*** – In *India*, the recently adopted National Rural Employment Guarantee Act (2005) is viewed as a major tool in the struggle to secure the right to food. The Act guarantees a right to at least 100 days of guaranteed employment every year to “every household in rural areas of the country” whose “adult members volunteer to do unskilled manual work” at the statutory minimum wage (sec. 3). Any adult who applies for employment must be employed without delay; if employment is not provided the applicant will receive a daily unemployment allowance (sec. 7).

***Preferred access to land resources for women, youth and vulnerable groups*** – In *Mali*, the Agriculture Orientation Act prohibits discrimination “with regard to access to land resources”. Article 83 specifies that “preferences will be given to women, youth and declared vulnerable groups in distribution of land parcels in the public domain”.



#### **BOX 40. Support measures for the most vulnerable – examples from state practice (cont.)**

Criteria for allocation of such parcels and for certification of vulnerability are to be determined by regulation (Art. 83.3).

**Protection and promotion of breastfeeding** – In the United States of America, the state of **Illinois** enacted the Nursing Mothers in the Workplace Act, which has been in effect since 2001. The Act requires employers to provide nursing women with reasonable paid break time each day to express breastmilk, unless the break time would “*unduly disrupt the employer’s operations*”. The break time may run concurrently with any break time already provided to the employee. Additionally, employers must make reasonable efforts to provide nursing women a private room; under the Act a bathroom stall expressly is not an acceptable private location.

In **Uruguay**, workers in the public sector are allowed to work half time so they may breastfeed their infants for the first six months of life.

**Brazil’s** national breastfeeding programme established a committee to review women’s employment and breastfeeding. The committee surveyed existing legislation and found that it was not uniform across federal, state and municipal levels. It also developed a programme to teach mothers to express their breastmilk in order to take advantage of nursing breaks. **Mexico** offers examples of workers who have negotiated better contracts with provisions for child care.

Sources: See Van Esterik, P. 1992, UN. 1995b.

The framework law should thus require that:

- ◆ Public authorities dealing with assistance measures establish priorities for action, including listing categories of the most vulnerable persons, on the basis of the information provided by the competent technical monitoring institutions.
- ◆ The right to food authority (or the equivalent coordinating body) is competent to review the proposed support measures and, where necessary, gives further guidance so as to ensure that all groups are covered appropriately.

- ◆ Competent public authorities design and adopt specific support measures to prevent or compensate for disadvantages that identified vulnerable persons or groups suffer from with regard to the enjoyment of their right to food, within established deadlines.

Two examples of legal provisions dealing with state obligations to prioritize the most vulnerable persons are given in Box 41.

#### **BOX 41. Obligation to prioritize the most vulnerable – examples from state practice**

According to the draft Law on the Right to Adequate Food of **Peru**, “food assistance provided by the State shall endeavour to ensure food and nutrition security in the perspective of the free exercise of the right to food. This shall be a temporary measure and be implemented in a planned manner, according to objectives, expected results and indicators which objectively demonstrate the annual progress made in achieving food and nutrition security in every area of intervention” (Art. 4.4).

The draft Framework Law on Food of **Honduras** provides for the obligation of the state to “ensure, as a priority, the right to food of the most vulnerable groups, that is:

- a) persons below the extreme poverty line: by priority, pregnant women, children from 0 to 5 years of age, adult persons as from 60 years of age who are not covered by the social security regime and persons who suffer from Grade 1, 2, and 3 malnutrition;
- b) persons below the poverty line: girls and boys from 0 to 14 years of age, disabled persons, pregnant and lactating women and elderly persons over 70 years of age that are not covered with social security regime.”

A definition of poverty line given by the National Institute of Statistics will be used for the purposes of the implementation of this aim (Art. 19).

In **Uganda**, the draft Bill for a Food and Nutrition Act contains provisions on special protection for mothers and children. Its Article 34 requires the “Ministry of Health to:

- A) Establish measures to ensure that the special nutrition needs of pregnant and nursing women are met and that assist mothers to provide adequate care for their infants;
- B) Promote and protect the right of infants to breastmilk and to appropriate weaning foods after six months of age, and adopt appropriate measures to ensure the enjoyment of the right to food for children of five years or less;
- C) Adopt measures to provide for food and nutrition needs of orphaned and vulnerable children.”

It may also be possible for the framework law to list out as exhaustively as possible the vulnerable groups for which the support measures must be taken as a priority. For instance, for “children group”, it could go on to include more specifically street children, children in custodial institutions, children working in hazardous industries, children in conflict situations, children of refugees, children with debilitating illnesses, children of parents with debilitating illnesses and so on. The advantage of such a detailed listing would be that it would require the competent state authorities to think of more specific entitlements for each of these categories also.

It is of particular importance that subsidiary laws or regulations establishing support measures for the most vulnerable persons or groups be developed in accordance with right to food standards and human rights principles (see above, section 3.2.5).

## 3.6

# PROVISIONS ON IMPACT ASSESSMENT

Assessing and evaluating the likely effects of a law, policy, programme or project on the availability, accessibility or adequacy of food of the concerned population beforehand can prevent interfering with their enjoyment of the right to food. A duty to undertake a right to food impact assessment can be provided for the relevant state authorities in addition to non-state actors, and further elaborated through subsidiary implementing legislation or regulation.

Including such a duty in the framework law would implement the Right to Food Guideline 17.2, which encourages states to undertake a “right to food impact assessment in order to identify the impact of domestic policies, programmes and projects on the realization of the right to food”. Generally speaking, impact assessment is the process of identifying, predicting, evaluating and mitigating effects of a policy, project or programme proposal prior to taking decisions and making commitments. The objectives of an impact assessment are to ensure that applicable considerations are explicitly addressed and incorporated into the decision-making process, to anticipate and avoid or to minimize the adverse effects of proposals and to ensure equitable balance among the various competing interests involved. Impact assessment first developed in the field of environmental protection but has also been applied widely in the field of health protection, the fight against poverty and human rights (see Box 42).

### **BOX 42. Undertaking impact assessments – examples from other fields**

WHO, the World Bank, the Organization for Economic Co-operation and Development (OECD), and the International Association for Impact Assessment (IAIA) have explored and developed principles for undertaking impact assessments: WHO: Health Impact Assessment; World Bank: Poverty Social Impact Assessment; OECD: Principles for Evaluation of Development Assistance; IAIA: Principles of Environmental Impact Assessment Best Practice.

**BOX 42. Undertaking impact assessments – examples from other fields (cont.)**

The Contracting Parties to the Convention on Biological Diversity have developed the *Voluntary guidelines for the conduct of cultural, environmental and social impact assessments regarding developments proposed to take place on, or which are likely to impact on, sacred sites and on lands and waters traditionally occupied or used by indigenous and local communities* (Akwé: Kon Guidelines, 2004). The guidelines should play a role in providing information on possible impacts of development projects and thereby help to prevent their potential adverse effects on the livelihoods of indigenous and local communities concerned.

In the European context, the European Policy Health Impact Assessment Guide provides useful information on the health impact assessment processes (see IMPACT. 2004.)

In the context of the right to food, impact assessment provisions will be particularly useful with regard to activities such as mining, timber extraction, exploitation of other biological resources, or adoption of support measures for developing biofuels, which can potentially affect the availability or accessibility of adequate food.

Three principal benefits derive from carrying out a prior assessment of the potential impacts of relevant policies, programmes and projects on the enjoyment of the right to food: (i) it can help to design the most appropriate and right to food compliant measures; (ii) it can prevent possible violations of the existing access to food or the means for its procurement; (iii) the existence of a prior impact procedure can serve as a deterrent in that decision-makers will know they should design projects and policies with the least negative impacts on the right to food, as these would be more likely to survive scrutiny.<sup>146</sup>

The main steps of an impact assessment process generally include the following:

- Screening (i.e. identifying proposals subject to impact assessment and to what level of detail).
- Scoping (i.e. identifying the issues and impacts that are likely to be significant for the effective enjoyment of a given right).
- Examination of alternatives (i.e. determining other options for achieving the same objectives as the proposal).

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146 Adapted from De Schutter, O. 2006.

- Impact analysis (i.e. identifying and predicting the likely social, economic and other related effects of the proposal).
- Mitigation and impact management (i.e. establishing measures necessary to avoid or minimize predicted adverse impacts and incorporate these into the proposal implementation plan).
- Impact statement or report, including simplified summary for public debate.
- Public consultation.
- Review of the impact assessment report (i.e. determining whether the report identifies all relevant information on the possible impacts on the enjoyment of a given right, takes into consideration all potential social and economic effects of the proposal and contains concerns and comments of the potentially affected population and all the information necessary for decision-making).
- Decision-making (i.e. approving or rejecting the proposal and establishing the terms and conditions for its implementation) and evaluation and monitoring.<sup>147</sup>

Establishing specific right to food impact assessment procedures will require considerable financial and human resources and may not be realistically possible in many countries. At the same time, in many countries there may be impact assessment procedures that are already in place (e.g. environmental impact assessment, social or health impact assessment, human rights impact assessment). Where this is the case, assessing the possible impacts of policies, projects and programmes on the availability, accessibility, stability, utilization and adequacy of food of concerned populations could be incorporated into these existing processes. The most appropriate home for a right to food impact assessment would be within a human rights impact assessment or, where this does not exist, a social impact assessment.

Accordingly, depending on the particular circumstances of a given state, the framework law could:

- ◆ Require a prior right to food impact assessment from state and non-state actors, either as a stand-alone process or incorporated into existing impact assessment procedures.

The relevant legislation or regulation related to impact assessment processes should be based on and consistent with right to food standards and human rights principles (see above, Part One). Box 43 gives an example of legislative provisions on impact assessment from state practice.

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<sup>147</sup> Adapted from the IAIA Principles of Environmental Impact Assessment Best Practice.



**BOX 43. Impact assessment – example from Uganda**

The draft Bill for a Food and Nutrition Act of *Uganda* requires that:

- 1) Prior to a major decision being made, the relevant public authority or concerned person shall carry out an impact assessment to identify, predict, evaluate and mitigate economic, social and other effects as well as the domestic policies, programmes and projects that may affect the realization of the right to food.
- 2) The Council shall cause to be undertaken an annual right to food impact assessment to identify the impact of domestic policies, programmes and projects on the realization of the right to food.

## 3.7 PROVISIONS ON INFORMATION

The Right to Food Guidelines make several recommendations related to information; for example, they invite states to “inform the general public of all available rights and remedies to which they are entitled” under the right to adequate food (Guideline 7.3), to disseminate information regarding food safety and consumer protection (Guideline 9.6) and marketed food (Guideline 9.7) as well as “the feeding of infants and young children that is consistent and in line with current scientific knowledge” (Guideline 10.6). Information<sup>148</sup> is of fundamental importance for people to be able to enjoy their rights or to make the best possible use of their entitlements; to make more informed choices with regard to food they buy and consume; to avoid risks to their health resulting from the consumption of an imbalanced or inadequate diet or of food contaminated by chemicals or pesticides; to prepare a nutritious and balanced diet for infants and young children; and to seek redress for legal violations including fraud (see Box 44). Information is equally important for government officials to assist them in acting in a way that does not violate somebody’s right to food.

### BOX 44. Relevance of information for the realization of the right to food – example from India

The Right to Information Act of *India* (No. 22, 2005) entitles every citizen to receive information from the government. The Act covers central, state and local governments and all bodies owned, controlled or substantially financed by the governmental, as well as non-governmental organizations substantially financed, directly, or indirectly, by funds provided by the appropriate government (sec. 2(h)). It also covers executive power, judiciary and legislature (sec. 2(e)). ▼

148 “Information” here should be understood broadly, including not only all technical information relevant to the availability, accessibility and adequacy of food, but also all activities or measures, including laws, regulations, policies, programmes and projects affecting or likely to affect the effective enjoyment of the right to food.

**BOX 44. Relevance of information for the realization of the right to food – example from India (cont.)**

People in rural Karnataka used the right to information to realize their entitlement to rice rations at a fixed price, and thus to enforce their right to food. Villagers participated in social audits and public hearings to demand that the rations due to them be allotted at the correct prices. Previously, monthly rations were not given to the people on a regular basis but people had not complained as they did not have the information about how many programmes existed or how much food a person was entitled to request. The public hearing in Karnataka resulted in people claiming their food portions and led to an improvement in the quality of the food grains provided.

The information can also relate to special measures for discriminated persons and groups, support measures for disadvantaged persons, including governmental programmes designed for such persons and groups, to changes in land and water regimes, to credit schemes and school-feeding programmes.

Although the right to information may already be legally recognized in the national context (in the constitution or in legislation), the framework law should reaffirm this right, refer to the existing law where appropriate, and elaborate more on the role of public authorities<sup>149</sup> in ensuring the right to information in the specific context of the right to food.

First, the framework law should require the competent public authorities at all levels to:

- ◆ Inform the population about the rights established in the framework law and about the implementing and subsidiary legislation adopted upon its entry into force, as well as about any other measure taken for the purpose of facilitating and promoting the realization of the right to food.
- ◆ Use the most appropriate ways and methods of disseminating information, including by providing information in oral ways (e.g. rural radio) and in local language(s), notably among the most marginalized areas and among populations with a high rate of illiteracy.

The requirement to provide information in such a way so as to make it clear and easily accessible to all is significant: for example, installing panels with written information about the newly established entitlement to a minimum amount of food in a village where the majority of population is illiterate would go against the basic human dignity of the concerned population.

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<sup>149</sup> For the meaning of the term “public authority”, see section 3.2.4.g above.

Second, the framework law should also reaffirm the right to access information and the corresponding duty of public authorities to provide the requested information. These are firmly established in international human rights law, where it is considered implicit in the freedom of expression,<sup>150</sup> and in many states.<sup>151</sup>

For example, the framework law could require that relevant public authorities:

- ◆ Establish a simple, fair and accessible procedure allowing individuals to seek information of relevance to the enjoyment of the right to food.
- ◆ Provide the requested information within an established short deadline.

Information of relevance to the enjoyment of the right to food should include all information held by a given public authority related to its work. For example, where a request for information regards a planned natural resource-based activity, concerned persons should have the right to receive all data concerning the planned activity including information regarding the licence/concession, in addition to the conditions and requirements linked to the exercise of the activity.

The right to be provided with information upon request is not an absolute right; in some situations state authorities may take decisions or employ measures that interfere with or limit the right to information (e.g. protection of the rights of others, protection of public health and public emergency in areas affected by a conflict). The government action is valid where the restrictions are established by law, necessary for the purpose of an overriding interest and proportionate to that interest. Restrictions should only apply where there is a risk of substantial harm to the protected interest and where that harm is greater than the overall public interest in having access to the information (see above, section 3.3.3).<sup>152</sup>

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150 On the American continent, the Inter-American Court of Human Rights in its jurisprudence has recognized certain aspects of the state's obligation to provide information. Very recently, the Inter-American Court, in the case *Marcel Claude Reyes and Others vs. Chile*, declared that all people have a general right of access to government-held information (Judgment of 19/09/2006). In Europe, the European Court of Human Rights has recognized a right to access information under circumstances in which the denial of information affects the enjoyment of other Convention rights, such as the right to respect for private and family life (see *Guerra and Others vs. Italy*, Judgment of 19/02/1998) and the right to life (see *Oneryildiz vs. Turkey*, Judgement of 30/11/2004). A similar position has been taken by the African Commission on Human Rights in its recent Declaration of Principles on Freedom of Expression in Africa (adopted at the 32nd Ordinary Session, 17–22 October, 2002, Banjul, Gambia); see [www.freedominfo.org/countries/index.htm](http://www.freedominfo.org/countries/index.htm)

151 Over 40 countries have incorporated the right to information into their constitutions while some 60 countries have adopted freedom of information laws that provide for the right to access state-held information; see [www.freedominfo.org/countries/index.htm](http://www.freedominfo.org/countries/index.htm)

152 See, for example, *International mechanisms for promoting freedom of expression*, Joint Declaration by the UN Special Rapporteur on Freedom of Opinion and Expression, the Organization for Security and Co-operation in Europe Representative on Freedom of the Media and the Organization of American States Special Rapporteur on Freedom of Expression.

## 3.8

# PROVISIONS ON EDUCATION AND AWARENESS RAISING

Like information, education is a key element for the effective realization of the right to food. It is the prerequisite for an individual to be able to understand information and make better use of his or her entitlements and rights. The right to education represents both a human right in itself<sup>153</sup> and an indispensable means for realizing other human rights, including the right to food.<sup>154</sup> The Right to Food Guidelines acknowledge the important role of education and awareness raising in giving effect to the right to food; they urge states to “strengthen and broaden primary education opportunities, especially for girls, women and other underserved populations” (Guideline 1.2), to “encourage agricultural and environmental education at the primary and secondary levels” (Guideline 11.3), to implement education measures to improve “means for food preparation ... especially in rural households” (Guideline 11.6) and to “promote and/or integrate into school curricula human rights education” (Guideline 11.7).

The framework law can play a role in strengthening this link between right to education and right to food, and include provisions regarding both children and adult education. In the specific context of the realization of the right to food, education enables children to acquire skills and knowledge that contribute to their self-development and help them become self-sustaining adults able to feed themselves by their own means. On the other hand, children who lack certain nutrients in their diet or who suffer from protein-energy malnutrition do not have the same potential for learning as healthy and well-nourished children.

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153 Since the Universal Declaration of Human Rights first recognized the right to education (Art. 26), this right has been reiterated in several other instruments such as the ICESCR (Art. 13.1), ICERD (art. 5(e) (v)), CEDAW (Arts 10 and 14.2(d)) and CRC (Art. 28)

154 See Vidar, M. 2005, p. 146.

This link between education and food was acknowledged very early by developed states, which introduced hot meals in many schools to increase enrolment and reduce the drop-out rate.<sup>155</sup> This is particularly important for girls, as women's education has a significant impact on child nutrition and thus infant and maternal mortality and the promotion of health and nutritional safety.<sup>156</sup> Education is also essential for adults to enable them to participate actively in social and political activities and in taking decisions that can affect their livelihoods. Skills development and understanding of human rights are equally relevant and necessary for public officials in order to enable them to implement their obligations and responsibilities under the right to food and the framework law in an effective manner. Accordingly, the framework law could require competent public authorities (e.g. ministry of education) to ensure that:

- ◆ The school curriculum includes material related to food and nutrition education, the right to food and human rights principles.
- ◆ Adult education and training programmes, when relevant, include material related to food and nutrition, the right to food and human rights principles.

The nutrition component of education is particularly important. Because nutrition education can have an impact on people's behaviour and dietary habits, it can strongly affect their enjoyment of the right to food. Nutrition education is also of particular value to children; communicating to mothers the value of exclusive breastfeeding in the early months of a child's life, the importance of energy-dense foods for children and the ways to decrease contamination and the risk of food safety hazards can strongly improve children's right to food as well as their health.

Some examples of legal provisions on education related to the realization of the right to food are given in Box 45.

#### **BOX 45. Education on the right to food – examples from state practice**

In **Ecuador**, the Law on Food and Nutritional Security (2006) charges the National Food and Nutrition Security Council with “design[ing] the study programmes on food and nutrition education that will be obligatory in every education establishment – public, private, municipal and semi private schools which partly receives public funding” (Art. 16), in coordination with other competent bodies.



<sup>155</sup> For example, in Scotland, the provision of a hot meal in many schools was introduced along with compulsory education as early as 1872.

<sup>156</sup> See German Federal Ministry of Food, Agriculture and Consumer Protection, German Technical Cooperation (GTZ) and FIAN. 2005.

**BOX 45. Education on the right to food – examples from state practice (cont.)**

In **Mexico**, education appears in the regulation whose objective is to improve the nutrition status of the population and to prevent health problems related to nutrition (NOM-043-SSA2-2005). The regulation sets out the criteria for education in the field of nutrition: persons working in the field of nutrition are obligated to provide guidance to the public, social and private sectors.

Educational and awareness-raising material related to food and nutrition, the right to food and human rights principles could be integrated into school and university curricula, material aimed at vulnerable population groups and at the most marginalized areas within a country and in training and skills development programmes for persons and groups working in areas relevant for the realization of the right to food (civil servants, lawyers, judges, CSOs, NGOs, farmers and the private sector).

## 3.9

# PROVISIONS ON EMERGENCIES

As a basic human right, the right to food applies at all times and in all situations, in times of peace as well as during armed conflict, in ordinary times and during emergencies.<sup>157</sup> This must be clearly confirmed by the framework law, and appropriate provisions on early warning and food response need to be provided. It would be particularly useful if the relevant provisions of the framework law would address both aspects of a food emergency: preparing for an emergency (i.e. early warning and preparedness procedures and measures) and reacting to an emergency (i.e. organizing and managing an adequate food response).

An emergency can be caused by natural events (drought, floods, storms, earthquakes, crop failures resulting from pests or disease) or by human agency (internal or international armed conflict). In the latter case, in addition to human rights law, international humanitarian law applies. This branch of international law consists of rules regulating the behaviour of parties to an armed conflict:<sup>158</sup> with regard to food, it prohibits certain behaviour such as the starvation of civilians as a method of warfare and it regulates humanitarian assistance activities, including food and food-related programmes.

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157 In times of public emergency, states are allowed to derogate from certain human rights, in accordance with the relevant provisions and conditions under the applicable international human rights treaty. For the right to food, the ICESCR only contains a general limitation clause (see above, section 3.3.3) and has no provision on derogations. However, in its minimum core content, i.e. freedom from hunger, the right to food is related to a non-derogable right to life and thus cannot be derogated even in emergencies. See Cotula & Vidar, 2003.

158 The main sources of international humanitarian law are the four 1949 Geneva Conventions and the two 1977 Additional Protocols. Given the nearly universal ratification of the Geneva Conventions, it is widely accepted that their provisions have acquired the status of international customary law, and are therefore binding upon all states regardless of whether they have ratified the treaties. On the other hand, ratification of the two Additional Protocols is less universal, and whether their provisions constitute norms of customary law must be assessed on a case-by-case basis.



In an emergency, people's ability to produce or purchase food and other essentials is significantly reduced. Thus, the state must be prepared to respond adequately to such situations; early intervention can avoid further destitution, suffering and violations of the right to food. To be able to do so, in-country capacity must be such to ensure adequate monitoring, risk assessment, early warning and preparedness for possible crises. While most countries in the world have some kind of intervention system allowing them to react to food emergencies (often through a food reserve), many lack adequate emergency preparedness measures (see Box 46).

#### **BOX 46. Food security reserves – examples from state practice**

Most countries susceptible to food emergencies have established strategic food reserves allowing them to cope with an emergency when it occurs, and have set up early warning systems to gather all information having a bearing on the current and expected food situation in the country (e.g. Ethiopia, Indonesia, the United Republic of Tanzania, Ukraine, Zambia).

The **Indonesian** Regulation on Food Security establishes the national food reserve, which consists of “government food reserves and public food reserves”. The government food reserves are to be created at all government levels: central, provincial, regency/mayorality as well as village (Art. 5). Public food reserves “shall be created independently and in accordance with the capacity of the society” (Art. 8). (See Governmental Regulation No. 68/2002 of 30/12/2002.)

The Food Security Act of the **United Republic of Tanzania** (1991) addresses the management of a national food security reserve. Responsibility for the reserve lies within the Food Security Unit of the Ministry of Agriculture. The government has no mandate to intervene to stabilize prices, although it does purchase from more disadvantaged regions, where private traders are less active.

A number of regional initiatives have also been established to cope with food emergencies such as the Southern African Development Community's Regional Food Reserve Facility ([www.sadc.int](http://www.sadc.int)), the East Asia Emergency Rice Reserve (<http://www.eaerr.com>) and the South Asian Food Security Reserve ([www.saarc-sec.org](http://www.saarc-sec.org)).

While direct provision of food will be a primary means to ensure the right to food, other facilitating measures are called for to strengthen the state preparedness to respond to emergencies as well as people's capacity to cope with emergencies. These include establishing procedures to strengthen food reserves (see Box 47) and emergency systems, as well as measures to accelerate food production

and distribution, reforming commercial structures, providing marketing services, employing risk management, providing credit and fertilizers, and revising pricing policies.<sup>159</sup> Therefore, the most appropriate response to emergencies will require an appropriate *combination* of provision and facilitating measures.

The FAO Right to Food Guidelines invite states to “put in place adequate and functioning mechanisms of early warning to prevent or mitigate the effects of natural or human-made disasters” (Guideline 16.7) and to establish “mechanisms to ... gain understanding of the coping strategies of affected households in the event of natural or human-made disasters” (Guideline 16.8). Such mechanisms and procedures, should be laid down through a relevant legislation. In many countries, however, this is not the case. Some countries only have a general policy statement; in some others the existing legislation is insufficient or inadequate for providing necessary legal guarantees for the management and prevention of food insecurity, and for ensuring an appropriate system for emergency response compatible with the right to food and human rights principles. The framework law could play a role in improving this situation.

In addition, while there should be in a country an authority responsible for coordination of the emergency response, such an authority cannot be established through a framework law on the right to food. On the other hand, the framework law can play a role in the establishment or strengthening of institutions dealing specifically with *food response* by providing a legal basis for an organized and prompt state action. It may also be useful if the framework law included provisions on managing emergency (food) response received through international assistance.

The framework law could thus include provisions that:

- ◆ Require the competent public authorities to review the relevant legislative and institutional framework regulating food emergencies so as to ensure that it covers both early warning and preparedness for a crisis as well as organizing and managing food response in the case of a crisis, and that it complies with the right to food and the relevant international standards.
- ◆ Establish or strengthen a national institution responsible for coordinating the emergency food response and ensure that its mandate and functions are compatible with the right to food and international standards regulating emergencies.<sup>160</sup>

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159 See Chiaradia-Bousquet, J.P. & Morel-Chevillet, L. 1996. See also FAO. 2002a.

160 In 2005, at the World Conference on Disaster Reduction, 168 governments adopted the Hyogo Framework for Action 2005–2015: Building the Resilience of Nations and Communities to Disasters. One of its strategic goals is “the development and strengthening of institutions, mechanisms and resilience to hazards”. See also FAO, 2007b.

- ◆ Designate the competent public authority responsible for initiating the request for international assistance in the case of necessity and for supervising and coordinating distribution of food response received.

Specific responsibilities and tasks of the relevant public and private actors for carrying out the various phases of risk assessment and risk management could be assigned through subsidiary legislation or regulations, and appropriate coordination procedures and mechanisms could be designed in some detail. Among others, this would include organizing monitoring, risk and hazard-assessment procedures, setting up early warning systems (at local, regional and national levels) actively involving those at risk, identifying response management structures, clarifying the responsibilities of different agencies and organizations in the provision of emergency relief, establishing or maintaining food stocks and relief funds, organizing training and education, and implementing information-sharing and coordination across the affected sectors (see Box 47).

#### **BOX 47. Developing and reviewing emergency management legislation – example from Solomon Islands**

The Solomon Islands drafted its first national disaster legislation in 1989. In 2005, under the Solomon Islands Institutional Disaster Risk Management Strengthening Project, the government started a multistep programme to review disaster legislation and plans. The aim of the programme corresponds to recent international trends in dealing with emergencies that indicate that the impact of disasters can be mitigated by human action and puts the focus on an intersection between identified risks and hazards and their management in terms of education, assessment, training, information sharing and cooperation in social organization.

Legislative review is deemed an integral part of updating and strengthening the capacity of the National Disaster Centre and its executive arm to deal with disasters. Mainstreaming disaster risk management through legislation is seen as an integral part of national assurance for risk management and disaster preparedness. The legislative review process will include multiple stages starting with a comprehensive analysis of legislation in efforts to gauge the current state of Solomon Islands disaster risk management.

*Source: See Kessler, N. 2006.*

As to the management and coordination of international food response, there should be a reporting obligation on assistance received (the form of assistance received and distributed, difficulties encountered, etc.), for example to the national authority on the right to food, as well as on regularly publishing the most relevant data.<sup>161</sup> Other provisions of the framework law or subsidiary legislation could include tying food assistance to local and regional procurements of food items needed, requiring respect for people's dietary habits and culture and following international standards for humanitarian assistance.<sup>162</sup>

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161 See Report of the German Federal Ministry of Food, Agriculture and Consumer Protection, GTZ and FIAN, 2005, p. 57 (cit., note 156 p. 126).

162 See Cotula, L. & Vidar, M. 2003, Chapter 3.8. See also Right to Food Guidelines 15 and 16.

## 3.10 PROVISIONS ON INTERNATIONAL COOPERATION

As mentioned earlier, Articles 2.1 and 11 of ICESCR refer to international cooperation and assistance as among the means to achieve the full realization of the right to food. The CESCR considers that the obligation to devote the “maximum of its available resources” in Article 2 of ICESCR was intended by its drafters to refer to both the resources existing within a state and those available from the international community through international cooperation and assistance (GC 3, para. 13). The full realization of the right to food at the national level would be furthered if national efforts are supported by an enabling international environment.

In GC 12, the CESCR underlined the essential role of international cooperation in achieving the full realization of the right to food. In implementing their commitments to international cooperation, states should take steps to respect the enjoyment of the right to food in other countries, to protect that right, to facilitate access to food and to provide the necessary aid when required (para. 36). At the same time, states have a joint and individual responsibility to cooperate in providing disaster relief and humanitarian assistance in times of emergency, including assistance to refugees and internally displaced persons. Each state should contribute to this task in accordance with its ability (para. 38). The CESCR has followed up on its opinion by regularly requesting information from wealthier countries on the way they cooperate internationally, including the amount devoted to overseas development assistance.<sup>163</sup>

The UN Special Rapporteur on the right to food has considered that states should “respect, protect and *support the fulfilment* of the right to food of people living in other territories, to fully comply with their obligations under the right to food.”<sup>164</sup>

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163 See Donati, F. & Vidar, M. 2008.

164 See UN Special Rapporteur on the right to food. 2006, para. 34.

Despite this, there is not a clear consensus among states about international cooperation as an international legal obligation, or about extraterritorial obligations.<sup>165</sup> Nevertheless, a state may decide in its own national legislation to establish standards for its international cooperation and for the extent to which its obligation to respect, protect and fulfil the right to food should be applied extraterritorially.

With regard to international food response more specifically, the Right to Food Guidelines require states that provide international assistance in the form of food to “regularly examine their relevant policies and, if necessary, review them to support national efforts by recipient States to progressively realize the right to adequate food” (Guideline 13).

The framework law can play a role in furthering state action in the field of international cooperation: it should thus usefully include provisions in this regard. For example, it could require that competent public authorities:

- ◆ Ensure that activities undertaken in other countries, including by private actors, do not infringe on the enjoyment of the right to food by people in the concerned countries.
- ◆ Promote international cooperation and provide assistance to ensure the realization of the right to food in other countries if in a position to do so.

#### **BOX 48. Promoting international cooperation – example from Brazil**

According to the National Food and Nutritional Security Framework Law of **Brazil**, the State of Brazil shall promote technical cooperation with foreign countries, as a means of contributing to achieving the human right to adequate food at the international level (Art. 6).

Thus, an established obligation to cooperate would also include the extraterritorial dimension of state obligations, i.e. the obligation to contribute to the realization of the right to food in other countries, in as much as they are in a position to do so.

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165 See Donati, F. & Vidar, M. 2008 and Cotula, L. & Vidar, M. 2003.

## 3.11

# PROVISIONS ON A NATIONAL AUTHORITY ON THE RIGHT TO FOOD

The proper implementation of the right to food is not possible without interdisciplinary collaboration across sectors, institutions and actors – both public and private – potentially affecting availability, accessibility and adequacy of food in a given country. The Right to Food Guidelines require states to “ensure the *coordinated efforts* of relevant government ministries, agencies and offices” (Guideline 5.2, emphasis added). For the purposes of the framework law on the right to food, coordination would require a strong coordinating mechanism equipped with adequate technical and budgetary capacities and with appropriate powers to link and organize the diverse elements towards the affirmed objective of realizing the right to food.

Such a coordinating mechanism could be one single body (national authority on the right to food) composed of several subbodies charged with specific tasks (decision-making body, technical executive body, advisory bodies).

If a model of one national authority on the right to food is followed, the framework law should:

- ◆ Establish or provide for the establishment of a national authority on the right to food as *the overarching coordinating body* for the implementation of the right at national level.

The law should also require that, in exercising their powers and duties, the national right to food authority:

- ◆ Applies the human rights principles established by the framework law (see above, section 3.2.5).
- ◆ Works in close cooperation with representatives of civil society and takes their views into consideration.

- ◆ Uses, to the fullest possible extent, the services, facilities and information (including statistical information) of the relevant public and private bodies and organizations to prevent duplication of effort and expenses.

The framework law should not itself provide details on the functioning of the coordination bodies: these would appear in implementing legislation to be adopted within deadlines set in the main law. However, the mandate, composition and main functions as well as provisions for ensuring that the established institutions are given the financial and human resources required to fulfil their mission should be given in the framework law itself.

Recommendations regarding the main elements of a national right to food authority and a technical body/secretariat follow in the next sections. These recommendations are by nature general, as the legal status, mandate, functions and composition of these institutions will vary from country to country depending on specific legal traditions, policies and other particular characteristics. Box 49 gives a brief overview of different models of national food and nutrition security coordination in the most relevant existing or draft laws.

#### **BOX 49. Models of national food and nutrition security organization and coordination – examples from state practice**

Throughout the Latin American region, coordination of national food and nutrition security policy seems to rely on a model of a *system* on food and nutrition security open to participation of various governmental and non-governmental institutions and bodies (this is the case in Brazil, Ecuador, Guatemala and Nicaragua). The legal status, composition and functions of various bodies that the system differ from country to country.

In 2006, **Brazil** adopted the Law establishing the National Food and Nutritional Security System (SISAN) to guarantee the human right to adequate food (National Food and Nutritional Security Framework Law No. 11.346 of 15 September 2006). SISAN comprises a group of organs and entities from all state levels, as well as private profit and non-profit institutions that are dedicated to food and nutrition security and have an interest in the system. The main bodies in charge of the implementation of food and nutrition security are the following: (a) the National Conference on Food and Nutrition Security, a body responsible for indicating to the National Council on Food and Nutrition Security (CONSEA) directives and priorities for the national food and nutrition policy and plans as well as for evaluation of the SISAN; (b) CONSEA, an advisory body assisting the Presidency of the state on food and nutrition security; and (c) the Inter-Ministerial Chamber for Food and Nutritional Security, a body responsible for elaborating the



**BOX 49. Models of national food and nutrition security organization and coordination – examples from state practice (cont.)**

national policy on food and nutrition security, for coordinating its implementation and for harmonizing the policies and plans of its counterparts at state and district levels, to be created by an act of the Federal Executive. Participation of various bodies and institutions in SISAN shall be defined according to the criteria set by the CONSEA and the Inter-Ministerial Chamber for Food and Nutritional Security.

**Ecuador** adopted the Law on Food and Nutritional Security in 2006 (Law of 27 April 2006). The law creates the national system on food and nutrition security with the purpose of coordinating, promoting and ensuring the production, distribution, availability, stability of supply, access and utilization of food in a holistic and adequate manner at all levels of state, and in accordance with intercultural and gender requirements. Participation in the system is open to public, private and community institutions and organizations. The system is composed of two main bodies: (a) the National Food and Nutrition Security Council (CONASAN), the main decision-making body and (b) the Executive Secretariat, which is the technical advisory body to the CONASAN.

In 2005, **Guatemala** adopted the Law on the National Food and Nutritional Security System – SISAN (Decree No. 32-2005). The SISAN comprises various government authorities and non-governmental bodies. It is structured on a three-part model of activity: (a) National Food and Nutrition Security Council (CONASAN), responsible for management and political decision-making; (b) Food and Nutrition Security Secretariat (SESAN) in charge of coordination and technical planning; and (c) various institutions or agencies at every level of state, responsible for implementation of the activities related to food and nutrition security. In addition, the SISAN shall also comprise two other organs; (d) a consultation and social participation body; and (e) a group of support institutions comprising institutions that are not formal members of CONASAN and international cooperation agencies able to provide technical, financial and operational support.

In **Nicaragua**, Decree No. 03-2007 established the National Commission on Food and Nutritional Sovereignty and Security within the Presidency of the Republic, as a decision-making body charged with coordinating government activities designed to combat poverty, hunger and undernutrition. The draft Law on Food and Nutritional Sovereignty and Security of July 2008 provides for the establishment of the National System on Food and Nutritional Sovereignty and Security (SINASSAN) to promote, protect and fulfill the right to adequate food as a fundamental human right inherent to human dignity. Participation in SINASSAN is open to various government authorities and non-governmental bodies dealing with issues affecting food sovereignty and security in Nicaragua.



#### **BOX 49. Models of national food and nutrition security organization and coordination – examples from state practice (cont.)**

The draft Law provides for a six-part structure of the SINASSAN: (a) the National Commission on Food and Nutritional Sovereignty and Security (CONASSAN), as a decision-making body; (b) the Food and Nutritional Sovereignty and Security Secretariat, a technical executive body in charge of promoting coordination, execution and intersectoral and interinstitutional collaboration; (c) Sectoral Technical Committees on Food and Nutritional Sovereignty and Security, the scientific and technical advisory bodies in charge of coordination with representatives from regional, departmental and municipal levels, and providing support to them; (d) Regional Commissions on Food and Nutritional Sovereignty and Security in the autonomous regions of Atlántico Norte and Sur; e) Departmental Commissions on Food and Nutritional Sovereignty and Security; and f) Municipal Commissions on Food and Nutritional Sovereignty and Security.

**Honduras, Peru** and **Uganda** are examples of a two-part model of a national authority responsible for food and nutrition security.

A draft Framework Law on Food of **Honduras** (of 2007) provides for the establishment of the National Commission on the Right to Food as a decision-making coordinating body. The Commission will be assisted in its work by a technical unit, to be created and regulated through implementing regulations.

Supreme Decree 118-2002-PCM (of 13 November 2002) of **Peru** established the Multisectoral Commission on Food Security within the Presidency of the Council of Ministers (PCM). The Commission is charged with coordinating, evaluating and prioritizing policies and sectoral measures aimed at guaranteeing the food security of the population. The Technical Committee of the Multisectoral Food Security Commission is an operative and decision-making body itself subordinated to the Technical Secretariat of the Interministerial Commission of Social Affairs of the PCM. A draft Law on the Right to Adequate Food of Peru (of 2007) does not give rise to any new institutions: it reiterates the responsibility of the PCM for the implementation of the National Food and Nutrition Security Policy, and establishes the restoration of a technical multisectoral food security group, under a new structural dynamic in order to improve its effectiveness.

The draft Bill for a Food and Nutrition Act of **Uganda** (of September 2008) provides for the establishment of the Uganda Food and Nutrition Council as a coordinating, monitoring and advisory body on food and nutrition security. It will be seconded in its work by the Secretariat, to be designated by the Office of the Prime Minister or Minister (to be defined).

Some of the systems established for coordinating national food and nutrition security mentioned in Box 49 involve many different bodies and are rather complicated; the involvement of numerous different bodies leaves room for overlapping responsibility, and excessive bureaucracy that may undermine the transparency in practice. While this option may be appropriate in certain countries, establishing one single body, composed of two to three organs, charged with specific tasks (such as examples of a two-part model mentioned in the box), may be a better option for many countries.

The possible structure, mandate and functions, and composition of such a body will now be addressed in turn.

### **3.11.1 STRUCTURE OF THE RIGHT TO FOOD AUTHORITY**

The national right to food authority can take two principal forms: it can be established within an existing ministry or as a separate, self-standing authority established at the highest level of government.

In most countries, national councils or commissions have been established to deal with issues related to food and nutrition security. In practice, many such institutions are ineffective due to unclear mandates, differences in priorities, system rigidities, lack of communication among various government sectors involved, lack of follow-through or insufficient human and financial resources. In addition, such institutions are generally attached to one line ministry (which is most often the ministry of agriculture, although sometimes the ministry of social development or ministry of health).

Enhancing coordination within the existing structure may be the only politically palatable choice within a national context, and it can lead to some improvements. This will be the case where the roles of the various entities are better defined and concrete mechanisms are established to improve coordination. On the other hand, having a national right to food authority attached to one line ministry can exacerbate problems of fragmentation and duplication in governmental activities related to the right to food, as it may skew priority setting and resource allocation. More importantly, because it is attached to one line ministry, the coordinating mechanism would not enjoy the political authority necessary to ensure active collaboration on the part of other actors.

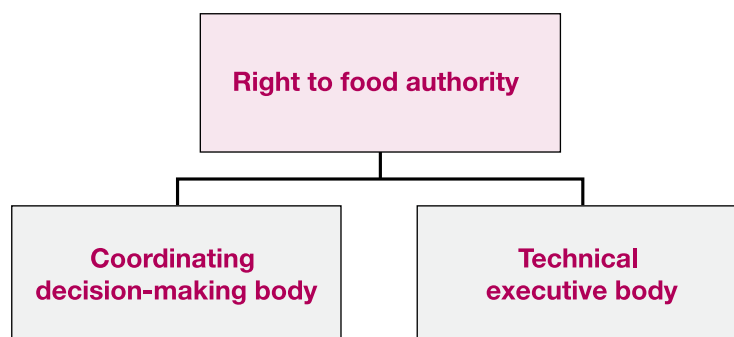
For these reasons, setting up a stand-alone national authority for the right to food or food security at the highest level of government or transforming existing structures into such a national authority (in the president' or the prime minister's office) is a better strategy for ensuring a clear view across ministries and divisions, and the authority needed to guarantee collaboration by all relevant state and non-state actors. The high hierarchical position of the authority and its exclusive focus on the realization of the right to food would facilitate systematic consideration

of the right to food or of its relevant components when decisions are made on economic, social, financial, agricultural, trade and other state policies. In addition, it would place the realization of the right to food and effective coordination higher on the political agenda.

While there are certainly difficulties involved in establishing a single government agency mandated to ensure cross-sectoral coordination, a number of countries have adopted this strategy in the field of food and nutrition security (see above, Box 49) and it should remain the ideal goal. The easiest path is to build on existing institutional structures. An existing commission or council on food and nutrition security could be strengthened: it could be detached from the line ministry and have its mandate, functions and composition reviewed and outlined in the framework law. In such a case, it is crucial that it be entirely absorbed into the newly established authority.

Such a coordinating mechanism for the right to food could be a two-part model of coordination composed of a coordinating decision-making body and a technical executive body (see Figure 1). Of course, the technical executive body would be subordinated to the coordinating decision-making body.

**Figure 1. Two-part model of coordination**



#### **a) Coordinating decision-making body**

A coordinating decision-making body should be established at the highest level of government (in the president's or the prime minister's office). A number of countries that have recently adopted or are envisaging the adoption of human rights-based legislation on food and nutrition security have followed this approach (see Table 1).

**Table 1. Main coordinating decision-making body and its location within governmental administrations – examples from state practice in the field of food and nutrition security**

COUNTRY	COORDINATING DECISION-MAKING BODY	LOCATION WITHIN GOVERNMENTAL ADMINISTRATIONS
<b>Brazil</b>	Inter-Ministerial Chamber for Food and Nutritional Security	To be established by an Act of Federal Executive.
<b>Ecuador</b>	National Food and Nutrition Security Council (CONASAN)	Ministry of Public Health.
<b>Honduras</b>	National Commission on the Right to Food	Presidency of the Republic.
<b>Guatemala</b>	National Food and Nutrition Security Council (CONASAN)	Presidency of the Republic; General Cabinet, the Social Cabinet and the Rural Development Cabinet.
<b>Nicaragua</b>	Food Security and Sovereignty Council	Presidency of the state (Art. 1.4. Decree No. 03-2007).
	National Commission on Food and Nutritional Sovereignty and Security (CONASSAN)	Presidency of the state (Art. 12. draft Law on Food and Nutritional Sovereignty and Security).
<b>Peru</b>	Multisectoral Commission on Food Security	Presidency of the Council of Ministers (Supreme Decree 118-2002-PCM of 13 November 2002).
	Interdepartmental Committee for Social Affairs	Presidency of the Council of Ministers (draft Law on the Right to Adequate Food, 2007).
<b>Uganda</b>	Uganda Food and Nutrition Council	Prime Minister or Minister for Agriculture (two options are still open)

## b) Technical executive body

The second part of the national right to food authority should be represented by an executive unit composed of technicians and professionals. Its role should include preparing and proposing a national right to food strategy, coordinating technical food security monitoring and exchange of information, assisting the members of a national right to food authority to enable them to carry out their functions, and supporting and facilitating the activities of the authority. A number of countries that have recently adopted human rights-based legislation on food and nutrition security have given the power to formulate and propose the national right to food policy to the technical executive body (e.g. Brazil, Ecuador and Guatemala).

A technical executive body could also be given a more important role, i.e. the responsibility for coordinating the day-to-day implementation of the right to food strategy and the framework law, leaving a national right to food authority to make the strategic and political decisions.

A technical body should consist of professionals appointed on the basis of their expertise and capacities in various fields relevant to the realization of the right to food. Considering the complexity of the right and its implementation, the secretariat should also be able to consult independent expert bodies (institutes, universities, or even international agencies and organizations) to draw upon their knowledge when needed.

### 3.11.2 MANDATE AND FUNCTIONS

The mandate and functions to be assigned to the national right to food authority in the framework law will vary depending on national circumstances, but some of the principal functions will undoubtedly be the same.

The primary task of the authority will be to advise the government on and coordinate all the many activities related to the right to food at national level. This means coordinating the many agencies and actors whose activities have an impact on the realization of the right to food. The authority should also be charged with regularly reviewing the national policy on the right to food to ensure that it is evidence-based. That means that the policy must be based on all relevant and available information on the state of the realization of the right to food in the country and be consistent with the real needs and demands of the affected populations.

The right to food authority could also be assigned the task of providing advice on harmonizing sectoral policies relevant to the realization of the right to food. To this end, it should ensure that the right to food, in all its components, is systematically considered when decisions are made on economic, social, fiscal, agricultural, trade and other state policies. The authority should thus have the mandate to demand and collect information from various governmental and non-governmental actors. Timely and precise information is critical for the decision-making process. The better the quality of its information, the better its decision-making. To have an impact on the implementation of the framework law and the right to food in general, information obtained must be shared and disseminated widely within government (at central, local and regional levels) and outside government (to other state bodies such as parliament, to civil society and the media).

The right to food authority could also be assigned a mediating role, i.e. with the duty to settle differences of opinions and positions with respect to conflicting policies (e.g. land or biological resources use, institutional responsibilities, etc.). Recommendations to line ministries and other governmental bodies should be based on data and information received from the relevant bodies in charge of monitoring progress on the realization of the right to food (see below, section 3.12). Considering the complex relationship between

this right and the necessary resources and the diversity of means by which it will be put into practice, the authority should also be charged with setting benchmarks for measuring progress in the implementation of the framework law and the realization of the right to food<sup>166</sup> (see below, section 3.11.2).

Full realization of the right to food will require time and resources. The national authority should be given the mandate to ensure that priorities are properly set and that the available financial resources are allocated correspondingly and used properly. This will be crucial for the effectiveness of the framework law.

Another important function of the national authority on the right to food will be to devise proposals for amendment of laws, regulations or policies relevant for the realization of the right to food and submit those to the relevant minister. Similarly, the authority should have the power to recommend to state agencies the adoption or modification of various policies or measures relating to the right to food or to one of its components (accessibility, availability and adequacy of food). A corresponding requirement on the bodies receiving such proposals to act on them within a specified time period or to justify in writing the actions taken or not taken in response to the national authority's recommendations should also be established by a framework law or implementing regulations.

The national right to food authority should report to parliament, at regular intervals, on the state of implementation of the right to food and the framework law itself. This report should include the evaluation of its own institutional functioning and performance in order to provide information about constraints faced. Such reporting would contribute to the accountability of the members of the coordinating body. As it will include all or most relevant sectors affecting the realization of the right to food in a country (see below, section 3.11.3), the national authority may also be the appropriate institution to review and comment on the observations of the relevant international human rights bodies related to a state's performance in the implementation of the right to food at the national level. It could also be given a mandate to report on such observations to parliament.

In light of the above, the framework law should thus include among the principal functions of the right to food authority:

- ◆ Advising the government and coordinating the many activities and actors involved in the facets of realization of the right to food at national, regional and local levels.

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166 The CESCR stressed the importance of providing "a basis on which the State Party itself ... can effectively evaluate the extent to which progress has been made towards realization of the obligations contained in the Covenant" (see GC 1, para. 6). Benchmarks should be established in relation to each of the obligations under the right to food that apply in a given state. The level at which right to food benchmarks are set is important; there should also be ongoing adjustment of the level of the benchmarks, particularly if they were set unrealistically high or low.

- ◆ Formulating, negotiating, adopting and reviewing the national policy on the right to food to ensure it adequately addresses the evolving needs and concerns of the population.
- ◆ Determining appropriate benchmarks for measuring progress in the implementation of the framework law and the realization of the right to food. Established benchmarks should be specific, time-bound and verifiable.
- ◆ Collecting information relevant for the realization of the right to food and ensuring information sharing and dissemination among all relevant actors, in the proper format and content for various users.
- ◆ Providing advice on harmonizing sectoral policies relevant for the realization of the right to food and making recommendations for change, on the basis of data obtained through technical and human rights monitoring.
- ◆ Setting priorities and coordinating the allocation of resources according to those priorities.
- ◆ Submitting to a minister concerned or state bodies proposals for amendment of a law, regulation or policy, or for new legislation, policies or measures relating to the right to food or to one of its components (accessibility, availability and adequacy of food).
- ◆ Reporting to parliament on the state of implementation of the right to food and the framework law itself, as well as on the Concluding Observations of all international human rights treaty bodies that have addressed a country's performance in the area of the right to food.

### 3.11.3 COMPOSITION

The composition of the coordinating decision-making body should reflect the multisectoral nature of the right. Ideally, the appointments should ensure representation of all sectors and social forces involved in the realization of the human right to food: governmental representatives and representatives from other state organs (research and statistic institutes, public universities) as well as representatives from civil society, the private sector and academia. This guarantees input from different stakeholders and improves the likelihood that laws, policies and programmes implemented by the national right to food authority are adapted to the real needs of a population suffering from hunger, malnutrition and food insecurity.

For governmental representatives, the framework law should require that they be the highest level officials (ministers or vice-ministers) in order to ensure that they are able to set the right to food as a priority in their sector and also



capable of motivating all units in their ministry. The chair of the authority could be the president or prime minister. The alternative – making one minister the chair – poses the risk of raising interministerial conflicts. The relevant sectors to be represented in a national right to food authority should correspond to the multisectoral and complex nature of the right to food. They should thus include, in addition to traditional ministries and agencies dealing with food and agriculture issues, the ministry of finance, the ministry of education, the ministry of justice and the ministry of health.

With regard to participation of representatives from civil society, the framework law should specify whether they should enjoy “full member” or “observer” status. This is of crucial importance for the effects of their participation.

Furthermore, the framework law should not only determine the number of representatives but also outline procedures to optimize their participation. These should include transparent and non-discriminatory selection criteria, clear consultation processes and identified working methods (see below, section 3.13.3). Some examples from state practice regarding composition of analogous bodies (i.e. institutions working in food and nutrition security) can be seen in Box 50.

#### **BOX 50. Composition of the national coordinating bodies on food and nutrition security – examples from state practice**

The National Food and Nutritional Security Framework Law of **Brazil** leaves to subsidiary legislation the details on criteria for membership in the National Council on Food and Nutrition Security (CONSEA) and the Inter-Ministerial Chamber for Food and Nutritional Security. It does require, however, that the CONSEA includes one-third of governmental representatives and two-thirds of civil society representatives. As to the composition of the Inter-Ministerial Chamber, its members will be “Ministers of the state and Special Secretaries responsible for food and nutrition security” (Art. 11.III). There is no provision for direct representation of civil society or the private sector in the Chamber itself.

In **Ecuador**, the National Food and Nutrition Security Council (CONASAN) is composed of the Minister of Health (who will also be the President of the Council), the Minister of Agriculture (Vice-President), the Minister of Education and Culture, the Minister of Social Welfare and the President of the Ecuadorian Intellectual Property Institute. The Law also provides for membership for one representative of the national consumer organization, one delegate of the Ombudsperson and one representative of the National Federation of Production Chambers.



### **BOX 50. Composition of the national coordinating bodies on food and nutrition security – examples from state practice (cont.)**

In **Guatemala**, the National Food and Nutrition Security Council (CONASAN) has representatives of the following ministries: Agriculture, Economy, Education, Environment, Finance, Health, Natural Resources and Work and Social Protection. In addition to the government representatives, two representatives from the private sector and five from civil society serve on the Council. As to the Food and Nutrition Security Secretariat, it will include technical personnel from the sectors represented on the CONASAN, consultation and social participation branch advisers and the participation of technical personnel from the group of support institutions, when required by SESAN.

In **Uganda**, the Food and Nutrition Council shall consist of a Chairperson (a person of distinguished personality with qualifications and experience in food and nutrition matters) and sixteen members representing the following: the Office of the Prime Minister; the Ministry responsible for agriculture; the Ministry responsible for health; the Ministry responsible for gender; the Ministry responsible for planning; the Ministry responsible for disaster preparedness; the Ministry responsible for education; the Ministry responsible for trade and industry; the Ministry responsible for local governments; and the Director of the Plan for Modernisation of Agriculture Secretariat. In addition, it will also include: a representative of universities and other tertiary institutions; a representative of the Uganda Human Rights Commission; the Director of the Uganda National Bureau of Standards; a representative of the civil society organizations dealing with food and nutrition security; a representative of the farmers' associations; and a representative of the food processing industry.

The framework law should also expressly provide for the need to appoint persons who will act as focal points responsible for ensuring the follow-up to actions and recommendations of the national authority, within each member ministry of the coordinating decision-making body. The focal points could be appointed by the minister who sits on the coordinating body among senior level officials.

#### **3.11.4 VERTICAL COORDINATION**

The authority will have to coordinate not only horizontally (across sectors) but also vertically, i.e. among the various layers of government. This will be especially important in federal or highly decentralized states. In federal states, replication of coordinating mechanisms will probably be inevitable, while in decentralized states coordination could be ensured through the establishment of coordinating offices and committees within the districts or municipalities.

When local entities are called upon to implement national policies, the need for their activities to be coordinated by the national body will be greater. In such cases, active participation of local government representatives in the membership of the national coordination authority will have to be ensured (see Table 2).

**Table 2. Vertical coordination of food and nutrition security – examples from state practice**

COUNTRY	REPRESENTATION IN THE COORDINATING BODIES	SEPARATE BODIES AT SUBNATIONAL LEVEL(S)
<b>Brazil</b>	Inter-Ministerial Chamber on Food and Nutritional Security shall include: <ul style="list-style-type: none"> <li>representatives of the bodies and authorities concerned with food and nutritional security of the union, states, federal districts and municipalities (Art. IV).</li> </ul>	National Food and Nutrition Security Conferences shall be held at the state, district and municipal levels, at which the delegates to the national conference will be chosen (Art. V.1).
<b>Ecuador</b>	National Food and Nutrition Security Council (CONASAN) shall include among its members: <ul style="list-style-type: none"> <li>one delegate of the Association of Municipalities;</li> <li>one delegate of the Consortium of Provincial Councils and one representative of the National Rural Parochial Councils (Art. 9).</li> </ul>	Councils on food and nutrition security to be established at the provincial, cantonal and parochial level (Art. 7).
<b>Guatemala</b>	National Food and Nutrition Security Council (CONASAN) shall include as one of its members: <ul style="list-style-type: none"> <li>the President of the National Association of Municipalities (Art. 13).</li> </ul>	Food and Nutrition Security Commissions to be established at the departmental, municipal and community levels (Art. 34).
<b>Honduras</b>	National Commission on the Right to Food will include as one of its members: <ul style="list-style-type: none"> <li>the President of the National Association of Municipalities.</li> </ul>	
<b>Nicaragua</b> (draft Law on Food and Nutritional Sovereignty and Security, 2008)	National Commission on Food and Nutrition Sovereignty and Security (CONASSAN) will include among its members: <ul style="list-style-type: none"> <li>the President of the Association of Municipalities in Nicaragua, as a representative of municipal governments;</li> <li>one representative of regional governments of autonomous regions of Atlántico Norte and Sur (Art. 13).</li> </ul>	Equivalent commissions will be created for the autonomous regions of Atlántico Norte and Sur (Art. 22).  Equivalent commissions will also be established at the level of department (Art. 23-24) and at the level of municipality (Art. 25-26).
<b>Peru</b> (draft Law on the Right to Adequate Food, 2007)	The Technical Multisectoral Food Security Group, to be established within the Interdepartmental Committee on Social Affairs. The Technical Secretariat, will include among its members: <ul style="list-style-type: none"> <li>a representative of the National Assembly of Regional Governments;</li> <li>a representative of the Association of Peruvian Municipalities.</li> </ul>	

## 3.12 PROVISIONS ON A MONITORING SYSTEM

Monitoring is central to a state's compliance with its obligations under the right to food and thus to the realization of this fundamental human right. The importance of monitoring is recognized by the CESCR and also by most human rights treaties, which have established monitoring committees at the international level to which States Parties are obligated to report periodically on progress made towards the implementation of guaranteed rights and freedoms. The Right to Food Guidelines specifically invite states to establish mechanisms to monitor the realization of the right to food (Guideline 17).

Generally speaking, monitoring is the process of systematically tracking and assessing state performance against clear benchmarks and targets. The FAO Right to Food Unit has developed a working definition of monitoring as a process consisting of “periodic collection, analysis and interpretation, and dissemination of relevant information to assess the progress in the realization of the right to adequate food among all members of society, and whether this is achieved in ways compatible with human rights principles and approaches”.<sup>167</sup> Because monitoring is the measurement of a situation in a time series, reports must be submitted at regular intervals.

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<sup>167</sup> *Methods to monitor the human right to adequate food*, 2008, was prepared by the FAO Right to Food Unit in cooperation with International Project on the Right to Food in Development (IPRFD) in two volumes. It provides the most current and relevant methodological and operational information related to rights-based monitoring. This Guide summarizes information regarding specific methods and provides references to easily accessible sources of technical and methodological documentation. Available at: [www.fao.org/righttofood](http://www.fao.org/righttofood)

The framework law can play a role in clarifying the distinction between technical monitoring and human rights monitoring, and building an integrated monitoring system in a country (subsection 3.12.1), including through designating a lead monitoring institution (subsection 3.12.2).

### **3.12.1 TECHNICAL AND HUMAN RIGHTS MONITORING**

In the right to food context, monitoring takes two forms:

#### **1. Monitoring government compliance with its obligations necessary to realize the right to food**

Monitoring here assesses government's willingness and effort (expressed through adoption of primary and subsidiary legislation, regulations, policies, programmes, projects, etc.) to implement the framework law.

#### **2. Monitoring progress in the realization of the right to food**

Here, monitoring covers the degree to which the right to food is effectively enjoyed by the people and the impacts of national, local and community measures designed to contribute to the realization of the right to food.

At country level, institutions exist with responsibilities for "technical" monitoring (i.e. collecting monitoring information on food security issues) and for "human rights" monitoring (i.e. evaluating the realization of human rights). The first group includes governmental bodies and public agencies. National statistical services conduct periodic censuses and surveys while line ministries, such as those responsible for agriculture, health, education, labour, industry, trade, environment or finance often maintain subject matter databases that contain information related to the implementation of their policies and programmes. Some countries have also established special governmental units that assess the food security situation, provide early warning or monitor the health and nutrition status of the population.

The monitoring information generated by these institutions, although not specifically directed at the right to food, nonetheless covers various components of right to food in a country: availability, stability of food supply, accessibility, utilization and adequacy of food. The institutions' reports contain information on issues such as: arable land per capita; per capita water availability; daily per capita calorie and protein supply; the percentage of hungry or undernourished; infant mortality rate; per capita food production; public expenditure per capita in education, health and nutrition; unemployment rates; and coverage of social security schemes, all of which are relevant to assessing the implementation of the right to food at

country level.<sup>168</sup> Apart from the governmental bodies, several other actors such as universities, research institutions and non-governmental organizations also maintain databases and information systems regarding their respective fields of action or interest. The principal characteristic of these “technical” institutions is that they do not monitor from a human rights perspective: they monitor not the degree of enjoyment of the right to food, but the status of the object of that right, i.e. food security.<sup>169</sup> And an improvement of the food security of the population, in aggregate data, does not reveal the status of the enjoyment of the right to food at the level of the individual (as it does not reveal existing inequalities and leaves out culturally determined patterns, and individual differences and preferences).

Institutions responsible for “human rights monitoring”, on the other hand, include independent bodies and human rights institutions with the duty to review the operation of legislation from a human rights perspective. For example, a discrimination commission, data protection commission or HIV/AIDS commission, where they have been established, would evaluate government activities and programmes in its specific area. National human rights institutions such as human rights commissions or ombudspersons, by contrast, are specifically mandated to monitor and promote the realization of human rights.<sup>170</sup> In monitoring government compliance and performance in the realization of human rights, human rights institutions rely, among other sources, on information generated by the “technical” monitoring bodies mentioned above. However, monitoring progress in the realization of human rights also requires analysis of other types of data, such as events-based data, data based on expert judgement and household perceptions. Events-based data refer to the reported acts of violation committed against individuals and groups by state and non-state actors. Such data generally give information about the act or omission that led to the violation, who was or were the victims and who committed the violations. This information is complementary to information gained through other sources. Data based on the experts’ judgement involve the use of diverse sources of information, including the media, government reports and reports from NGOs by independent experts (advocacy groups, academic researchers) who are asked to evaluate the state’s performance. Such data are generally used for cross-national

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168 National census data, where available, can be particularly useful sources of information, in particular when the census has been designed and conducted in a way that allows for disaggregation of data, e.g. by marginalized group status such as women or indigenous populations, or by geographic regions, and urban and rural areas.

169 See Vidar, M. & Immink, M. forthcoming.

170 Human rights institutions have developed mainly starting from the 1990s precisely in response to a growing recognition of the importance of human rights in building democratic societies. While in 1990 there were 8 national human rights institutions worldwide, by 2002 there were 55; today there are 123 (See Kjærsum, M. 2003, p. 1). For the list of all human right institutions, see <http://www.demotemp360.nic.in/NationaldataList.asp>

ranking and comparisons over time.<sup>171</sup> Further to governmental bodies, some non-governmental actors such as NGOs and academic institutions are also active in monitoring state compliance with human rights standards and governmental performance in the realization of human rights (see Box 51).

#### **BOX 51. Role of civil society organizations in monitoring – examples from Brazil**

In **Brazil**, a network of NGOs, social associations and institutions called the Brazilian Forum for Food and Nutrition Security undertakes research and field work to generate and analyse information related to food and nutrition security. The outputs produced by the network and individual members are used for policy and programme proposals and for monitoring.

Another interesting initiative in terms of monitoring the right to food in Brazil has been the establishment of the National Rapporteur on the Human Rights to Food, Water and Rural Land in 2002, coordinated by the Economic, Social and Cultural Human Rights Platform, a network of civil society organizations.

*Source: See Valente, F.L.S. & Beghin, N. 2006. See also Bruera H.G. 2004.*

While in most countries there exist institutions responsible for generating monitoring information and monitoring progress in the achievement of food security on the one hand, and in the realization of human rights recognized by domestic law on the other, in most cases what is lacking is an integrated and human rights- based approach to monitoring, characterized by: (i) access and information sharing among government institutions at all levels and among governmental and non-governmental institutions; (ii) multisectoral analysis of available data and information; (iii) use of right to food indicators; (iv) a comprehensive interpretation and analysis of the information from a human rights perspective; (v) broad dissemination of monitoring outputs to public and private actors and civil society; and (vi) a guarantee that government will rely on the monitoring information in the development and implementation of policies relating to the right to food.

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171 On various methods used for human rights monitoring see, among others, UNDP. 2006.

The framework law can play a role in establishing such an integrated monitoring system by requiring the relevant authorities and bodies at all levels to:

- ◆ Collect data related to food and nutrition security using monitoring methodologies and processes consistent with human rights principles as established by the law (see above, section 3.2.5).
- ◆ Disaggregate collected data by age, sex, status and group.
- ◆ Monitor progress achieved in the realization of the right to food in a country.
- ◆ Establish or identify an early warning mechanism.

From an institutional point of view, to facilitate the functioning of a viable monitoring system for the realization of the right to food at national level, the framework law should identify or establish a lead monitoring institution (see below).

### **3.12.2 IDENTIFYING OR ESTABLISHING A LEAD MONITORING INSTITUTION**

The framework law will have to establish or designate a lead monitoring institution for the right to food at national level, taking into account the types of institutions already existing, their mandates and capabilities. While a lead monitoring institution should be focused on human rights monitoring, it must be able to identify correct indicators, to interpret the monitoring information obtained from “technical” monitoring from a human rights perspective and above all to coordinate the assessments of all different monitoring stakeholders in a participatory way.<sup>172</sup> The law should set out key elements of the mechanism and its functioning, leaving the details of its operation to subsidiary legislation to be adopted within established deadlines, if necessary and appropriate.

The choice of institution will depend on its authority to access and demand information from governmental bodies and its capacity to analyse and interpret relevant information and to transform it into policy recommendations. Above all, the institution should be independent from direction by the government as this will determine the credibility of its recommendations. Indeed, one of the fundamental principles of monitoring is that its effectiveness depends on separating the monitor from the monitored. Only in this way can measurement of progress in the realization of the right to food be undertaken objectively. Such an institution could possibly be an institution within government, provided it does not have itself any operational responsibilities or powers in the field of the right to food, and is not subject to pressure from other governmental agencies. The FAO Right to Food Unit

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<sup>172</sup> The lead institution should rely on information and work of other monitoring agencies within a state. See FAO. 2006c, p. 43.



has developed a checklist against which to evaluate attributes and responsibilities of an institution to be given primary responsibility to monitor the realization of the right to food. These include the following: clear mandate; adequate and identifiable human and financial resources; work plan that specifies time-bound outputs; strong dissemination plan targeting different stakeholders; high level of credibility; good access to all relevant sources of information; advisory committees with human rights and technical expertise; good advocacy and communications capacity.<sup>173</sup>

Depending on the national context, some possible choices for the lead institution include:

- a) The national right to food authority where established or, where it does not exist, an inter-ministerial coordinating body such as a national commission or council on food and nutrition security.

If the framework law has created a national right to food authority or has co-opted an existing interministerial body for that function, it might seem logical to designate that authority or body to take the lead in monitoring implementation of the right. The advantage is that by convening representatives of different sectors, it would ensure a holistic view of government activities and maximize cross-sectoral interpretation of the monitoring outputs. It should also facilitate information sharing among various governmental bodies at all levels of government. Where established at the highest level of government, the institution would also have the political authority needed to access or demand all the information it may need as well as to influence policy-making based on its monitoring of information collected. On the other hand, a right to food authority or a transformed food and nutrition security commission or council with representatives of various ministries may not have the necessary independence from interference by those ministries needed to achieve this task objectively and thoroughly. Moreover, separating coordinating and monitoring functions makes it more likely that the established benchmarks have a real impact on future governmental action.

- b) A specialized independent body or national human rights institution.

Given sufficient resources, the framework law could establish a specialized independent body to monitor government compliance and performance in the realization of the right to food (such as a commission on racial equality or on HIV/AIDS). A more realistic option may be to assign the monitoring role to an existing, independent body such as a national human rights institution. Right to Food Guideline 18 recognizes the importance of human rights institutions in this

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173 This checklist is based on the so-called "Paris Principles", the Principles on the status and functioning of national human rights institutions, adopted by General Assembly Resolution A/RES/48/134 of 20 December 1993 (see Office of United Nations High Commissioner of Human Rights Web site: <http://www2.ohchr.org/English/law/parisprinciples.htm> See FAO, 2008, Vol. I, Chapter 5.

area and recommends that their mandate “include monitoring the progressive realization of the right to adequate food”.

This option would have many advantages. National human rights institutions such as human rights commissions or ombudspersons are institutions *par excellence* mandated to monitor and promote the realization of human rights.<sup>174</sup> While their mandate and functions vary from country to country, it can be said that this development can be seen as global in that all regions have seen an increase in the number of new institutions.<sup>175</sup> While many national institutions are attached, in some way or another, to the executive branch of government, they generally enjoy independence from governmental interventions, which is often assured through legal, operational and financial means, democratic and open appointment and dismissal procedures, and the manner in which they operate. National human rights institutions have status and credibility because of their established legal mandate; they also have the knowledge and competence to comprehensively interpret and analyse monitoring information related to human rights. Even if these bodies have for the most part focused on civil and political rights, in many countries their mandate has expanded and they are the natural home for human rights monitoring of all kinds. Some examples of human rights institutions monitoring progress in the realization of economic, social and cultural human rights are given in Box 52.

#### **BOX 52. Role of human rights institutions – examples from state practice**

The National Human Rights Commission of **India** was established under the Protection of Human Rights Act 1993. Its mandate is to protect and promote rights guaranteed by the Indian Constitution or embodied in the ICESCR. The Commission has been very active in monitoring government compliance with human rights, including economic, social and cultural rights; it has often made recommendations for changes to existing or proposed legislation. Thus, for example, the National Rural Employment Guarantee Act guaranteeing a minimum of 100 days of employment per year has been modified so as to delete the reference to “one able bodied person” in every household, on the urging by the Commission. Another important amendment to the Hindu Succession Act awarding equal rights of females in all property, including agricultural land, will go a long way towards empowering women and removing gender discrimination. ▼

174 See above, note 168.

175 While human rights commissions have been established in common law countries (for example, Australia, India, Ireland, New Zealand and South Africa), and in African and South Asian countries (some of these being common law countries as well), human rights ombudspersons have obtained formal status as national institutions in Northern Europe, in Latin America and some Eastern and Central European countries.

**BOX 52. Role of human rights institutions – examples from state practice (cont.)**

The National Human Rights Commission of the **Republic of Korea** has recently listed the implementation of economic, social and cultural rights (ESCR) among its priorities. For this reason, the Commission has established a research society on ESCR with academics, lawyers and human rights activists and launched a full scale analysis of ESCR in the country. The Commission is preparing policy recommendations, for example with regard to forced eviction (which implicates the right to housing).

The **New Zealand** Human Rights Commission's continuing work on implementing the Action Plan for Human Rights involves a significant monitoring component. The Commission maintains an active legal and policy programme, providing advice and submissions to central and local government on the compliance of policy and legislative proposals with human rights. The Commission's comments on ESCR implications are vital, because current government processes require policies to be formally checked for compliance only with the civil and political rights contained in New Zealand's human rights legislation.

The **South African** Constitution explicitly mandates the South African Human Rights Commission to monitor ESCR, including the right to food. The Commission must investigate, report and carry out research on the observance of economic and social rights, take steps to secure appropriate redress where these rights have been violated and educate state organs on the need for the protection and promotion of these rights. Every year the Commission must request relevant state organs to provide it with information on the measures taken towards the realization of socio-economic rights including the right to food. On the basis of this input, a report on the state's realization of economic and social rights in South Africa is published. The Commission has also held public hearings in many parts of the country, as well as several consultative and educational workshops for government officials and CSOs.

The Human Rights Commission of **Uganda** is mandated under the 1995 Constitution to report annually to Parliament on the status of civil, cultural, economic, political and social rights in the country. The reports have analysed the state of some ESCR in Uganda. The Commission is currently developing monitoring tools on the right to adequate food, the right to adequate housing, the right to education and the right to adequate shelter. The Commission is actively engaged in monitoring state compliance with human rights: it has made various recommendations to Parliament, for example suggesting that these rights form part of the Constitution, which guarantees fundamental human rights and freedoms.

Sources: See NHRC and OHCHR India, 2005. See <http://www.nhrc.nic.in/publications/escr.pdf>.

Whatever the option chosen, the key is that the lead monitoring institution has the human and financial resources, and the credibility, to monitor and promote the human right to food independently and effectively. Further, where appropriate, CSOs should also be represented in the lead monitoring institution established or designated in the framework law (see below, section 3.13.2).

## 3.13

# PROVISIONS ON CIVIL SOCIETY REPRESENTATION AND PARTICIPATION

The Right to Food Guidelines invite states to “ensure that relevant institutions provide for full and transparent participation of the private sector and of civil society, in particular representatives of the groups most affected by food insecurity”. Actors external to government (farmers, local communities, NGOs/civil society organizations [CSOs], the private sector) should be able to communicate their concerns to the government and give their inputs to policies and programmes that will affect them.<sup>176</sup> As noted above, the right to participate in public life is recognized in several international human rights instruments.<sup>177</sup> The principle of participation should be included under the chapter on principles in the framework law, as discussed above in section 3.2.5a.

The legitimacy of CSOs derives from their origins: they are generated by a real need in the community or the society, which they strive to fulfil. Their capacity to influence and effect social change enables them to be the main means of participatory and not representative democracy; civil society representation is not the representation of the interests of the “people”. In reality, various civil society groups always represent a particular interest in society, and many times these interests are competing.

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176 “Civil society is about participation, while parliamentary democracy is about representation ... civil society is complementary, not a rival, to representative democracy” (see Marschall, M. 2001. See also Boyer, B. 2001).

177 The right to participation is implicit in the ICESCR (Art. 8 (on freedom of association), 13 (on education), and 15 (on cultural life) and explicit in the ICCPR (Art. 25.1 on the right to take part in public affairs). It is spelled out in the 1986 UN Declaration on Development and in the 1993 Vienna Declaration and Programme of Action.

Civil society participation in decision-making is meant to improve transparency, efficiency and effectiveness of government. It also lends credibility and legitimacy to government decisions. Active involvement of all stakeholders interested in the realization of the right to food would provide information “from the ground” and ensure that policies are based on real needs and that local concerns are put on the agenda. It would also bring the perspectives and ideas of those affected directly into the discussion. The active involvement of civil society in the work of the institutions charged with overseeing the realization of the right to food in a country may also have the advantage of imparting a sense of ownership and responsibility on the part of these civil society actors; i.e. they would distance themselves from unrealistic demands and expectations while becoming increasingly involved and invested in those actual governmental policies and programmes they helped shape.

On the other hand, the active participation of civil society in the institutions established by the framework law could bring a number of challenges. The first might be how to integrate a diverse array of interests into the policy-making process. Neither the process nor the results should be disproportionately influenced by one or a few sectors. A related question of who decides which representatives of civil society can participate may also be a challenge (see below, section 3.13.3).

Second, there may be a lack of capacity on the part of civil society groups in some countries – making meaningful participation more difficult. Participation requires knowledge and the ability to contribute to discussions, priority setting, analysis and evaluation of policies and programmes. Finally, where there is no culture of collaboration between governments and civil society, or where existing government structures do not allow for the full involvement of civil society groups and associations under terms of equality and respect, participation may be difficult to engender.

For these reasons, the institutional mechanisms and consultation processes must be defined clearly in the framework law. The following sections examine some of the main areas that the framework law should address, in order to improve the likelihood of effective and meaningful participation by civil society groups.

### **3.13.1 AREAS FOR CIVIL SOCIETY PARTICIPATION**

The framework law should identify the areas in which the competent public authorities – at all levels – must or should seek and consider the contributions of civil society. Some of these could include policy- and law-making, establishing benchmarks and evaluating progress in the realization of the right to food. Also, their contributions can be ensured in administrative decision-making, where necessary and appropriate.

CSOs are by definition closest to those whose right to food must be respected, protected and fulfilled. The framework law should thus require the competent public authorities at all levels to establish consultation processes ensuring that the views of concerned CSOs are taken into account in the elaboration of policies or programmes that could influence the realization of the right to food or some of its components.

However, it is at local level that people can best define their priority concerns and articulate how to deal with them. Local governments can be a crucial source of empowerment, by ensuring concrete opportunities for people to participate in the local decision-making processes, acting as a voice for local needs at higher levels, and providing adapted support for local people's initiatives.<sup>178</sup> Civil society involvement at the subnational and local levels of government would bring a double advantage: on the one hand, governmental decisions could be better adapted to the actual needs and concerns of the population; and on the other, civil society groups could take responsibility and use their networking structures to build capacity and increase public awareness of the right to food and government activities in the field.

Civil society should also be actively involved in establishing appropriate benchmarks and measuring progress in the realization of the right to food in a country. Their participation in the monitoring activities would contribute to preventing the targets from being set too low and would assist in achieving the broadest possible agreement on what constitutes an adequate rate of progress.

It is unlikely that the framework law will identify the precise consultation processes to be employed (leaving this to implementing instruments). Some of the possible mechanisms include soliciting written submissions from interested individuals and groups, holding public hearings with various constituencies and convening round table discussions among different constituent groups. In rural and remote areas or areas inhabited by minority ethnic groups, oral hearings in local languages will be particularly desirable for enhanced participation.

In order to guarantee public participation and ensure that the state plays a dynamic role in this area, the framework law could require that:

- ◆ Consultations on specific areas of implementation of the framework law are guaranteed.
- ◆ A national public hearing is held every two years, at which the state is required to report on progress made with the implementation of the framework law and the progressive realization of the right to food in a country.

An equivalent duty could also be established for subnational public authorities.

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178 See IFAD, 1995.

### 3.13.2 INSTITUTIONAL MECHANISMS AND FORMS OF CIVIL SOCIETY REPRESENTATION

Various mechanisms could be deployed to ensure civil society representation in decision-making, planning and implementation processes affecting their right to food.<sup>179</sup> The framework law could institutionalize public participation in three ways: (i) including civil society representatives in the national right to food authority; (ii) establishing an advisory panel to advise the right to food authority; and (iii) both.

In recent decades, many countries have formalized public consultation in governmental decision-making by *opening national coordinating bodies to civil society representation*: civil society representatives have been involved in the work of coordinating national authorities on environmental protection, HIV/AIDS, drugs, corruption and criminal justice, for example. A number of recently adopted laws on food and nutrition security also provide for the participation of civil society representatives in the national councils on food and nutrition security (see Box 53).

#### BOX 53. Civil society representation in national coordinating bodies – examples from state practice

In **Ecuador**, **Guatemala** and **Nicaragua**, the national councils on food and nutrition security include members coming from CSOs (one, five and two respectively).

In **Uganda**, the draft Bill for a Food and Nutrition Act provides for the participation of one representative of the CSOs dealing with food and nutrition security, and of one representative of farmers' associations.

The framework law will have to identify the precise role of civil society representatives in the national coordination body, i.e. whether they sit as full members or act as observers only. Even where they are full members, their numbers may limit their ability to affect decision-making within the right to food authority. Thus, their representation within the right to food authority should be complemented by other “diffuse” processes of consultation (see above).

Another possibility is simply to convene a *separate advisory panel* attached to the coordinating decision-making body or to the technical executive body.

<sup>179</sup> For an interesting analysis of forms of government–civil society cooperation in Europe, see Bullain, No. & Toftisova, R. 2005.



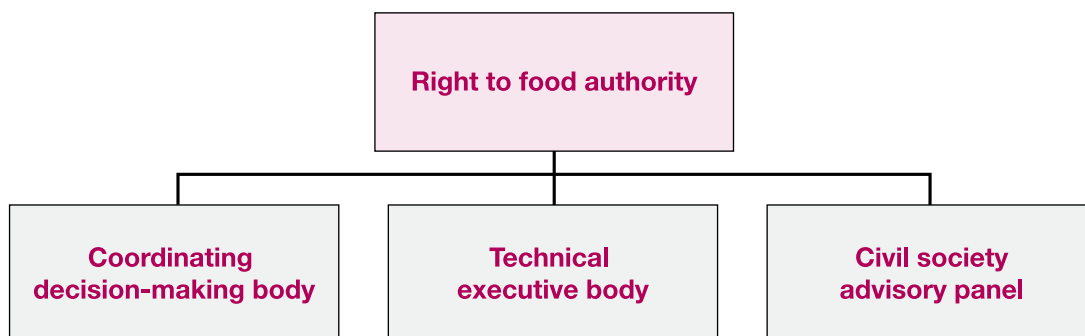
This mechanism could ensure that the demands and interests of the most affected populations are heard and taken into account when relevant decisions and policies are taken at the level of government. Such an advisory body could be composed of representatives of civil society only or could have a balanced representation of government and civil society groups. The first option has been followed in Guatemala's Law on National Food and Nutritional Security System while the second option was chosen in Brazil (see above, Box 49).

The advisory body could either be a separate body or attached to the national right to food authority. One advantage of the latter is that it would allow civil society representatives to work directly with high-ranking members of government and thus potentially have a stronger voice in decision-making. This should be facilitated by defining clearly the legal force of the panel's contributions, its working methods and the selection criteria for its members.

Another important point for the framework law to resolve is the legal force to be given to the contributions of civil society participants. The law could indicate, for example, that the competent public authority "shall" or "should" take their contributions into consideration, or that it must clearly justify departing from those recommendations.

The most appropriate form of civil society representation will of course depend on specific circumstances in a given country. However, in most cases the best solution may appear to be a combination of the two options: representation in the national coordinating decision-making body as well as the establishment of an advisory panel to that body, as shown in Figure 2. Such a structure of the right to food authority would have the potential to ensure the fullest and broadest participation of civil society representatives in the process of realization of the right to food in practice.

**Figure 2: Three-part model of coordination**



### 3.13.3 SELECTION CRITERIA AND REPRESENTATION

Ideally, all CSOs with an interest in the right to food or some of its components should be consulted where their interests are affected. However, this is not likely to be possible in practice. Therefore, to ensure effective representation by civil society representatives, clear definitions of the selection process and the selection criteria are essential (see Box 54).

#### BOX 54. Selecting civil society representatives – examples from state practice

In **Brazil**, the law requires the National Conference on Food and Nutrition Security to determine the criteria and the procedures for selecting members of the National Council (Art. 12).

In **Guatemala** (Agreement N. 75 that sets a Regulation to the National System on Food and Nutritional Security), the list of sectors to be represented within the national coordinating body is determined in advance: they include indigenous populations, farmers, private industry, churches, academia, NGOs, women's organizations and professional councils (Art. 31).

According to the draft Bill for a Food and Nutrition Security Act of **Uganda**, the Prime Minister/Minister (to be defined) will be given the power to appoint a representative of CSOs and of farmers' associations. He or she will do so "in consultation with such organisations and authorities as may appear to the Prime Minister/Minister to be appropriate, and from among persons who are qualified for appointment by virtue of their professional qualifications and experience in food and nutrition matters. He or she must also take into account the organisational capacity of the organisation, and ensure effective representation and gender equity" (Art. 13. (2-4)).

The selection process should be participatory, non-discriminatory and transparent. For example, the framework law should identify how the various groups will participate, i.e. whether they are always represented or serve on a rotational basis. On the other hand, neither the framework law nor its implementing instruments should specifically identify the civil society groups that can be represented, as this risks excluding groups that have not been mentioned or accorded "recognition" by the government. Similarly, the framework law should guarantee that the civil society representatives are selected by civil society itself, rather than through invitation by the government.

To ensure a fair representation, the framework law could require that the civil society groups reflect a balance among areas of expertise, regions of the country or other criteria. Some of these other criteria could include:

- ◆ The ability of a group to represent the relevant communities.
- ◆ The size of the group they represent.
- ◆ The type of geography (urban, rural, forest).
- ◆ The expertise of the organization as it relates to the right to food.
- ◆ The organizational capacity of the group.
- ◆ Gender balance.
- ◆ The balance in representation of the relevant communities and interests within society (farmers, indigenous populations, fisherman, local communities, forest communities, etc.).

The most important factor is that the criteria do not exclude a particular group from representation. The body in charge of appointing the nominated civil society representatives should assess whether the relevant criteria have actually been met in each case.

A final consideration is whether civil society groups have in place their own systems to ensure effective and democratic consultation. The framework law may not have a real impact, but implementing instruments might assist by indicating how exactly the selected persons will be truly representative (e.g. how will they consult the communities whose interests they support) and accountable (e.g. how will they report back to the local level).

## 3.14

# PROVISIONS ON REMEDIES

Key factors that significantly influence the realization of human rights guaranteed by law are the availability and accessibility of mechanisms that allow people to complain in the event that their rights are violated. Together with the fundamental principle of the rule of law and as an integral part of it, access to justice for the enforcement of the right to food is thus of crucial importance. Under international human rights law, access to justice includes the right to an “effective remedy” for anyone whose rights are violated.<sup>180</sup> While the justiciability of economic, social and cultural rights has long been subject to argument,<sup>181</sup> several authors have sought to demonstrate the unfoundedness of such positions.<sup>182</sup> The notion of justiciability generally refers to a possibility for an individual to complain before a court or other independent authority about an alleged violation of his or her human right (e.g. the right to food), and obtain adequate remedy where a violation is found. It is today widely acknowledged that domestic protection of human

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180 See, for example, Article 8 of the UDHR, Article 2.3 of the ICCPR and Articles 6 and 13 of the ECHR.

181 The notion of “justiciability” generally refers to the capacity of a right to become subject to a dispute before a court and be enforced. See for example, Vierdag, E.G. 1978.

182 See, for example, Van Hoof, G.J.H. 1984; Eide, A. 1993; Scheinin, M., 1995. International recognition of justiciability of economic, social and cultural rights is widely based on the frequent consideration of matters affecting these rights by domestic courts in many states as well as by international and regional human rights mechanisms. See, for example, Eide, A. Krause, C. & Rosas, A. 2001 and Borghi, M. & Postiglione Blommestein, L. eds. 2006.

rights cannot be fully assured without the judiciary which is the ultimate guarantor of rights,<sup>183</sup> although the argument that economic and social rights lack the qualities of justiciability is still sustained by some<sup>184</sup>.

The right to an effective remedy need not be interpreted as requiring a judicial remedy in each and every case; administrative remedies are often cheaper, speedier and more accessible to individuals than formal court proceedings. Any such administrative proceedings and remedies should, however, be accessible, affordable, timely and effective. An ultimate right of judicial appeal from administrative procedures of this type would also be appropriate. However, there are some obligations, such as those concerning non-discrimination, in relation to which the provision of some form of judicial remedy seems indispensable in order to satisfy the requirements of the ICESCR (GC 9, para. 9). As to the Right to Food Guidelines, they invite states to ensure administrative, quasi-judicial and judicial mechanisms that provide adequate, effective and prompt remedies accessible, in particular, to members of vulnerable groups (Guideline 7.2).

The application of the principle of rule of law and access to justice in the context of the framework law thus requires clear provisions on recourse mechanisms in case of an alleged violation. Such provisions would also contribute to the application of the principle of accountability of the competent public authorities for the respect and enforcement of the framework law provisions. Ideally, such provisions would include administrative appeals, judicial appeal and also quasi-judicial mechanisms such as human rights commissions or an ombudsperson.

These will now be discussed in turn.

### **3.14.1 ADMINISTRATIVE REMEDIES**

In practice, in many national systems, the requirement of exhaustion of administrative review procedures is a precondition for recourse to judicial proceedings. Administrative decisions, acts or omissions can generally be challenged before a higher administrative authority (see Box 55).

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183 In terms of the CESCR, any person or group who is a victim of a violation of the right to adequate food should have access to effective judicial or other appropriate remedies at both national and international levels. All victims of such violations are entitled to adequate reparation, which may take the form of restitution, compensation, satisfaction or guarantees of non-repetition (GC 12, para. 32).

184 See, for example, Dennis, M.J. & Stewart, D.P. 2004, p. 515.

Thus, for example, with respect to the minimum amount of food entitlement, an individual could challenge the non-delivery of the benefit he or she is entitled to or its delivery in an inadequate form (e.g. food not corresponding to established requirements either qualitatively or quantitatively).

The framework law could state that:

- ◆ Any administrative decision or action taken in breach of any of the provisions of the framework law or its subsidiary legislation or omission to act in accordance with such provisions can be challenged before the higher administrative authority.

The competent higher authority should have the power to impose all measures it deems necessary for redressing the violation.

A country may also opt for simply introducing a provision referring to the existing legislation dealing with the responsibility of the civil servants. Box 55 gives a few examples of legal provisions dealing with administrative remedies from state practice.

#### **BOX 55. Administrative remedies for enforcing the right to food – examples from state practice**

In **Mexico**, the 2004 Law on Social Development provides for the “right of any person or civil society organization to make a formal complaint for any act or omission which prejudices or could prejudice the exercise of any of the rights established by the Law” (Art. 62), thus including the right to food guaranteed in Article 4 . The law also guarantees the right to make a public complaint (*denuncia popular*) as a means of access to justice in the field of social development. Thus, any person has the right to complain, before the state inspectorate, about any action taken by the competent authorities, which he or she considers a violation of any of the rights established by the law (Arts 64 to 67).

The National Food Security Draft Bill of **South Africa** provides that “any affected person may appeal to the Minister (of Agriculture) against a decision taken by any person acting under a power delegated by the Minister under this Act” (Art. 39.1).

The draft Law on Food and Nutritional Sovereignty and Security of **Nicaragua** states that “any violation by action or by omission of the provisions established in the present law constitutes administrative infraction by the public authorities on the basis of the Law on Civil Service. The regulation to the present law will establish, on a case by case basis, the application of administrative sanctions (Art. 34). It also specifically establishes administrative revision claims and appeals claim for any person who considers that her or his rights have been violated as a result of an administrative act issued by an administrative authority on the basis of the present law (Art. 36).”



### **BOX 55. Administrative remedies for enforcing the right to food – examples from state practice (cont.)**

The draft Law on the Right to Adequate Food of **Peru** states that “Officials of public agencies and the National Government and the Regional and Local Governments which prevent the exercise of the right to adequate food shall be punished according to the provisions of the Framework Law on Public Employment, Law No. 28175” (Art. 16).

The framework law should also require that the implementing legislation or regulation provides for effective administrative procedures and for adequate remedies. Purely administrative appeals should be complemented by the right to subsequent judicial review by the competent court.

### **3.14.2 JUDICIAL REMEDIES**

In most countries, guaranteed human rights are safeguarded by ordinary courts. Although specific remedies may be available elsewhere in the national legal system (e.g. under specific sectoral laws or a state constitution), a framework law should introduce a general judicial remedy in the field of food. This would enable the persons concerned to complain not only about a breach of the law provisions, but also and above all, to challenge the limitations of a given legislation *in ensuring their right to food*. For example, on the basis of the social security law, a person could not only challenge a non-delivery of benefits, but also the level of benefits allocated on the basis of social security law as insufficient to ensure access to sufficient and adequate food or, in the case of the food safety legislation, the level of established safety requirements as inappropriate to ensure the protection of the existing right to food.

The framework law could include provision stating that:

- ◆ Any person who considers that her or his right to food, as defined by the framework law, has been violated, shall be afforded access to a review procedure before a court.

The right of access to a court includes the right to the enforcement of a court’s decision. Without it, the right to judicial review would be meaningless. Thus, the court does not only determine whether there has been a violation of a human right, it also grants an appropriate remedy once a violation has been found.

Judicial remedies for human rights violations vary according to the country's legal system (common law/civil law), the type of human right invoked (civil and political/economic, social and cultural)<sup>185</sup> and the type of court with jurisdiction to decide (supreme/constitutional/ordinary courts). Considering the complex and multifaceted nature of the right to food, possible judicial remedies to redress violations of the human right to food<sup>186</sup> may include:

- ◆ Restitution of the right (e.g. implementing an entitlement, restoring access to means of subsistence, removing unsafe food from the market).
- ◆ Cessation of the violation or guarantees of non-repetition (e.g. stopping logging activity, barring mining in a certain area to prevent further interference with the right to food).
- ◆ Rehabilitation (e.g. carrying out a thorough and effective investigation for establishing liability of state officials or bodies as well as of private actors for acts or omissions that have led to a grave violation of the right to food such as starvation deaths or a death caused by unsafe food); rehabilitation is generally combined with compensation for the damage suffered from the violation of the right.
- ◆ Compensation, in kind or in cash, for the (material and moral) damage caused by the violation of the right to food (e.g. offering alternative land suitable for agriculture in case of an eviction necessary for using the relevant land for another compelling public interest or compensating a loss of harvest due to an unregulated industrial activity).
- ◆ Ordering of systemic remedies that have as their orientation the mitigation or amelioration of patterns of entrenched rights violations or the need to reorganize government programmes, etc. (e.g. reforming legislation detrimental to right to food such as laws pertaining to oil deregulation or mining, and setting programmes for gender equality in order to prospectively redress and prevent future violations).

Box 56 provides an example of a general legal provision on remedies for the right to food violations.

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185 International recognition of the justiciability of economic, social and cultural rights is based on the frequent consideration of matters affecting these rights by domestic courts in many states as well as by international and regional human rights mechanisms. See, for example, Liebenberg S., 2001, p. 25, and Borghi & Postiglione Blommestein eds. 2006.

186 The Maastricht Guidelines on Violations of Economic, Social and Cultural Rights (1997) provide that "All victims of violations of economic, social and cultural rights are entitled to adequate reparation, which may take the form of restitution, compensation, rehabilitation and satisfaction or guarantees of non-repetition" (Guideline 23).



### **BOX 56. Judicial remedies for the right to food violations – example from Honduras**

A draft Framework Law on Food of **Honduras** contains rather detailed provisions on justiciability: Article 20 establishes that “every person or group of persons who considers that his or her right to adequate food has been violated or is in conditions of an imminent risk, has the right to access effective judicial or other appropriate recourse for the protection and redress of a right in conformity with the rules of due process.

The *onus probandi* in procedures relating to violations of the right to food will rest on the defendant (para. 1).

In those cases in which a violation is not yet established, but there is an imminent risk of such a violation, judicial authorities can adopt interim measures necessary to guarantee the integrity of a right and to prevent a violation before the adoption of a judicial decision having the force of *res iudicata* (para. 2).

All victims of a violation of the right to food have the right to an adequate redress through restitution, indemnity, compensation and guarantee of a non-repetition or a combination of those (para. 3).

Furthermore, in view of the possible grave consequences of a violation of the human right to food, courts should also have the power to grant interim relief measures, when necessary, until final judgment is given. Box 57 gives a short overview of interim orders issued by the Indian Supreme Court in a major right to food case, which have had (and continue to have) a determinant influence on both the legal recognition and the realization of the right to food in India.

### **BOX 57. Indian Supreme Court interim orders in PUCL vs. Union of India and Others and their significance for the realization of the right to food in India**

While economic, social and cultural rights are enshrined in the Indian Constitution as “directive principles of state policy” and thus non-binding on national judges, since the late 1970s, the Indian judiciary has begun to refer to the directive principles when interpreting civil and political rights. The Supreme Court has thus explicitly stated several times that the right to life should be interpreted as a right to “live with human dignity”, which includes the right to food and other basic necessities.



**BOX 57. Indian Supreme Court interim orders in PUCL vs. *Union of India and Others* and their significance for the realization of the right to food in India (cont.)**

The landmark case concerning the right to food was the People's Union for Civil Liberties' (PUCL) petition to the Supreme Court filed in 2001, in response to starvation deaths in rural areas, especially in the drought-affected areas of Rajasthan and Orissa (see also Box 14). The petition focused on the general need to uphold the right to food, which follows from the fundamental "right to life" enshrined in Article 21 of the Indian Constitution. Supreme Court hearings have been held at regular intervals since April 2001, and the case has attracted wide national and international attention.

Although the "final" judgment has not been issued, significant "interim orders" have been passed from time to time. For instance, the Supreme Court has passed orders directing the Indian Government to: (i) introduce cooked midday meals in all primary schools; (ii) provide 35 kg of grain per month at highly subsidized prices to 15 million destitute households under the Antyodaya component of the Public Distribution System; (iii) double resource allocations for Sampoorna Grameen Rozgar Yojana (India's largest rural employment programme at that time, now superseded by the Rural Employment Guarantee Act); and (iv) universalize the Integrated Child Development Services (ICDS).

Source: <http://www.righttofoodindia.org/index.html>

Judicial proceedings dealing with the alleged right to food violations will have to comply with the general basic principles underlying the system of protection of human rights (e.g. burden of proof, legal standing). As these may vary according to a country's specific legal tradition, it may be useful if the framework law referred to the relevant principles as recognized and established in domestic legal systems. In such cases, the law-makers should ensure that the relevant references do not lead to duplication and confusion.

Some of the relevant principles may include the following: legal aid for those who lack sufficient resources; the burden of proof on the public authority to demonstrate that there has been no breach of the given right in a particular case; legal standing for associations, organizations or other bodies (NGOs, CSOs and human rights institutions) having a legitimate interest in the defence and promotion of the right to food; and a duty for the judges to interpret legal provisions in question with reference to the ICESCR and other relevant international human rights instruments.

### 3.14.3 QUASI-JUDICIAL REMEDIES

Although courts are the basic national mechanism for the protection of human rights, they generally depend upon matters being brought before them and have no independent research capacity. National human rights institutions, on the other hand, when endowed with quasi-judicial competence, can initiate action on their own motion and can recommend innovative and far reaching remedies to address not only the particular circumstances of a case before them but also the broader systemic causes and consequences of the violations of human rights (see Box 58).<sup>187</sup> In addition, procedures before national human rights institutions are generally simpler and cheaper and may be of easier access for the poor.

Because violations of the right to food (and of most other economic, social and cultural rights) most often originate in systemic or structural problems (arising, for example, from legislative gaps or government policies), national human rights institutions have an important role to play in the enforcement of the right to food.

Remedies for such systemic failures may include adoption of appropriate legal and other measures or both, and securing mechanisms maintaining a fair balance between the general interest of the society as a whole (e.g. economic development) and the interests of guaranteeing the human right to food of individuals. This kind of redress can be recommended by national human rights institutions, which have competence to deal with human rights violations.

#### **BOX 58. National human rights institutions with quasi-judicial competence – examples from state practice**

In a number of countries, national human rights institutions have been given quasi-judicial competence with the mandate to hear and consider individual complaints and petitions. This is the case, for example, in **Canada, Ghana, India, Ireland, Latvia, Mexico, Mongolia, Nepal, South Africa** and the **United Republic of Tanzania**. Furthermore, most ombudspersons established in Latin American countries also have the mandate to investigate and hear complaints of human rights violations. They recommend settlements of disputes or make decisions on complaints to be implemented by public authorities.

In **Brazil**, there are several quasi-judicial bodies competent for dealing with right to food complaints: the National Commission for Monitoring Human Rights Violations has a mandate to receive and investigate complaints of violations of the human right to food. The public ministry is an autonomous body endowed with a duty to care for constitutional rights, protecting them from the public power's actions and omissions. Civil inquiry and the public civil action are among the instruments given to it by the Constitution.



<sup>187</sup> In some countries, the public ministry (office of public prosecution), which is traditionally in charge of criminal prosecution only, is also given the power of ensuring the good administration of the rule of law, including protection of guaranteed human rights. Thus, it conducts investigations concerning individual and systemic violations. In this regard, it is especially important that such an institution enjoys the status of a judiciary body, which would make it more independent and impartial.

### BOX 58. National human rights institutions with quasi-judicial competence – examples from state practice (cont.)

In **Guatemala**, the mandate of the Office of the Human Rights Ombudsperson includes the protection of human rights, including the right to food. Its tasks, among others, are mediation, conciliation, quasi-judicial decision-making, legal assistance and the recording of violations. The ombudsperson can give recommendations to public authorities towards better protection of guaranteed human rights, and those authorities are required to give effect to the recommendations.

In some countries, national human rights institutions competent to deal only with civil and political rights have nonetheless interpreted and implemented their mandate as including economic, social and cultural rights as well. Thus, for example, in late 1990s, despite a Supreme Court ruling confirming that it could only investigate civil and political rights violations, the **Philippines'** Commission on Human Rights developed a system of "investigative monitoring" of economic, social and cultural rights based on the constitutional requirement that it monitor government compliance with international treaty obligations including the ICESCR.

In the **Republic of Korea**, the National Human Rights Act clearly establishes limitations on the investigation of complaints, which should be, in principle, complaints regarding alleged violation of civil rights. In addition to revising the statute, the Commission is addressing limited violations of economic, social and cultural rights by broadly interpreting Article 10 of the Constitution guaranteeing the right to human dignity.

*Sources: See Kjærsum, M. 2003; Beurlen de França, A. 2006; Valente, F.L.S., Franceschini, T. & Burity, V. 2006 and Chan-Un Park, 2005.*

The framework law on the right to food should thus usefully assign the mandate to the national human rights institution, where it exists, to mediate, to provide legal assistance and to record and investigate violations of the right to food (see Box 59). In addition, it could also usefully take from the OHCHR handbook for strengthening national human rights institutions: accuracy and objectivity; timeliness; diversity of information; adherence to human rights standards; and respect for all parties.<sup>188</sup>

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188 See UN. 1995a.

### **BOX 59. Quasi-judicial recourse for the protection of the right to food – examples from state practice**

A draft Framework Law on Food of **Honduras** requires that “The National Commission on Human Rights and other organizations dealing with protection of human rights, must act to collect, document and denounce violations of the right to food” (Art. 20.9).

The draft Law on Food and Nutritional Sovereignty and Security of **Nicaragua** requires the Attorney General for Defence of Human Rights to designate a Special Attorney on Food and Nutritional Sovereignty and Security (Art. 39a).

The national Attorney General for the Defence of Human Rights is also required to report before the National Assembly on the state of the right to sovereignty and food and nutrition security as well as on the progressive achievement of the right to food to the National Assembly annually (Art. 39.b).

The draft Bill for a Food and Nutrition Act of **Uganda** provides for the right of “a person whose right to food is violated to refer the matter to the Uganda Human Rights Commission for redress” (Art. 40.1).

The experience of many national human rights institutions dealing with individual complaints and petitions shows that this is an extremely challenging task in terms of time, resources and knowledge. If such an institution is to deal successfully with individual complaints and petitions in a timely and effective manner, it should be given sufficient resources and powers to fulfil its mandates and perform its functions. On the other hand, a national human rights institution should, on its part, develop mechanisms and strategies that will enable it to respond in a timely and effective manner, strictly set its priorities and adhere to fixed and approved strategic plans and budgets.

It is also important to build a good relationship between national human rights institutions and the judiciary, and stress the complementarities in protecting the right to food. National human rights institutions can play a role in improving a greater understanding within the judiciary of international human rights norms and thus ensure their application in national jurisprudence; on the other hand, judgments of the courts can be used in the daily work of national human rights institutions in the protection of the right to food.

## 3.15

# PROVISIONS ON IMPLEMENTATION

To have a real impact, the framework law on the right to food should contain provisions on its implementation. As noted above, implementation of the framework law will call for the elaboration and enactment of a series of other legal instruments (secondary legislation, regulations, decrees of the cabinet of ministers, etc.). The framework law should thus require:

- ◆ The government to adopt the necessary implementing legal instruments within a precise time period.
- ◆ Relevant future laws affecting the realization of the right to food to be compatible with the right to food and the framework law.
- ◆ Other relevant laws to be interpreted in a way compatible with the right to food.

Because implementation of the framework law is likely to require amendments to a variety of sectoral laws and enactment of subsidiary instruments in those sectoral areas, it should also:

- ◆ List the sectoral areas that must, as a priority, be reviewed and modified as necessary, to ensure that they are compatible with and conducive to the realization of the right to food in a country.
- ◆ Require that any law that the body in charge of its review finds incompatible with the right to food and the framework law is repealed.

Box 60 gives some examples of similar legal provisions from state practice.

### **BOX 60. Provisions on implementation of framework legislation – example from state practice**

The Agriculture Orientation Act of **Mali** is an example of “framework” legislation, meaning its application and implementation require adoption of other, subsidiary legal instruments. To facilitate this process, the law requires that “laws regulating the agricultural sector notably agriculture, water, fisheries, animal farming, environment, forestry, hunting, land planning, social protection, plant protection, animal health, grain and soil be reviewed and, where necessary, amended in accordance with the present law” (Art. 199).

The Law establishing the National Food and Nutritional Security System of **Guatemala** requires the CONASAN, through SESAN, to issue the corresponding draft regulation, and submit it to the Presidency of the Republic for adoption, within a maximum period of 90 calendar days following the date of enactment of this law (Art. 42).

The draft Law on Food and Nutrition Sovereignty and Security of **Nicaragua** provides that “Ministers of State shall propose the revision of the sectoral laws relevant for availability, access, consumption and biological use of food, in order to guarantee the implementation of the System of Sovereignty and Food and Nutrition Security. It is up to the President of the State to present to the National Assembly, within one year of the publication of the present Law, the proposals of the modifications of such legislation for the approval” (Art. 38a).

It also states that “the present law repeals all existing norms of equal or lower status that are contrary to its provisions” (Art. 43).

The framework law should also require competent ministers and other executive authorities to report, at regular intervals, to the national right to food authority, notably on:

- ◆ Legislative and regulatory measures that have been elaborated and adopted and the time frames within which it is envisaged that their objectives will be achieved (see Box 61).

**BOX 61. Legal provisions on reporting – examples from state practice**

The draft Law on Food and Nutritional Sovereignty and Security of **Nicaragua** requires the Attorney General for Defence of Human Rights to report annually to the National Assembly “on the state of the right to sovereignty and food and nutrition security as well as on the progressive realization of the right to food” (Art. 39b).

The draft Framework Law on Food of **Honduras** requires in its Article 22 that the “National Commission on the right to food nominates an independent rapporteur on the right to food /.../ who will report to the Commission and other related bodies, on the situation of the right to food in a country”.

The draft Law on the Right to Adequate Food of **Peru** requires “the ministries sitting on the Interdepartmental Committee on Social Affairs to submit a six monthly progress report to the Presidency of the Council of Ministers on the attainment of the food and nutrition security goals and objectives. The Presidency of the Council of Ministers shall submit an annual report to the Congress of the Republic on progress with relation to compliance with and the protection and establishment of the human right to adequate food, consistently with the goals defined in the National Food Security Strategy and the priorities laid down by the interministerial committee” (Art. 13). In addition, the *Defensoría del Pueblo* (ombudsperson) “shall ascertain respect for, and the protection and attainment of the right to adequate food, and shall present progress reports on performance in his annual report to the Congress of the Republic” (Art. 14).



## 3.16 FINANCIAL PROVISIONS

The progressive implementation of state obligations under the right to food as defined by the framework law and its monitoring will require adequate financial resources. The Right to Food Guidelines encourage states to “allocate resources for anti-hunger and food security purposes in their respective budgets” and requires them to “ensure transparency and accountability in the use of public resources” (Guidelines 12.1 and 12.2).

The framework law could stipulate the financing arrangements necessary for the implementation of this fundamental human right as well as the principles that will govern the allocation and spending of resources. According to CESCR general comments, the principle of progressive realization means that cutbacks that are sometimes unavoidable must be conducted on a rational and equitable basis. At the same time, the minimum core content of the right to food consistent with the imperative of human dignity must always be ensured, regardless of resource constraints (see above, section 3.3.2). For example, the framework law could thus include provisions that:

- ◆ Require the minister of finance to allocate in the annual budget specific and sufficient resources for the purposes of the implementation of the right to food, in accordance with priorities set by the national right to food authority.
- ◆ Require that allocation of those resources be aimed at the progressive realization of the right to food over the long term.
- ◆ Reaffirm that the obligation to ensure every person’s right to be free from hunger can never be deviated from by temporary or permanent cutbacks.

The framework law could also include provisions relating to other possible sources of financing for right to food activities, such as special funds, tax interventions, and so on. Box 62 gives some examples of such provisions from state practice.

**BOX 62. Financial provisions – examples from state practice**

In **Ecuador**, the Law on Food and Nutritional Security provides for the establishment of a national food and nutrition security fund financed with, among others: money allocated from the national budget; economic resources from national and international institutions; and resources originating from the exchange of public external debt for food and nutrition security projects (Art. 20).

The **Guatemalan** Law on the National Food and Nutritional Security System requires the Minister of Finance to allocate in the general budget, an average of 0.5 percent to be used specifically for food and nutrition security programmes and projects for the most affected populations (Art. 38). In addition, every year, CONASAN shall request the Ministry of Finance to provide an estimate of VAT revenues in order to be able to take account, in the budget management and planning process, of the resources available to the institutions forming part of the National Food and Nutrition Security Strategic Plan (Art. 39). Finally, when drawing up the general budget of state revenues and expenditure for each financial year, the Ministry of Public Finance must make provision for the appropriations required for the implementation of SINASSAN as a whole as formulated by the Secretariat through the relevant channels (Art. 40).

The Agricultural Orientation Act of **Mali** requires the Government “to provide, in the law on finances and in the legislation on planning of spending and public investments, for adequate budgetary resources in accordance with the objectives and ambitions of the law” (Art. 196).

According to the draft Law on the Right to Adequate Food of **Peru**, “the Presidency of the Council of Ministers and the Ministry of the Economy and Finance shall direct food and nutrition security investment and expenditure towards the priorities laid down at all tiers of government, using the “results based budgeting’ methodology” (Art. 11). In addition, “The *Contraloría de la República* (Comptroller’s Office) shall audit the use of the resources for food and nutrition security to guarantee their efficient use” (Art. 14.1).

“The Presidency of the Council of Ministers shall, through the Interdepartmental Committee on Social Affairs (coordinating body) and the Ministry of the Economy and Finance, lay down a system to provide incentives for local and regional governments to perform actions and direct resources for the implementation of the right to adequate food” (Art. 15).

Adequate financial resources should also be provided to ensure the effective functioning of the institutional framework for the realization of the right to food (i.e. to fund the national authority on the right to food and the lead monitoring institution). The resources should cover meeting costs, secretariat, information dissemination, capacity-building activities, programmes (such as the minimum food entitlement)<sup>189</sup> and evaluation. Funds may also be needed to access external expertise for research, surveys and assessments. Naturally, adequate and effective accountability mechanisms should be in place.

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189 The cost of the minimum food entitlement will depend on which benefits, if any, the minimum essential food is to replace. Supporters of the idea of introducing a Universal Basic Income (going much beyond the “minimum food”) sustain that it could be afforded by most developing countries in the world although for some countries, international co-financing would be necessary. See Haarmann, C. & Haarmann D., eds. 2005 and Künnemann, R. 2005.

## 3.17

# CONCLUDING REMARKS

In a multisectoral and complex field such as the right to food, legislative action is necessary to allow the state to take coherent action to realize this human right fully.

It is today widely acknowledged that a piecemeal approach to addressing hunger and food insecurity makes it more difficult and costly to achieve in a sustainable way. The preceding sections have attempted to demonstrate the usefulness of a framework law on the right to food. Framework law allows better articulation of the contents of this fundamental right, clarification of government obligations, and the provision of means of enforcement at the administrative, judicial and quasi-judicial levels.

Framework law can provide a conceptual framework and legal basis to organize the various sectors of the state with minimal institutional arrangements. It can facilitate and articulate various activities related to availability and stability, accessibility, adequacy and utilization of food. It can serve as an anchor for an integrated policy for the progressive realization of the right to food in a country. It can provide the basis for a more efficient distribution and expenditure of state resources.

Insofar as a framework law would set out goals and mechanisms for monitoring and controlling the implementation of right to food, it can also significantly contribute to decreasing favouritism and corruption, common in many places where food insecurity is significant.

In a given country, the elements to be included in a framework law on the right to food will of course be determined by its specific legal and political context. The characteristics of hunger, food insecurity and vulnerability, the level of realization of

right to food, and the understanding of the underlying reasons for that situation will also influence the content. National priorities and resources are also determining factors. Some countries may choose to follow the present Guide and include all the elements discussed here, while others may include only some of these elements. Some other countries may also decide to go beyond the Guide and address additional issues that have not been discussed here.

Whatever the final outline of a national framework legislation on the right to food and its level of detail may be, an explicit legal norm establishing the right of every person to adequate food will provide individuals and groups with the necessary basis for demanding its realization and for monitoring progress achieved.



# PART FOUR

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## **PART FOUR**

# **SECTORAL COMPATIBILITY REVIEW**

Even if the right to food is recognized through the state constitution or a framework law on the right to food, or both, it will still be necessary to ensure that sectoral laws do not have a negative impact on the exercise of the right to food. Regardless of whether a state decides to pursue one or both of the other legislative options for implementing the right to food, governments should review all relevant sectoral legislation that does or could affect the various components of the right to food (e.g. accessibility, availability, adequacy) in order to ensure that the country's legislation creates an enabling framework that allows people to feed themselves with dignity.

The first step towards ensuring that sectoral legislation is conducive to the exercise of the right to food in the country is a review of the relevant laws with regard to both right to food standards and human rights principles. Problematic features of a sectoral law could include, for instance, the failure to establish clear entitlements, inadequate mandates or powers assigned to administrative authorities, the lack of a monitoring requirement accompanied by appropriate procedures or the lack of remedies for violations of the right to food. The second step requires a modification or repeal of those legislative provisions found contrary to right to food standards and human rights principles, in order to optimize the legislative framework to support the realization of the right to food. In order to present a balanced picture, the review should also note the positive features.

Following a brief discussion of the review planning process, Part Four explores selected areas of sectoral regulation, assessing possible effects on and implications for the realization of the right to food. In addition to highlighting some of the key issues relevant to the right to food in these sectoral areas, the analysis should serve as an illustration of how the regulation of sectoral areas can affect, positively or negatively, the ability of people to feed themselves by their own means and through their own efforts.

## 4.1 PLANNING THE REVIEW

### 4.1.1 CONTEXT AND SCOPE

A compatibility review can be undertaken with respect to existing legislation (*ex post* review) or future, draft legislation (*ex ante* review). An *ex ante* review is generally narrow and examines the technical legal compliance of the normative contents of a given future piece of legislation with the right to food. An *ex post* compatibility review can range from a very narrow “on paper” evaluation to a very detailed analysis of the “on the ground” effectiveness of legislative provisions, and can include the undertaking of extensive field research. In practice, an *ex post* review most often takes into account at least some aspects related to the implementation of an existing piece of legislation on the ground.

Because the right to food cuts across many different sectors, undertaking a compatibility review will be an ambitious challenge for many countries in terms of resources. However, it is one of the key elements for the realization of the right to food. Addressing implementation is more difficult than analysing the legal consistency of laws with the human right to food on paper; yet, only by examining existing laws on paper and in practice can governments and civil society actors fully understand how the legislation facilitates or hinders the realization of the right to food. Therefore, whenever possible, an *ex post* compatibility review should address both the technical legal consistency of its contents and its implementation aspects.

There are two types of compatibility review: (i) a stand-alone right to food review, and (ii) a right to food review that is included in a larger legislative review and evaluation process. A stand-alone review has the advantage of allowing for a more in-depth evaluation of laws with regard to the right to food, but would be costly to establish as a continuous process. It would be most suitable for one-off *ex post* evaluation. Integrating right to food components into existing processes

has the advantage of being less costly and providing for more holistic and comprehensive reviews, but the disadvantage of perhaps not being thorough enough from a right to food perspective.

If a right to food compatibility review is incorporated into existing *ex ante* processes, this helps ensure that the future legislation will create no hindrance to the realization of the right to food. Many countries have *ex ante* legislative evaluations of the future law's consistency with human rights generally.<sup>190</sup> Where the human right to food is not already among the rights considered in an existing *ex ante* evaluation process, more specific and tailored questions will need to be added.

In recent decades, many countries have begun reviewing their legislation in specific sectors to improve its effectiveness and, often, its compliance with international standards. This has been the case, for example, in the areas of land reform, agriculture, fisheries, food safety and water legislation. Incorporating the right to food compatibility assessment into these existing *ex post* reviews would be very useful, and may be a better option for countries with limited resources (rather than undertaking a stand-alone right to food review).

Section 4.2 (methodology for the compatibility review) and Tables 3 (right to food standards) and 4 (human rights principles) provide some guidance on the types of questions and the criteria that should be incorporated into existing legislative review procedures to take account of the effects of laws or regulations on the realization of the right to food in a country. As to questions specific to the different sectors, sections 4.3-4.10 review some key issues.

Eight areas of regulation have been selected on the basis of the Right to Food Guidelines, which are also used as a support for analysis.

For many of the selected sectors the international dimension is significant: countries are parties to a variety of international agreements with different objectives (i.e. trade, agriculture, environment, food safety) as well as to human rights treaties. Thus, specific national legislative choices in a particular sectoral area affecting the right to food can be – and frequently are – determined by the country's international commitments. Although there is no hierarchy among international agreements, some think that there may be arguments for considering that, in the case of a conflict, human rights should take precedence.<sup>191</sup> The most relevant international instruments governing the sector are therefore mentioned as well.

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190 In most cases, it will be a national human rights institution (i.e. ombudsperson or human rights commission) that will be in charge of this aspect of evaluation.

191 See Cullet, P. 2003, p. 37.

#### 4.1.2 INSTITUTIONAL RESPONSIBILITY

Before carrying out a right to food compatibility review, it will be necessary to identify the institution or institutions responsible for it. Evaluating the compatibility of sectoral legislation with the right to food requires knowledge of the sector as well as legal and human rights expertise. In addition, a compatibility review requires a broad understanding of social and economic impacts, in order to assess the on the ground effects of the legislation in question. This argues for a more technical body to carry out the compatibility review. On the other hand, high-level political support is critical to implementing and acting upon the recommendations and the action plan that result from the review. This would argue for assigning responsibility for carrying out the review to one body and supervisory responsibility to another, higher entity with real power to mandate and implement change. The supervisory and operational bodies would jointly identify legislation for review, while the supervisory body would set priorities, establish deadlines and oversee the work of the specially constituted operational team that would carry out the review.

The supervisory entity could be parliamentary, governmental or independent; each option has its advantages and disadvantages and the choice will ultimately depend on the specific circumstances of each country. Where there is already a specific parliamentary committee charged with scrutinizing legislation for its compatibility with human rights or with monitoring the implementation of international human rights instruments, it could be assigned the responsibility for supervising and coordinating a right to food compatibility review. Because it is housed within the parliament, this option would have the benefit of producing an authoritative final plan of action and ensuring political support for the implementation of the recommended changes (see below, section 4.2.3).

Another option could be assigning a governmental unit to supervise the review of legislation for its compatibility with the right to food. A national authority on the right to food where established (see above, section 3.11), or another interministerial coordinating body, may be well placed to take on this responsibility. One advantage is closer access to information regarding the actual impacts of particular legislation on the enjoyment of the right to food in the country. Governmental oversight of the review may also help with mainstreaming the right to food within various government departments and strengthening governmental officials' commitment to this human right. On the other hand, as the government will often be at the origin of legislation examined and bear the responsibility for its implementation, it may lack the necessary objectivity and critical perspective to supervise its review.

Yet another possibility may be entrusting an independent body with this responsibility. This could be a national human rights institution, an independent research body or a university, whichever entity has the real authority to oversee and implement the recommended changes. In many countries, national human rights institutions already play a role in the evaluation and review of national legislation

for its compatibility with human rights (see above, section 3.12.1). Most often, these institutions review draft laws, although there are some that also have responsibility for reviewing existing legislation on paper and in practice.

In all cases, the responsibility for carrying out the review itself should be given to a specialized team, which would report to the supervisory body. This review team should work in close cooperation with other governmental institutions, including those involved in monitoring food security and those dealing with human rights, as well as with non-governmental bodies and civil society (see above, sections 3.1.3 and 3.13). The team should have broad representation and expertise, as well as objectivity and commitment to the realization of the right to food in a country. Members of the review team should include experts from various disciplines and origins: legal experts, including at least one right to food expert, and technical representation from the sector that is the subject of review.

Most of the preceding discussion concerns the operation and supervision of a right to food specific review. Where a decision is taken to integrate consideration of the right to food and human rights principles into an existing process of legislative evaluation, it may only be necessary to amend the duties of the institution or institutions responsible for the review, and ensure that the composition of the operational team that will carry out the review includes right to food expertise.

### 4.1.3 PARTICIPATORY PROCESSES

With respect to the drafting of the framework law, section 3.1.3 of this Guide discussed the need to involve actively all relevant stakeholders and set out some possible procedures and mechanisms to guarantee that participation and consultation. In the case of a compatibility review process, participation will be essential in an *ex post* context, where the review includes an evaluation of the effectiveness of the legislation in practice (see below, section 4.2.2). This is because input and comments from persons, groups and local communities affected directly by a particular sectoral law (e.g. farmers, indigenous peoples and communities, fisherfolk or consumers) will be crucial to evaluate how the legislation affects their capacity to feed themselves by their own means and thus realize their right to food. The affected stakeholders should be given the opportunity to provide their input throughout the review process, also making comments on the final report and plan of action resulting from the review (see below, 4.2.3).

## 4.2 METHODOLOGY

As noted earlier, the objectives of a right to food compatibility review are to identify legislative provisions that support<sup>192</sup> or constrain the ability of persons to enjoy their right to food, and to support the development of positive legal measures to strengthen people's self-sufficiency. This section discusses a possible review methodology and gives some examples of questions that should underpin the review.

### 4.2.1 SELECTING SECTORS FOR REVIEW

Ideally, the review should cover all national legislation that affects or is likely to affect the capacity of people to feed themselves by their own means. In practice, however, this will often not be possible as the amount and type of legislation will be vast, including primary laws, subsidiary laws, governmental regulations, ministerial decrees, schedules and other instruments. In some countries, customary rules and practices may also be relevant.<sup>193</sup> The relevant sectoral areas will be equally wide and diverse. Selecting legislation for review and setting priorities will thus be crucial for the effectiveness of the compatibility review. Where resources are limited, it would be preferable to have an effective review of a few pieces of legislation in one sector than a perfunctory review of many sectors and many acts.

As mentioned earlier in this guide, states are required to progressively realize the human right of every person to access sufficient and adequate food. At the same time, they should prioritize the most vulnerable segments of the population who face the greatest difficulties in realizing their rights.

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192 While the main objective is to identify problems with a view to addressing them, positive features could also be highlighted in the interest of balance or preventing such aspects being lost.

193 In many countries, access to resources such as land and water is regulated not only by statute but also, to a large extent, by customary law. Although the compatibility review is unlikely to cover customary law (among other reasons, because it is unwritten), it should try to identify whether right to food problems originate from the content of customary law or its interface with statutory law and whether they merit a more detailed analysis.

These should be given “first call” when selecting sectoral areas for review. At the global level, the majority of hungry people live in rural areas. About half of them live in smallholder farming households. Roughly two-tenths are landless. One tenth is pastoralists, fisherfolk and forest users. The remaining two-tenths are the urban poor.<sup>194</sup> This roughly indicates priority areas that can be targeted for review. Nonetheless, it does not mean that a right to food compatibility review is unnecessary in countries with little food insecurity; at the national level, each country has its own peculiar hunger and right to food problems and causes. These must be analysed in detail and mapped adequately, in order for the review team to decide on the sectoral areas to examine as a priority.

A good knowledge of the main factors of food insecurity in a country is a condition *sine qua non* for identifying areas where corrective legislative action is or might most urgently be needed and thereby selecting priority laws to be reviewed. In many cases, the roots of the problem are not lack of available food, but lack of access to available food (see section 3.1.2). Consequently, legislation that establishes an *entitlement* (e.g. land, fishing licence, employment, social assistance) should be made a high priority in the review. In other cases, the inability to enjoy the right to food freely may be a consequence of certain *economic activities* affecting access to adequate food or the means for its procurement (e.g. natural resource extraction, building and construction, food production, food processing, food marketing, foreign investment). The Right to Food Guidelines provide a useful tool for this exercise as they identify the main sectoral areas where action, including through legislation, may be needed to facilitate the realization of the right to food.

Where possible, the compatibility review should also include an examination of national legislation relevant for the free exercise of human rights and freedoms (e.g. laws on association, administrative and civil codes, criminal code, laws on human rights institutions). These rules and regulations may ultimately determine the ability of persons to participate actively in the process of implementation of the right to food in a country, to exercise their human right to food effectively and to claim its protection in case of its violation.

#### 4.2.2 ASSESSING LEGISLATION FROM THE RIGHT TO FOOD PERSPECTIVE

The main task of the review will be to identify laws, regulations or provisions within them that could affect people’s capacity to access sufficient and adequate food. More specifically, the review team should strive to identify:

- ✓ Provisions that directly or indirectly limit (or are likely to result in limiting) the capacity of people to exercise their right to food, and whether those limits are justified (see Table 3).

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194 UN Millennium Project. 2005a, p. 6.

Some examples of provisions that directly limit a person's capacity to access food include: insufficient minimum wage; discriminatory conditions for access to land and natural resources; cumbersome procedure and/or conditions in place for eligibility for social assistance payments or small business licences. Other legal provisions, such as incentives for foreign investments or natural resource-based economic activities, price interventions or insufficient food safety standards, can also limit or are likely to result in limiting a person's capacity to exercise his or her right to food.

- ✓ Apparently positive or neutral norms that could limit the freedom of a person to exercise his or her right to food.

A typical example of such norms would be provisions that do not distinguish between men and women in issues dealt with by a law at hand. In fact, even when formally equal, the exercise of women's rights is often affected by entrenched cultural attitudes and perceptions. For example, having in mind that resources such as time, money and power are unequally distributed in practice, land tenure regimes based on the assumption of equality and community unity may result in *de facto* discrimination of women.

- ✓ Gaps and inconsistencies in the legislative provisions or in the institutional set-up that may constrain the realization of the right to food and require remedial action.

An example of a gap in the legislative provisions would be a law that imposes ceilings on the allowable size of landholdings but does not provide for any sanction in case of non-respect (which can prevent someone from realizing his or her right to food). An example of inconsistencies would be a law establishing a natural reserve within a forest area in order to improve availability and accessibility of food sources for the forest communities, and at the same time providing incentives for land cultivation within the reserve, including for non-forest communities.

- ✓ Gaps in regulation and issues that should be addressed through legal action.

The review team should also be mindful of possible gaps in regulation and issues that should be regulated by law in order to implement the right to food fully in a country. For example, the absence of legislation on nutrition standards and consumer protection would be a gap in ensuring the right to adequate food.

In an *ex post* review that goes beyond technical analysis of legal compliance of normative contents of a given piece of legislation, the review team should also determine:

- ✓ Whether the norms established by the legislation are both implemented and respected by the relevant group (public officials, individuals, private actors).



- ✓ Non-intended and unforeseen consequences of a law or regulation.
- ✓ Actual effects of any non-respect in practice;
- ✓ Importance of those effects with respect to hindering the realization of the right to food.

Selected legislation should be examined in detail against right to food standards and human rights principles set out in international law. These have been discussed in detail in parts one and three of this guide, notably sections 3.3 and 3.5. The recommendations given by the Right to Food Guidelines as to the implementation of the right to food at the national level should also be used as a support for analysis.

The assessment should start by identifying possible implications of legal provisions for various elements of the right to food (i.e. availability, stability, accessibility, adequacy and utilization of food in a country) in order to determine whether it hinders or is likely to hinder progressive improvement of living conditions in a country and people's self-sufficiency. Table 3 illustrates an example of this type of assessment.

**Table 3. Assessing a legal provision with respect to elements of the right to food**

LEGAL PROVISION	ASSESSMENT WITH RESPECT TO ELEMENTS OF THE RIGHT TO FOOD		
	Availability, stability and sustainability of supply	Accessibility	Adequacy and utilization
<b>Charging for water services</b>	Can contribute positively by discouraging theft and wasteful use, thus improving the availability of water for food preparation and irrigation purposes.	Better water management and piped water can improve people's access to water for food preparation. Accessibility can be hindered when price is fixed too high, and no exemptions are provided for low income households and areas, or both.	Better water management and piped water closer to households can improve hygiene and thus also the adequacy of food people consume. When charges are set too high, people may limit their water use, which can have negative implications on the adequacy and utilization of food.

As said above, assessing legislation from the right to food perspective should also include the assessment of legal provisions against general principles of human rights. More specifically, the review process should evaluate whether these principles are expressed in the selected sectoral legislation, and to what extent. Sectoral legislation, where it conforms with human rights principles, empowers people to assert their right to food and hold their governments to account for their acts or omissions.

Table 4 gives some examples of questions that can guide the team in the assessment of selected legal provisions against human rights principles. The questions are given here in order to stimulate discussion and analysis and should be complemented by other more specific questions tailored for each relevant sector (see sections 4.3–4.10).

**Table 4. Assessing legislation against human rights principles**

HUMAN RIGHT PRINCIPLE AND DEFINITION	QUESTIONS TO ASK WITH RESPECT TO THE LEGISLATION
<p><b>PARTICIPATION</b></p> <p>People should be able to participate in the planning, design, monitoring and evaluation of decisions that concern them. Participation should be active, free and meaningful.</p>	<ul style="list-style-type: none"> <li>• Do the beneficiaries of the law and the concerned stakeholders have the right to participate in the implementation of the law?</li> <li>• Who can participate and how? Are there any exceptions?</li> <li>• Is a participation procedure provided for expressly?</li> <li>• Does the law provide for any institutional participation mechanism?</li> <li>• Is the selection process non-discriminatory and transparent?</li> <li>• Is there a legal requirement for the competent authorities to consult the relevant stakeholders?</li> <li>• What forms of consultation are provided for?</li> <li>• Are the roles of beneficiaries and stakeholders clearly established?</li> </ul>
<p><b>ACCOUNTABILITY</b></p> <p>Public officials should be answerable to their superiors and to the people they serve for their actions in carrying out their mandates and assigned roles. Such accountability can be ensured through social, administrative, political and judicial processes and controls.</p>	<ul style="list-style-type: none"> <li>• Are the competent authorities in charge of implementation and enforcement clearly indicated? Are their mandates and responsibilities established?</li> <li>• What is their level of discretion in decision-making, for example, with respect to delivering established entitlements, services or benefits?</li> <li>• Are there any deadlines for implementation of different provisions? Are they realistic?</li> <li>• Is there a legal obligation to inform the intended beneficiaries about the law's provisions?</li> <li>• Are accountability mechanisms provided by the law accessible to the public?</li> <li>• Are appropriate sanctions and remedies in case of non-compliance by authorities provided for?</li> <li>• Are accountability procedures and mechanisms effective (or likely to be effective) in practice?</li> <li>• Is there a monitoring and/or evaluation mechanism established by the law? If so, does it monitor and evaluate according to human rights principles?</li> <li>• Do the competent administrative authorities have adequate powers and resources to implement the legislation under review?</li> </ul>
<p><b>NON-DISCRIMINATION</b></p> <p>No person or group should be discriminated against on any ground, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status. Particular attention needs to be given to those who cannot enjoy their rights as fully as other persons or groups.</p>	<ul style="list-style-type: none"> <li>• Do certain provisions of the law explicitly disadvantage any particular category of person or group?</li> <li>• Does the law entail any different treatment of persons or groups on prohibited grounds?</li> <li>• Are there any apparently neutral provisions that have resulted or are likely to result in a disadvantage for a particular category or group of persons? Do established procedures ensure effective equality of persons?</li> <li>• Does the legislation provide for some special measures aiming at contributing to tackling/correcting existing discrimination against certain categories of persons (e.g. women, indigenous peoples, subsistence fishers or farmers)?</li> <li>• Is the legislation supportive of discriminatory customary laws, traditions and practices, or does it aim at correcting discriminatory practices?</li> <li>• Are established entitlements, system of services or benefits genuinely accessible by and to all?</li> <li>• Where there are several official languages in a country, does the law exist in all relevant languages and do all the language versions say the same thing? ▼</li> </ul>

**Table 4. Assessing legislation against human rights principles (cont.)**

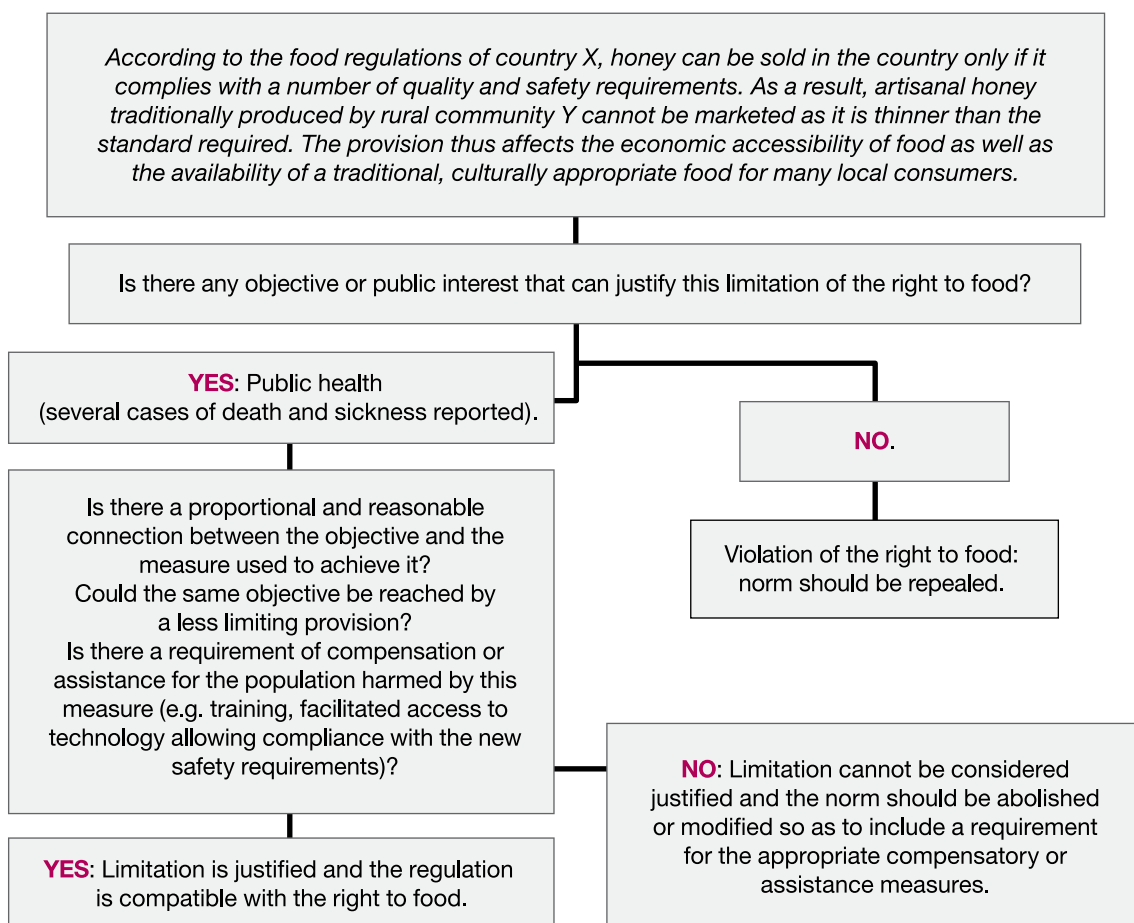
<b>HUMAN RIGHT PRINCIPLE AND DEFINITION</b>	<b>QUESTIONS TO ASK WITH RESPECT TO THE LEGISLATION</b>
<p><b>TRANSPARENCY</b></p> <p>Concerned persons must have the necessary information about decision-making processes and who is accountable and responsible for what.</p>	<ul style="list-style-type: none"> <li>• Is there a legal requirement to inform the concerned beneficiaries/affected persons about the established entitlements/services/norms?</li> <li>• Does the law provide for the right of persons to seek information and the obligation of the competent authorities to provide it?</li> <li>• Is the law clear about the bodies responsible for its implementation?</li> <li>• Where an established entitlement/service/benefit is subject to predetermined criteria, are these criteria defined with sufficient precision?</li> <li>• Is there an obligation to ensure that information is available not only in official languages but also in all relevant languages in a country?</li> <li>• Where the law provides for the loss of rights (expropriation, revocation of licence, etc.) are conditions enumerated with sufficient precision?</li> </ul>
<p><b>HUMAN DIGNITY</b></p> <p>Human dignity refers to the absolute and inherent worth that a person has simply because they are human, not by virtue of any social status or particular powers. This principle is of particular importance for children, persons with disabilities and the elderly.</p>	<ul style="list-style-type: none"> <li>• Can the established requirements, procedures or other provisions affect people's dignity?</li> <li>• Are there provisions requiring officials to treat beneficiaries of services with respect, and to respect individuals' dignity in case interventions are necessary that restrict their access to food?</li> <li>• Where the law at hand establishes an entitlement or relates to service delivery, does it provide for the obligation to inform the concerned beneficiaries in a way that is accessible also to illiterate persons?</li> <li>• Does the law or regulation under review provide for an individualized assessment of needs where appropriate (e.g. food assistance for infants, children, pregnant or breastfeeding women)?</li> </ul>
<p><b>EMPOWERMENT</b></p> <p>People should have the power, capacities, capabilities and access needed to change their own lives, including the power to seek from the state remedial actions for violations of their human rights.</p>	<ul style="list-style-type: none"> <li>• Are there provisions that enable individuals to know and claim their rights?</li> <li>• Is public education and awareness raising part of the obligations of the responsible entity or officials?</li> <li>• Are monitoring reports and findings widely disseminated and accessible to the concerned persons and groups?</li> <li>• Are enforcement proceedings and remedies available and accessible in practice?</li> </ul>
<p><b>RULE OF LAW</b></p> <p>Every member of society, including the state, must follow the law. Legal rules must be clear, well understood and fairly enforced. People should have: the right to complain in front of an independent judicial or equivalent body; the right to due process; and the right to adequate redress.</p>	<ul style="list-style-type: none"> <li>• Does the law equally apply to everyone including public officials?</li> <li>• Is the law drafted as clearly and simply as possible? Are its provisions ambiguous or unduly vague?</li> <li>• Are there provisions on the right to complain about decisions taken by the competent bodies? Are the relevant bodies independent and impartial and do they have the power to impose measures to redress violations of the right to food they have found?</li> <li>• Is there a right of appeal?</li> <li>• Are there specific remedies determined for violations under the law? What kind of remedies? Are they adequate, prompt and effective?</li> </ul>

The review team is likely to find provisions in sectoral laws that limit the exercise of the right to food. For various reasons, a state may have to adopt measures that can interfere with the human rights of its people, in the interest of achieving what it considers a compelling public interest. However, international human rights law requires that states strike a balance between the interests of the community as a whole (e.g. the general well-being of the country) and the individual’s effective enjoyment of his or her right to food (see above, section 3.3.3). Once it has identified a provision it considers a potential limitation on the right to food, the review team’s role will be to determine:

- ✓ Whether the limitation could be considered justified because it is necessary for achieving a pressing public interest and the general well-being of the country.
- ✓ Whether the law contains an express requirement to adopt adequate accompanying measures that are necessary for preserving the right to food of the concerned persons.

Figure 3 gives an example of this type of assessment.

**Figure 3. Assessing a legal provision potentially limiting the right to food**



### 4.2.3 FOLLOW-UP TO THE REVIEW – REPORTING AND CREATING A PLAN OF ACTION

Once the review team has completed its work and identified the weaknesses of the selected sectoral legislation, it should make a written report and a plan of action to be submitted to the supervisory body. While the report should note the main positive aspects, its focus should be on problematic features of examined legislation and the main issues where remedial action is needed. The report should also contain the reasoning and motives for the proposals made, as well as their precise objectives and goals.

The plan of action might contain recommendations with regard to the following:

- Suggested amendments to the legislation to ensure conformity with right to food standards.
- Modifications to the mandate of public authorities responsible for implementation or enforcement.
- Governmental action needed to improve implementation.
- Issues and areas that require further work and regulation.

Before submitting the report and proposed plan of action to the supervisory body the review team should disseminate draft versions for consultation and comments to the relevant ministries and other concerned stakeholders (and possibly, also to state parliament).

## 4.3 LAND

The Right to Food Guidelines require states to respect and protect the rights of individuals with respect to resources such as land, water, forests, fisheries and livestock without any discrimination. States should also carry out land reforms consistent with relevant human rights obligations and in accordance with the rule of law, in order to secure efficient and equitable access to land (Guideline 8.1).

Access to agricultural and forest land provides not only a means of food production and a source of employment but is also a means for accumulating other assets and recuperating after natural or human-induced crises. According to the Special Rapporteur on the right to food, “Access to land and agrarian reform must form a key part of the right to food given that access to land is often fundamental for ensuring access to food and to a livelihood and therefore freedom from hunger”.<sup>195</sup> The need for secure rights over land and resources and the need to improve access for the landless, poor and disadvantaged segments of society are acknowledged in several international instruments (see Box 63). They should therefore also be taken into account during the review process in countries that have committed to them. The right to food implications are likely to be particularly acute where there is a very uneven and unequal distribution of access to land and at the same time a large part of the rural population is facing hunger and poverty.<sup>196</sup>

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195 See UN Special Rapporteur on the right to food, 2002b.

196 See Coomans, F. 2006.

### BOX 63. Access to land and international instruments

ICESCR Article 11.2 (a) requires states to improve methods of production, conservation and distribution of food by, among other issues, “developing or reforming agrarian systems in such a way as to achieve the most efficient development and utilization of natural resources /.../”.

In its GC 12 on the right to food, the CESCR states that strategies to realize the right to food “should give particular attention to the need to prevent discrimination in access to food or resources for food. This should include: guarantees of full and equal access to economic resources, particularly for women, including the right to inheritance and the ownership of land and other property, credit, natural resources and appropriate technology...”.

Agenda 21, adopted during the UN Conference on Environment and Development, states that “the main tools of sustainable agriculture and rural development are policy and agrarian reform, income diversification, land conservation and improved management of inputs”. States are required to “review and refocus existing measures to achieve wider access to land” and urged to “ensure equitable access of rural people, particularly women, small farmers, landless and indigenous people, to land, water and forest resources” (Chapter 14).

CEDAW provides for the right of rural women to have access to agricultural credit and loans, marketing facilities, appropriate technology and equal treatment in land and agrarian reform as well as in land resettlement schemes (see Article 14(2)g).

With regard to indigenous peoples, the ILO Convention No. 169 states that collective “rights of ownership and possession of indigenous peoples over the lands which they traditionally occupy shall be recognized”. Governments are required to “take steps necessary to identify” these lands and to “guarantee effective protection” of the recognized rights. In addition, recent jurisprudence under the International Covenant on Civil and Political Rights interprets the Covenant’s Article 27 (relating to the right of indigenous peoples to enjoy their culture) to include rights to land and resources when they are an essential element of a community (see among others, *Lubicon Lake Band v. Canada*, HRC Communication No 167/1984, Views adopted on 26/03/1990, para. 32.2; *Kitok v. Sweden*, HRC Communication No 197/1985, Views adopted on 27/07/1988, para. 9.2).

Finally, the recent UN Declaration on the Rights of Indigenous Peoples requires governments to protect indigenous peoples’ rights over lands and to title and demarcate such lands.

At the national level, several countries have recently engaged in land law reform.<sup>197</sup> How land reform should be carried out is for each state to decide according to its own historic, legal, social, economic and other circumstances,<sup>198</sup> and this is not the focus of the present Guide. The next sections identify the main issues within national land law that can have significant implications for the right to food and that bear close examination by the national review team.

#### 4.3.1 CHARACTERISTICS OF LAND RIGHTS

The Right to Food Guidelines invite states to facilitate sustainable, non-discriminatory and secure access and utilization of resources and protect the assets that are important for people's livelihoods (Guideline 8.1). The right to food compatibility review of the land law should thus focus on: legal provisions that establish land rights and their content (e.g. right to use, mortgage, sell); those concerning leasing of land, duration of a land right, obligation to use land in a certain way; provisions reserving the right of the state to allocate concessions for economic activities; and other provisions leaving space for broad state interference.

Land rights (also called "tenure rights") define what rights are held with respect to land, by whom, for what length of time and on what conditions. Land rights include ownership as well as other landholding and use rights (e.g. leasehold, usufruct, servitudes and grazing rights), which may coexist in the same plot of land.<sup>199</sup> These rights may be held by individuals or groups or by the state. The form of a land right and its characteristics can significantly affect the enjoyment of the human right to food by influencing the capacity of persons to produce food or to generate the income needed to purchase it, and by restricting people's ability to prevent the state or other actors from interfering with their rights related to land, which in turn affect their ability to feed themselves.

In many parts of the world, land rights are weak or unclear; in addition, several different types of legal system (statutory, customary or a combination) may apply to the same territory, resulting in overlapping rights, contradictory rules and

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197 Among the concerns that have driven the moves towards land reform over the last decades were: market liberalization; poverty alleviation and food security; strengthening of democracy; decentralization; customary and indigenous tenure rights; and sustainable management of land and natural resources. In some countries, a national constitution establishes the right to land restitution (South Africa) or the obligation to make productive, socially beneficial use of land (Brazil), creating a clear legal basis for land reform. See also Quan, J. 2006; Ziegler, J., Way, S.A. & Golay, C. 2006.

198 According to the UN Secretary-General, there are four areas of land reform that could be considered politically feasible and economically sustainable. These are: (i) transforming tenancy rights; (ii) redistributing ownership of uncultivated land; (iii) giving title to lands and watercourses owned by the state; and (iv) redistributing land based on the willing-buyer willing-seller principle. See UN. 2003b, para. 48.

199 See Hodgson, S. 2004; Cotula, L. (ed.) 2006.



competing authorities (“legal pluralism”).<sup>200</sup> Unclear rights and legal pluralism within a country can cause insecurity with regard to land and natural resources, as well as to their use and management.

Tenure insecurity can affect the right to food by discouraging investment in and improvement of the resource, as the holder does not expect to retain tenure rights for a sufficient time period. Furthermore, land cannot be used as collateral for credit, which can affect the availability of food in a country.<sup>201</sup> Tenure insecurity can also affect the (environmental) sustainability of the use of the resource, its productivity and eventually its value, as the right holder may extract the maximum value from the resource in a shorter period of time, not knowing how long he or she may hold the right. Tenure insecurity also makes people less inclined to lease land as they may fear the land will not be returned to them. This can result in limited access to land for tenants, lessees or purchasers, and eventually increased food insecurity.

It is widely acknowledged that securing land rights does not require establishing individual land ownership.<sup>202</sup> In fact, individual titling and registration may itself contribute to tenure insecurity, by raising the spectre of land being lost to outsiders and creditors and by disrupting locally recognized systems without replacing them with other institutions that can or will effectively protect the newly delineated rights.<sup>203</sup> A given land law can be compatible with the right to food regardless of whether it establishes individual or collective rights and regardless of the particular forms of use rights. What is relevant is that the established rights are clear with respect to their content, duration and enforcement, thus complying with the principles of transparency and the rule of law (see above, Table 3). When tenure rights are weak or not well defined in the legislation, the competent officials will have more discretion in interpreting and enforcing the law, which can have negative effects. For example, weakly defined land rights may be ignored in practice where more specific powers are given to government officials under forestry, mining or other laws regulating exercise of economic activities. Box 64 gives two examples of recent land laws securing land tenure in a country through establishing land rights for individuals and communities on land in state property.

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200 See Cotula, L., Toulmin, C. & Quan, J. 2006, p. 19. See also Meinzen-Dick, R., Pradhan, R. & Di Gregorio, M. 2004.

201 For an interesting study of the effects and consequences of land tenure insecurity on food security and the role of national legislative frameworks, see Unruh, J.D. & Turray, H. 2006.

202 Efforts to secure tenure rights through systems of individual private ownership were initiated by the state in many parts of Africa, Asia and Latin America. However, in many cases, most notably in Africa, they proved to be ineffective. See Cotula, L. Toulmin, C. & Quan, J. 2006; FAO, 2002b.

203 *Ibidem*. See also Quan, J. 2006.

**BOX 64. Characteristics of land rights – examples from state practice**

A number of countries in Africa have recently adopted laws aimed at securing land rights on land that remains the property of the state.

The **Mozambique** Land Law (1997) upholds the principle that ownership of all land and natural resources is vested with the state, but recognizes “a right of use and benefit” over land, by individuals (men and women), local communities and companies (Art. 10). Any nationals who occupy land on the basis of customary norms and practices or who have been using “free” land in good faith for more than ten years can acquire the right of use and benefit from land (Art. 12). Individuals have the right to occupy the land and are entitled to legal recognition without having to formally register it. The landholder can transfer, including by inheritance, and under certain conditions can mortgage the right, but cannot sell it (Art. 16). The Land Law also provides for mandatory community consultation processes before investors are allocated land-use rights and forest concessions (Arts 13 and 24).

According to the **Angolan** Land Law (2004), the state holds “direct domain” and can confer or transfer the “useful domain” of land to individuals and entities. Rural communities can obtain a “perpetual right of useful customary domain”. The transfer, however, does not automatically include a right to natural resources (Art. 10).

The law requires that effective use of the land, according to custom, be defined by the relevant authority at the moment of the transfer of the right. However, the recognition of a land right subject to specific uses (e.g. “traditional or customary”) can preclude the holders from using land for other purposes (as opposed to only those that exist as a matter of custom or as currently practised) and possibly result in loss of land rights in the case of a subsequent change of land use.

As in the examples in the box, formal documentation and thus legal security of their lands empowers individuals and communities to assert their rights and to claim protection from interference from others, including the state itself.

Another important issue for the review team to examine is which persons or groups can acquire the land rights established by a land law. The definition of “eligible land right holders” in the legislation can raise right to food compatibility concerns as it may preclude certain persons or groups from obtaining a land right and thus also affect their ability to enjoy their right to food. For example, definitions requiring that the land be used in a certain way may leave some persons or communities, such as those who migrate (e.g. pastoralists or hunter-gatherers) outside the scope of the law, and preclude them from seeking recognition of their land-use rights (see Box 64). Similarly, when a law recognizes

and protects the land rights of “communities” (e.g. “local communities” in Mozambique, “rural communities” in Angola, “villages” in the United Republic of Tanzania), the definition should not unduly privilege or disadvantage some persons within a community (see below).<sup>204</sup>

### Women’s land rights

The Right to Food Guidelines require states to promote women’s full and equal participation in the economy and to introduce (where it does not yet exist) and implement gender sensitive legislation providing women with the right to inherit and possess land and other property (Guideline 8.6). Although they are responsible for most of the food production in developing countries, women farmers most often do not enjoy independent access to and management control of land and land-based resources. In many instances they are only able to access land or resources through relationships with men (e.g. through marriage or through allocations made to their male relatives). Yet, without land and secure land rights in their own name women cannot build or strengthen their autonomy, they risk remaining dependent on their relationships with men and so cannot freely exercise their right to food.<sup>205</sup> Single women are particularly vulnerable. The importance of women’s access to land, credits and extension services has been recognized at the international level not only within human rights treaties, but also in instruments relating to the environment and sustainable development (see above, Box 63).

Even where national laws contain a general equality clause, their implementation in practice can and often does result in women being worse off than men. The legislative review should focus not only on the stated requirements for acquiring, registering and titling land, but also on how the rules apply in practice, i.e. whether they discriminate against women in favour of men. Where a law recognizes land rights derived from plural and customary regimes, this should not mean enshrining discriminatory practices that may exist under such regimes. Thus, laws that allow customary authorities to allocate and manage community land should explicitly require them to do so in a non-discriminatory manner notably with respect to women.<sup>206</sup> Appropriate safeguards and mechanisms preventing or correcting existing discriminatory practices should be in place (e.g. obligatory representation of women in traditional structures at community level). Box 65 gives some examples of relevant legal provisions from recently adopted laws.

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204 On the implications of a definition of “communities”, see Cotula, L. 2007, pp. 55–58.

205 On the relevance of women’s rights for the enjoyment of the right to food, see UN Special Rapporteur on the right to food. 2003b.

206 See Ikdhahl, I., et. al. 2005.

### **BOX 65. Securing women's land rights – example from United Republic of Tanzania**

The **Tanzanian** Village Land Act (1999) breaks new ground in women's rights to land. With the stroke of a pen the Act renders invalid any customary practices that discriminate against women: “[Any] rule of customary law or any such decision in respect of land held under customary tenure shall be void and inoperative and shall not be given effect to by any village council or village assembly or any person or body of persons exercising any authority over village land or in respect of any court or other body, to the extent to which it denies women, children or persons with disability lawful access to ownership, occupation or use of any such land” (section 20 (2)).

Another provision of the Act is worth mentioning: the Village Land Council (competent for dispute settlement) shall consist of seven people, to be nominated by the Village Council and approved by the Village Assembly. Three of the members shall be women (section 60).

In addition to land laws, the review team should examine legislation in related areas such as family and succession and access to credits and markets, as these too can have negative implications for women's equality.

### **Indigenous and tribal peoples' land rights**

Due to long historical processes of colonial and non-indigenous expansion, political and economic exclusion, indigenous peoples are among the most vulnerable to poverty, hunger and malnutrition.<sup>207</sup> The risks are heightened by the widespread failure of state legal regimes to recognize effectively indigenous forms of land rights. Furthermore, indigenous lands and territories are often endowed with substantial oil and gas, mining, timber and other valuable natural resources. Some believe that this often leads to “tensions with governments and outside interests who do not wish to grant indigenous people substantive control over this wealth”.<sup>208</sup> Whatever the cause, indigenous and tribal peoples need land rights in order to feed themselves and preserve their culture and distinct identity through traditional economic and subsistence activities such as hunting, gathering, farming or fishing.<sup>209</sup> Moreover, without secure land rights, indigenous peoples cannot participate in the design or management of projects affecting their lands, even though these often result in the depletion of

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207 See Ziegler, J. Way, S.A. & Golay, C. 2006.

208 See Cotula, L. Toulmin, C. & Quan, J. 2006, p. 31.

209 See Ziegler, J. Way, S.A. & Golay, C. 2006.

their lands and resources and, in many cases, in displacement of communities without adequate compensation. The legal recognition and protection of indigenous peoples' land rights are thus fundamentally important for the realization of their right to food.<sup>210</sup>

Land rights issues relating to indigenous peoples are specifically protected by international law (see above, Box 63). The Right to Food Guidelines invite states to give special attention to indigenous peoples and their relation to natural resources (Guideline 8.1). Although several countries have taken steps legally to recognize the rights of members of indigenous and tribal peoples to their communal land, territories and resources, considerable constraints remain. The review team should first look at the nature and content of indigenous peoples' rights to their land, territories and natural resources and their duration – for example, whether statutory or customary law guarantees legal title to land and territories allowing their permanent use and enjoyment. The team should also examine the requirements and time scale for delimiting and demarcating indigenous lands,<sup>211</sup> in particular whether the concerned indigenous and tribal peoples are actively involved and consulted in that demarcation.

More generally, the review team should assess whether established mechanisms and procedures allow the concerned indigenous and tribal peoples to participate, in an effective and meaningful way, in decision-making processes concerning resource exploitation or conservation in their territories. The right to use and enjoy their territory would be meaningless if not connected to the natural resources that lie on and within the land, as these are necessary for the peoples' development and survival. Where the legislation or customary law restricts indigenous peoples' rights, it must establish safeguards including consultation (and where applicable, a duty to obtain consent), benefit sharing and environmental and social impact assessment. Where there is no specific legislation in place, the review team might wish to recommend its adoption and include it in the plan of action.

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210 On the links and relationships between the right to food and indigenous peoples, see Knuth, L. 2009.

211 See Quan, J. 2006, p. 29.

### 4.3.2 INTERFACE BETWEEN STATUTORY LAWS AND CUSTOMARY RULES

In many countries, customary law interplays with statutory law in the field of access to land and natural resources. One of the key challenges in land law is the status of land rights derived from customary law. Some statutory laws recognize customary land rights; others do not. In either case, the customary law rules will be relevant for the right to food compatibility review as many people depend for their livelihoods on land and other resources governed by complex and often overlapping customary rights.

As noted above, a number of recent national laws have recognized land rights of “communities” (see Box 64). When title over land is given to a community, in most cases within a community area demarcated under the law, the allocation of individual plots of land and their use will be governed by customary rules or traditional practices. However, community-based systems of tenure are often very complex, with overlapping rights over the same resource held by different users. In many contexts, these systems may be inconsistent with human rights principles, most notably, non-discrimination, accountability and transparency (even when those are enshrined in the state constitution or laws). Some degree of formalization of individual holdings within a community area, and a clearer legal definition of the powers and responsibilities of traditional leaders may be needed to ensure non-discrimination – in particular, against women and minorities – and a minimum level of accountability, transparency and empowerment within traditional and customary structures.<sup>212</sup> Another issue that can raise concerns from the right to food perspective: when a recognized land right is transferred to a community, this can undermine decision-making power and control at other levels (e.g. family level). For example, the traditional leader(s) of the community can ignore the existing arrangements, and sell land plots to outside people. Box 66 gives an example of a recent legal claim before the South African High Court challenging the constitutionality of the recently adopted Communal Land Rights Acts of South Africa, which allowed Traditional Councils to become Land Administration Committees.

#### **BOX 66. Dealing with the interface between statutory law and customary law – example from South Africa**

The Communal Land Rights Act (2004) of South Africa was adopted with the aim of securing land rights of persons and communities whose land tenure is insecure as a result of past racially discriminatory laws or practices. Among others, the Act says that where Traditional Councils exist, they will represent communities “as owners of communal land” and will have the power to allocate and register “new order” rights on communal land.

<sup>212</sup> See FAO, 2002b, pp. 230–231.

### **BOX 66. Dealing with the interface between statutory law and customary law – example from South Africa (cont.)**

This provision was controversial because tribal authorities were the building blocks of the Bantustan political system, and their boundaries were drawn to elicit cooperation from traditional leaders and punish those who refused to cooperate with “separate development”. While some tribal authorities are more legitimate than others and coincide with historical community boundaries and identities, many others are hotly disputed or dysfunctional.

Four groups of rural people introduced a legal claim before the High Court complaining that transferring title to old tribal authorities undermines their ability to control and manage their land at different levels of social organization. Another key complaint regards the risk of reinforcing the patriarchal power relations that render women vulnerable. As of April 2008, the legal process is in course before the High Court.

*Source: See Claasens, A. 2008, pp. 107–119.*

### **4.3.3 LAND ADMINISTRATION**

Another area of regulation with right to food implications is in land administration. The compatibility review will need to focus on the roles and responsibilities of the administrative authorities in charge of the law’s implementation and the procedures followed in the land administration system. For example, legal provisions establishing high registration fees or rigid title or registration requirements may discourage persons and communities from applying to acquire land rights, thus reducing availability of land and eventually affecting the accessibility of food for many. Poorly designed, overly sophisticated or socially inappropriate land administration systems may reduce tenure security or exacerbate conflict, again affecting the availability and accessibility of food. Transparent land administrations prevent corruption and discriminatory practices with a positive effect on tenure security.<sup>213</sup> An explicit requirement for the competent authorities to inform stakeholders of their established rights and to provide legal advice where needed will contribute to legal empowerment of people and facilitate the realization of their right to food. Legally providing the acceptance of verbal evidence for acquiring established land rights will be useful in countries with high levels of adult illiteracy. Box 67 gives some examples of relevant legal provisions from recently adopted laws.

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213 See FAO. 2007c.

### BOX 67. Acquisition of land rights and land administration – example from state practice

According to the **Mozambique** Land Law (1997), the issuance of a title is not a prerequisite for claiming the established right of use and benefit over land (Art. 13). This provision is particularly useful for those who do not possess title documents to prove their occupancy of land. Furthermore, the absence of registration does not prejudice the right of land use and benefits; the right can be proved also by means of “testimonial proof presented by members, men and women of local communities” (Arts 13–15).

The **Tanzania** Village Land Act (1999) vests all village land in the village. The village council is the Village Land Manager, responsible for making decisions concerning the allocation of village land, the issuance of Certificates of Customary Rights of Occupancy and the maintenance of a village land register. Both villagers and non-villagers may apply for registration and issuing of this certificate. The application is to be submitted to the village council, which, in the case of non-village applicants, is required to seek advice from the Commissioner. The council deliberates the application, taking into account, *inter alia*, the availability of the land and the applicant’s ability to make productive use of the land (section 23). The Act also makes special provisions for the establishment of a Village Land Council “to mediate between and assist parties to arrive at a mutually acceptable resolution on any matters concerning village land” (section 60).

Along with secure land rights, easy access to dispute settlement institutions (formal or customary or both) is essential for persons or communities to protect their entitlements to land and resources as well as their right to food when facing competing claims from others, including the state itself.<sup>214</sup> The relevant land law should therefore provide for an enforcement mechanism and conflict management systems, where the roles of the formal courts and customary dispute resolution systems are clearly defined, and where appropriate mechanisms are provided to facilitate their use by the poor. Further, whether a customary decision can be final is also an issue that should be considered when addressing this topic.

#### 4.3.4 REGULATION OF ECONOMIC ACTIVITIES

The protective role of the state under the human right to food requires it to ensure that private actors do not deprive people of their access to food or the means for its

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214 For an interesting paper comparing the costs and processes of formal and informal methods of property rights adjudication, see Henrysson, E. & Joireman, S.F. 2007.



procurement. The way the state allocates concessions or licences for commercial resource exploitation (e.g. agro-industrial, fishery, mining, tourism), notably within lands used by communities and indigenous peoples, can have significant right to food implications. In many countries, impoverishment and food insecurity have resulted from hazardous industries and harmful activities undertaken by private actors and authorized by the state. Although promoting economic activities and facilitating investment projects can contribute to the well-being of a country and thus to realizing the human right to food (including by generating employment opportunities), they can negatively affect livelihoods by reducing the availability, accessibility and/or adequacy of natural resources on which the affected persons and communities depend. Thus, appropriate requirements and safeguards must be in place.

From the right to food perspective, the conditions under which a concession or permit for undertaking a resource-based activity can be issued are of particular concern. To conform to right to food standards, the relevant legislation should include, for example, the requirement of an impact assessment, the informed consent of the affected persons to the intended use of their land and environments, and negotiation – on an equal footing – to share the benefits from the activity with the concerned persons and communities. When there is a risk of harmful effects on people's livelihoods, the relevant legislation should impose appropriate restrictions on the exercise of a given economic activity. These can include, for instance, geographical limitations and the use of certain methods and technologies to prevent or minimize negative effects on people's food sources and their ability to sustain their livelihoods in an autonomous manner, including through just and equitable compensation for taking of land and for any damage resulting from the activity, such as pollution and depletion of resources.<sup>215</sup>

In some cases, the exercise of a resource-based economic activity can require the expropriation of land. Neither the right to food nor other human rights imply prohibition of expropriation *per se*. The state, as the guarantor of established legal rights, can oblige an individual or group to cede or lose his or her land rights for the sake of a higher public interest, although in most countries expropriation is subject to adequate compensation.

Where a dispossession of land used for subsistence purposes is unavoidable for a higher public interest, it should be executed in accordance with several key principles in order to respect the right to food: reasonable notice for the concerned persons; full information; adequate balancing measures determined with full involvement of the concerned persons; prohibition of discrimination;

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215 Examples of such provisions include requiring and publicizing environmental and social-impact assessments, facilitating active and informed participation of the concerned persons and communities in the decision-making processes and providing for a right to ask and obtain relevant information and appropriate monitoring after issuance of the licence. Ultimately, the government should not be allowed to issue a required licence or concession if the concerned community has not consented to it. For more information on this issue, see Cotula, L. Toulmin C. & Quan, J. 2006.

and the right of appeal before an independent authority (against the expropriation as well as the amount or form of compensation).<sup>216</sup> That the land has ensured a person's or a group's self-sufficiency is particularly relevant for the determination of the accompanying balancing measures. For example, in some circumstances monetary compensation or a food safety net may not be compatible with right to food standards, as neither of these would preserve the capacity of the concerned persons or groups to provide for themselves; it would be more in line with human right to food to respect and protect the functioning entitlements of groups who would otherwise become vulnerable.<sup>217</sup> In such cases, the legislation should thus explicitly require that the balancing measures preserve the ability of the persons concerned to sustain their livelihoods in an autonomous and dignified manner (see Box 68 and Table 3 above).

#### **BOX 68. Expropriation and compensatory measures – example from South Africa**

In **South Africa**, laws are particularly strong with regard to limits on expropriation. The Extension of Security of Tenure Act (1997) makes eviction from land in certain instances more difficult, by requiring that a court, before granting an eviction order, consider whether the eviction would be just and equitable in the light of all relevant circumstances. Although the Act does not say so explicitly, where the land in question is used to produce food, courts could take into account whether eviction would affect the evicted person's exercise of the constitutional right to food (sec. 8.1).

In a recent decision by the South African Land Claims Court, the compensation received by the Kranspoort community for the loss of rights in land at the time of their dispossession was not "just and equitable" as it covered only improvements to the land, and not the loss of "beneficial occupation", i.e. loss of communities' grazing and cultivation rights, which constituted their entitlements to food. (*In Re Kranspoort Community* 2000 (2) SA 124 (LCC).)

Another important issue is the scope of the expropriation provisions: given that in many countries the land is formally owned by the state and occupied and used in terms of informal rights (e.g. tenancy, customary rights), compensation for expropriation should not be limited to ownership rights backed by legal title,

216 See CESCR GC 4 on the right to adequate housing of 13 December 1991 and GC 7 on the right to adequate housing: forced evictions of 20 May 1997; See also UN. 1997.

217 See Eide, A. 2007, p. 149.

but also cover use rights.<sup>218</sup> Where appropriate, compensation rights should extend to owners, tenants, workers or any person who can demonstrate an interest lost as a result of expropriation. In addition to the right to food standards and human rights principles previously examined, the review team should also look at the relevant standards developed at the international level with regard to the right to housing and forced evictions.<sup>219</sup>

In some cases, expropriation can be a measure to facilitate access to land for the poor and the landless,<sup>220</sup> and as such it can contribute to the realization of their right to food. Appropriate safeguards must be in place, however, to protect the accessibility of food for agricultural workers, farmers and consumers, among others, even in these cases.<sup>221</sup>

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218 See Cotula, L. Toulmin, C. & Quan, J. 2006.

219 See, in particular, GCs 4 and 7 of the CESCR; see also UN. 1997.

220 See UN Special Rapporteur on the right to food. 2002b.

221 One of the best-known examples of such legislation is Zimbabwe's Land Acquisition Act (1992), which has dramatically increased the powers of the President to acquire land without ensuring the necessary procedural safeguards and compensation requirements. It has had significant negative impacts on the agricultural production and food situation in the country causing massive right to food violations. See Amnesty International. 2004.

## 4.4 WATER

The Right to Food Guidelines call upon states to, among others, improve access to, and promote sustainable use of, water resources and their allocation among users (Guideline 8C).

Water is vital to human beings as household water: individuals need 20 to 50 litres of water that is free from harmful contaminants each and every day in order to ensure their basic needs. It is essential for drinking, for washing food and cooking food items and also for sanitation. Water is also a primary input for food production in agriculture; almost 70 percent of all available freshwater is used for agriculture, and it is estimated that more than one-third of global food production is based on irrigation.<sup>222</sup> Although hunger and malnutrition today stem more from a lack of purchasing power or lack of access to land and productive resources than from the overall national availability of food, a return of scarcity due to lack of irrigation water would dramatically increase the number of hungry and undernourished. Thus, the importance of access to water in relation to food security<sup>223</sup> is undeniable. International instruments have increasingly confirmed the significance of access to water for people's livelihoods and human rights (see Box 69).

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222 See UN. 2003a.

223 See Villan Duran, C. 2000. He argues that the right to food and the right to water should be treated as one right.

### BOX 69. Right to water in international law

In 2004, in its GC 15, the CESCR defined the right to water as the right of everyone “to sufficient, safe, acceptable, physically accessible and affordable water for personal and domestic uses” (para. 2). It also noted “the importance of ensuring sustainable access to water resources for agriculture to realize the right to adequate food. Attention should be given to ensuring that disadvantaged and marginalized farmers, including women farmers, have equitable access to water and water management systems, including sustainable rain harvesting and irrigation technology” (para. 7).

Article 14 of CEDAW requires states to guarantee to women the right to “enjoy adequate living conditions, particularly in relation to /.../ water supply”.

Article 24 of the CRC requires States Parties to combat disease and malnutrition “through the provision of adequate nutritious food and clean drinking water”.

Furthermore, international water law clarifies that in the event of conflicts over the resources of international rivers, human needs must be prioritized, which means that “special attention is to be paid to providing sufficient water to sustain human life, including both drinking water and water required for production of food in order to prevent starvation” (Statement of Understanding accompanying the UN Convention on the Law of Non-navigational Uses of Watercourses, UN Doc. A/51/869 of 11 April 1997).

As mentioned earlier, although the right to drinking-water is generally discussed within the human rights community as a separate human right, according to the Special Rapporteur on the right to food, the right to food should include “not only the right to solid food, but also the right to liquid nourishment and to drinking water”.<sup>224</sup> On the other hand, in its GC 15 on the right to water, the CESCR recognized that *water used for irrigation* by vulnerable people who only have access to the food they grow themselves must be among key elements of the right to water, as well as of the right to food.<sup>225</sup> In practice, water is very unevenly distributed not only between countries but also within countries; individuals’ access to water and water services depends on their geographic location, whether they live in a rural or urban area and what position in society they have.<sup>226</sup>

224 See UN Special Rapporteur on the right to food. 2002a, para. 25.

225 See GC 15 on the right to water, para. 7 and GC 12 on the right to adequate food, paras 12–13. See also UN Special Rapporteur on the right to food. 2003a.

226 Currently, 1.1 billion people lack sufficient access to safe drinking water, and 2.6 billion lack access to basic sanitation. See UN Millennium Project, 2005b.

Domestic water legislation, although guided by standards established in regional and international instruments, is largely guided by the specific national context. The issues and concerns surrounding the nation's water resources are complex and many. Given the strong links between water and food, almost any law dealing with water is likely to have right to food implications and should be looked at in depth by the national review team. The following paragraphs point out only a few legislative issues in water law that can affect the ability of persons to provide for themselves and should be assessed for their compatibility with the right to food and human rights principles.

#### **4.4.1 WATER DISTRIBUTION AND DELIVERY SYSTEMS**

Traditionally, drinking-water is provided through water systems and facilities managed by the state (in most cases, by local authorities). In order to be right to food compliant, water distribution systems should be structured so as to ensure that all water facilities and services are of sufficient quality and water is equitably distributed, allowing all individuals and households access to water and sanitation services. Human rights law requires that particular focus be given to the status of marginalized and vulnerable groups, including the facilitation of small-scale providers to expand their operations or build facilities in new areas. The review team should pay particular attention to provisions that may result in preventing access by certain persons or groups to water sources or piped water.

Several factors, including the shortfall of funds for infrastructure maintenance and development, have led many national and local governments to look to the private sector for assistance in water system management and development.<sup>227</sup> Privatization of public service is a challenging issue and can adversely affect people's access to water and thus their right to food. While private sector involvement in drinking-water delivery is not contested in itself, the privatization process should not negatively affect the existing safety, affordability and accessibility of drinking-water for the concerned persons (GC 15, para. 24). In addition, water should be delivered in an equitable and non-discriminatory manner consistent with human rights standards. It is also fundamental that all stakeholders be appropriately informed and actively involved in the privatization process from the beginning. Ultimately, its success will depend on the capacity of the state to ensure that provision of water is adequately regulated and monitored. The right to food compatibility review can in its turn contribute to achieving this.

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<sup>227</sup> Between 1995 and 1999, governments around the world privatized an average of 36 water supply or wastewater treatment systems annually. See UNDP/IFAD, 2006, p. 48.

### Affordability of water services

Charging for (household and irrigation) water services is increasingly promoted as an appropriate response to the urgent need to improve water services. Charging can improve access and quality of service, discourage theft and wasteful use, and reinforce a feeling of ownership among people. However, to comply with the right to food, the charges must not prevent access to food or be structured unfairly. Furthermore, in accordance with a state's duty to prioritize the most vulnerable, legislation should ensure that low-income households and areas have the least expensive services. There should also be appropriate legal provisions preventing local authorities or service providers from disconnecting the water supply and thus depriving users of access to a sufficient amount of safe water per person per day. Disconnection should only be permitted in very restricted circumstances and where a just and adequate alternative is available.<sup>228</sup> Regular access to a certain quantity of safe drinking-water is in fact required to prevent starvation and disease.<sup>229</sup>

Several national courts (e.g. in Argentina, Brazil, India and South Africa) have, in some cases, reversed decisions to disconnect water supply to poor people who could not pay.<sup>230</sup>

Ensuring the minimum quantity of safe drinking-water through relevant water legislation can be seen as one of the key elements for the realization of the right to food. Box 70 gives two examples of states/regions that have already legally recognized the right to a minimum supply of water. Countries that are envisaging establishing an entitlement to a minimum amount of food should evaluate whether also to include a minimum quantity of safe drinking-water (see above, sections 3.2.4.a and 3.5.4.a).

#### **BOX 70. Access to a minimum supply of water – examples from state practice**

In the Flanders Region of **Belgium**, legislation recognizes a right to a minimum supply of water, meaning that every person is entitled to receive a minimum amount of drinking-water free of charge per year, the amount based on WHO's recommendations.



228 See, for example WHO. 2003a, p. 29.

229 See World Summit on Sustainable Development, Plan of Implementation 2002, para. 25c.

230 See Dubreuil, C. 2006. p. 64.

**BOX 70. Access to a minimum supply of water – examples from state practice (cont.)**

**South Africa's** Water Services Act of 1997 codified the constitutional right to access basic water supply and sanitation, mandating the construction of sufficient pipes to bring piped water to within 200 metres of every household. The Act also recognizes a single national water right, called the Reserve, which is designed to satisfy the constitutional mandate to protect basic human needs and the environment by setting aside enough water to sustain functioning ecosystems and to provide each person with sufficient water for drinking, food preparation and personal hygiene. This has subsequently been quantified as a minimum of 25 litres of water per person per day. This amount has recently been reviewed by the High Court of South Africa in a case concerning the City of Johannesburg's practice of forced installation of prepayment water meters in Phiri. In its final judgement of 30 April 2008, the High Court ruled that the contested practice is unconstitutional and unlawful, and ordered the City to provide residents of Phiri with 50 litres of free basic water per person per day, setting aside the City's decision to limit free water to 25 litres per person per day (*Lindiwe Mazibuko & ors v. The City of Johannesburg & ors*, case No 06/13865, High Court of South Africa; judgment available at [www.cohre.org/watersa](http://www.cohre.org/watersa)).

**Access to and use of water for irrigation**

The availability of water for irrigation confers opportunities on individuals and communities to boost food production, both in quantity and diversity; to satisfy their own subsistence needs and to generate income from surpluses.<sup>231</sup> As competition for water increases, water-use-allocation regulations and mechanisms can thus significantly affect the realization of, in particular, poor farmers' right to food.

In most countries, water resources (surface water such as rivers or streams as well as groundwater) fall increasingly under the scope of the government's allocative authority.<sup>232</sup> Beyond *de minimis* use, individuals can generally claim a right to take and use water from natural sources (whether from surface waterbodies or groundwater) subject to the terms and conditions of the governmental grant or permit (a "water right"). As with land rights (see above, section 4.3.1), water rights differ significantly between countries and within a single country. Water rights, however, also relate to the supply of water through a canal for irrigated agriculture or industrial use. This type of right is quite different from classical

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231 See UNDP/IFAD. 2006.

232 This is largely a consequence of the growing complexity of water resources management and the desire to satisfy all of society's demands. This complexity stems from the increasing interdependence of water quantity-related and water quality-related factors, and the intense interface between water and other environmental resources. See Burchi, S. & D'Andrea, A. 2003.



water rights inasmuch as it is a “contractual water right” giving an entitlement to a service supplied in consideration for payment.<sup>233</sup> The review team should examine how subsistence farmers and other vulnerable persons secure water rights and access to water for irrigation. In order to be right to food compliant, irrigation laws should put in place mechanisms to ensure reliable delivery of water and transparency in its management in addition to appropriate balance in equity and efficiency in access to water for irrigation purposes. For this, it is fundamental that appropriate procedures and mechanisms exist that allow for ensuring informed, active and participatory decision-making with regard to water use allocation and water resources management.

As is the case with land rights (see above, section 4.3.1), water rights differ significantly between countries and within a single country; most often, statutory water rights coexist with customary or traditional water rights.<sup>234</sup> When addressing the water issue, the review team should thus also evaluate the interaction between statutory water rights and customary rights in general and minimize opportunities for conflict, which could open the way also to right to food infringements.

#### **4.4.2 PARTICIPATION AND INTEGRATED WATER MANAGEMENT**

One of the challenges within the water sector is to determine how certain decisions are made, which stakeholders are involved and what principles, rules, regulations (formal and informal) and institutions apply. Participation is a fundamental principle of the human rights-based approach and can assist in improving water management. The application of participation and transparency principles in the context of water management would require that water users are able to take an active part in the internal structure of the government water administration. The formation of groupings of water users (e.g. water users’ associations) for the development and management of sources of irrigation water is widely known and indeed provided for in many recent national laws.<sup>235</sup> Where a national legislation provides for the establishment of water users’ groupings, their legal status should be clearly defined, in particular with regard to their decision-making authority. Involving stakeholders in water management should extend, for example, to decisions about whether to install water points and where, what technology should be used, and what management arrangements should be introduced, as well as how costs will be divided. Such participation would build consensus and support for water allocation and management decisions, and would be consistent with human rights principles.

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233 *Ibidem*. See also Hodgson, S. 2006. For a comparison of different rights related to water, see Newborne, P. 2006 and O’Neil, T. 2006, p. 131.

234 See for example, Hodgson, S., 2004

235 See FAO, 2002b and see also Hodgson, S. 2003.

## 4.5 FISHERIES

The Right to Food Guidelines require states to respect and protect the rights of individuals with respect to resources such as fisheries (Guideline 8.1). Fisheries provide food and livelihoods for both communities living in coastal areas and inland communities dependent on freshwater fishing. The fisheries sector is a source of livelihood for 41 million fishers and fish farmers in the world,<sup>236</sup> and approximately 95 percent of this figure pertains to developing countries.<sup>237</sup> Fish has a high nutritional value and is a source of vitamin A, D, B1 and B2, iron, phosphorus, calcium, iodine and fatty acids, in addition to proteins.

Fishing communities in most regions are characterized by social and economic vulnerability, particularly among subsistence and small-scale fishers who compete with industrial fishers for access to declining resources and who may not have access rights to these resources. Besides fishers and fish workers, other groups are also affected by the availability of fish to meet their food needs, including better-off fish consumers. These considerations highlight the most salient link between the fisheries sector and the realization of the right to food: the sustainability of the resource. Conservation and sustainable use of fisheries resources are therefore key elements for achieving respect and protection of the right to food for fishing communities and consumers, and failing to achieve these means that the ability of future generations to access this food resource will be jeopardized significantly.

Aquaculture is recognized as the fastest growing source of food production, contributing to half of the world's fish production, and it has expanded in recent years to meet growing demand and high levels of fish consumption. Aquaculture offers a number of opportunities to contribute to poverty alleviation, employment,

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236 See FAO. 2006d.

237 Asia accounts for 85 percent and Africa for 7 percent. In terms of nutrition, the average consumption of animal protein in the diet (23.1 percent in Asia and 19 percent in Africa) derives mainly from fish, with the consumption of fish in coastal communities considerably higher. See Kent, G. 2003.

community development, reduction of overexploitation of natural aquatic living resources and food security, in tropical and subtropical regions. As much as 40 percent of global fish production is traded internationally, and exports exceed those of meat, dairy, cereals, sugar and coffee. Much of this derives from aquaculture.<sup>238</sup>

The importance of fisheries and aquaculture to ensuring food security for coastal people and communities requires the integration of the right to food standards and human rights principles into national fisheries legislation. As many countries are currently reviewing their policies and legislation with a view to managing their fisheries resources in a sustainable way and ensuring compliance with international fisheries instruments (see Box 71), the time is ripe for integrating these standards and principles into fisheries reviews as well.

#### **BOX 71. International fisheries instruments**

Several international fisheries instruments allude to elements relevant for the realization of the right to food, including responsible fisheries management, consideration of the special needs of developing countries and the need for protection of small-scale fisheries.

The United Nations Convention on the Law of the Sea (UNCLOS, 1982) is the primary binding international instrument governing the peaceful, equitable and efficient utilization and conservation of marine resources. UNCLOS grants coastal states sovereign rights to manage fish stocks in their exclusive economic zone (EEZ), but obliges them to manage these resources in a way that maintains or restores these stocks at levels that can produce the maximum sustainable yield, taking into account, *inter alia*, the economic needs of coastal fishing communities and the special requirements of developing states (Art. 61). At the same time, states shall meet the objective of optimum utilization (Art. 62), which implies that coastal states have a duty to give other states access to the surplus of the allowable catch in their EEZ when they do not have the capacity to harvest the entire allowable catch. Among the factors for consideration in providing access are the requirements of developing states; the need to minimize economic dislocation in states whose nationals have habitually fished in the zone; and the needs of landlocked and geographically disadvantaged states and the nutritional needs of the populations of those states.

Subsequent agreements also accord special recognition to the needs of poorer countries and the need for protection of small-scale fisheries. These include the Agreement for the Implementation of the Provisions of the United Nations Convention on the Law of the Sea of 10 December 1982 Relating to the Conservation and Management of Straddling Fish Stocks and Highly Migratory Fish Stocks.



238 See FAO, 2006d.

**BOX 71. International fisheries instruments (cont.)**

Referring to the duty to cooperate in the establishment of conservation and management measures, the Agreement calls upon states to take into account “the vulnerability of developing States which are dependent on the exploitation of living marine resources, including for meeting the nutritional requirements of their populations [...]; the need to avoid adverse impacts on, and ensure access to fisheries by, subsistence, small scale and artisanal fishers and women fish workers, as well as indigenous people in developing States “[...] (Art. 24(2)).

The FAO Code of Conduct for Responsible Fisheries (1995), although not legally binding, enjoys recognition as one of the most important and authoritative fisheries instruments through its accommodation of principles and criteria for responsible fisheries and aquaculture management and development. The Code explicitly recognizes the important contributions of artisanal and small-scale fisheries to employment, income and food security and calls upon states to “appropriately protect the rights of fishers and fish workers, particularly those engaged in subsistence, small scale and artisanal fisheries, to a secure and just livelihood, as well as preferential access, where appropriate, to traditional fishing grounds and resources in the waters under their national jurisdiction” (Art. 6.18).

Lack of fisheries legislation, inadequate legislation and the inability of states to enforce their legislation properly open the way to depletion of fish stocks, which can translate into economic shortfalls, hardship to fishers and disruption of traditional ways of life, and thus loss of livelihood in fishing communities. This prevents persons from feeding themselves with dignity. The following subsections address key issues in national fisheries legislation relevant to the right to food.<sup>239</sup>

**4.5.1 FISHERIES MANAGEMENT**

The Right to Food Guidelines invite states to “consider specific national policies, legal instruments and supporting mechanisms to protect ecological sustainability and /.../ promote the sustainable management of fisheries” (Guideline 8.13). An affordable and stable supply of fish requires good fisheries management, i.e. a management system that ensures that the fisheries resources are maintained at biologically, environmentally and economically sustainable levels. The relevant international instruments require national authorities to manage fisheries “responsibly”, and thus a number of more recent laws have already included a

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<sup>239</sup> Linkages between the right to food and national fisheries legislation are explored in more detail in the Right to Food Study, see FAO. 2009

sustainable approach to fisheries management as a stated purpose of the law (see above, Box 71). Because “responsible fisheries management” privileges sustainability as well as accountability of state authorities, it *prima facie* facilitates realization of the right to food. The review team should assess whether the legislation establishes a fisheries management system that ensures that fisheries resources are maintained at biologically, environmentally and economically sustainable levels, and are managed in a transparent and accountable way.

### **Access to and allocation of fisheries resources**

Limiting access to fisheries resources preserves the availability and accessibility of fish for human consumption and helps combat the effects of open access regimes, for instance, depletion of stocks, shortened fishing seasons and related negative social and economic effects. User rights may be allocated to a community, individual, company or vessel and the fisheries legislation should clearly define and protect these rights. In general, allocation of user rights to a community is carried out in order to serve social goals (providing employment and income for instance). As such, it can be seen as a step towards strengthening people’s capacity to feed themselves in an autonomous and dignified manner. However, if user rights are allocated to individuals or companies, combined with the right to transfer these rights, this can cause a drop in employment opportunities because of economic rationalization, the formation of monopolies and the transfer of ownership from coastal communities.<sup>240</sup>

Limitations on user rights should be used in combination with other limitations on the entry to fisheries, such as catch quotas. This means that the fisheries legislation should provide for a total allowable catch (TAC) to be determined for each commercial fishery based on scientific data, usually for one year at a time. As scientific data about fish stocks are often inadequate, TACs can be set too high and thus cause overexploitation of the resources. To mitigate this, the law could require the application of the precautionary approach when setting the TACs, which means that a lack of scientific certainty should not justify inaction in the face of risks to fisheries resources. To avoid a race to fish, resulting in unsustainable levels of fishing capacity, the legislation should require that determined TACs be divided into individual quotas. As industrial and small-scale fishers often compete for the same resources, the review team should assess whether the criteria for allocating these quotas reflect a concern for securing the right to food of vulnerable groups (see below, section 4.5.3).

When reviewing provisions on user rights and quota allocations, the team should consider in particular whether established criteria, conditions and procedures are clearly defined, non-discriminatory and accessible; whether information is readily available to potential right holders; and whether there are mechanisms

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240 See FAO. 1997.

for individuals to complain against negative administrative decisions. The laws should not contain lengthy, complicated or costly licence application procedures, particularly in areas where the relevant population is largely illiterate or unaware of how to obtain fishing licences. As already noted, fisheries laws should ensure that officials are accountable for their actions and foster the rule of law.

### **Spatial and temporal controls on fishing – species and habitat protection**

Fishing mortality can be reduced by restricting fishing activities to certain times or seasons, or by restricting fishing to particular areas.<sup>241</sup> As a way of rehabilitating stocks, such restrictions can play an important role in sustainable fisheries management and hence in the realization of the right to food.

Such measures are particularly important for vulnerable fishers, and states' obligation to protect under the right to food would require them to preserve the existing availability and accessibility of food from interference by private actors. Closures that allow only small-scale and subsistence fishers to fish in the marine waters closest to shore while restricting trawling that is detrimental to the environment would be a good example of appropriate protection by the state. Regulating fishing methods and gear would also minimize the harmful impacts of fishing on the marine environment and resources.

### **Monitoring, control and surveillance**

Illegal, unreported and unregulated fishing undermines national and regional efforts to manage fisheries in a sustainable way significantly, and causes a rapid depletion of fish stocks. Monitoring, control and surveillance (MCS) are key means of combating this, through legislation providing for the collection, measurement and analysis of fishing activities (catch, species composition, fishing effort, by-catch, area of operation, etc.), and the regulation and supervision of these activities to verify proper enforcement.<sup>242</sup> A lack of appropriate MCS mechanisms can strongly affect the realization of the right to food as they are instrumental for protecting fishery resources through which individuals can meet their nutritional needs.

### **Mechanisms for participation in fisheries management**

The human rights principles of participation and empowerment require that fisheries legislation provide mechanisms for engaging, as much as possible, the local fishers' communities and other stakeholders in fisheries management. Accommodating the interests of a wide range of stakeholders, who often represent competing or conflicting interests, implies the recognition that the efficiency of management measures often depends on the support gained from the interested parties.

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241 See FAO. 2003a.

242 For more information about key tools for MCS, see FAO. 2003b.

Increased stakeholder participation in fisheries management encompasses a wide range of arrangements, from granting all interested parties the right to have a say in consultative rounds regarding policy documents and legislation, to setting up advisory bodies for stakeholder consultation and the establishment of cooperative management mechanisms. This kind of legal provision could contribute significantly to the empowerment of fishing dependent communities, i.e. by making them more skilled and eventually more able to use legal institutions and procedures to assert and defend their rights, including the right to food. However, these participatory mechanisms must be accompanied by institutions and procedures that ensure the enforceability of the rights granted.

#### 4.5.2 AQUACULTURE – POST-HARVEST PRACTICES AND TRADE

The rapid and largely unregulated expansion of aquaculture is causing considerable environmental damage, and increasingly governments are recognizing that inappropriate legislative arrangements are hindering the sustainable development of the sector.<sup>243</sup> Environmental risk factors contribute to fish diseases and related health problems, which are associated with lower production levels and economic losses. This is a challenge to food security and in turn for the realization of the right to food. A legal framework for aquaculture should therefore contain measures to mitigate environmental impacts, including provisions related to aquatic animal health and disease control. In addition, the highly perishable nature of fish and fish products makes them vulnerable to pathogens. Laws that adequately protect the hygiene and quality of fish and fish products are therefore essential for ensuring the adequacy component of the right to food, as well as for protecting the health of consumers. Finally, because facilitating access to resources is an important element of the realization of the right to food, the aquaculture legislation should establish mechanisms for granting fish farmers access to waterbodies and land for aquaculture production.

Given the importance of the foreign exchange revenue generated from exports of fish products for developing countries, the implementation into national legislation of standards adopted by the Codex Alimentarius Commission (for food) and the World Organization for Animal Health (OIE) (for animal health), which have both become reference points for international standards under the World Trade Organization (WTO) Agreement on the Application of Sanitary and Phytosanitary Measures (SPS Agreement), has become increasingly important. However, problems arise when national standards are not clearly established or are used arbitrarily to deny imports from certain countries by applying excessively stringent requirements under the guise of sanitary or veterinary protection. Small-scale fishers face challenges in meeting the standards laid down by some import countries as implementation is resource and capital intensive; high certification costs and complex procedures can also marginalize these groups.<sup>244</sup>

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243 See FAO, 2002b.

244 See Samudra. 2003.

Trade also plays a role in food security and the right to food, where fish commodities may be diverted from the local population to overseas markets, or when certain types of products, such as octopus and shrimp, are exported to generate higher revenues. On the one hand, the extra revenues might augment the ability to import more culturally appropriate fish or other food products for consumption by the local population;<sup>245</sup> on the other, incentives for cultivating “cash crops” for export might be a challenge to national food security and the right to food if revenues are not cycled back into the local communities, or if the availability of fish products at the local markets is affected negatively by export practices. Therefore, the legislation should provide for safeguard mechanisms in case of adverse effects, or for mitigation measures.

#### 4.5.3 SPECIAL MEASURES FOR DISADVANTAGED GROUPS

According to the Right to Food Guidelines, states should give special attention to indigenous people and their relation to natural resources, and take steps so that members of vulnerable groups can participate fully and equally in the economy (Guidelines 8.1 and 8.2). In some cases, national legislation does not acknowledge the existing access to fisheries resources of indigenous fishing communities, or even reallocate their traditional fishing areas, thus limiting their capacity to provide for themselves. When regulating a previously unregulated fishery, legislation should take account of any traditional user rights already in place.

In many parts of the world, women have a significant role in small-scale fish processing and marketing activities. However, many fisheries laws neither recognize this role nor contain adequate social protection measures for women, such as maternity leave. The review team should closely examine the gender context in which fisheries legislation is being or is to be implemented. For example, the gains from increased employment brought about through trade (for example by including women in fish processing facilities) may be offset by the loss of fish for female artisanal fish processors who cannot compete with larger export destined processors.<sup>246</sup> Those in poor fishing communities can, as a result, become further entrenched in poverty where there are no education or capacity-building options created for them by the law.

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245 See Kurien, J. 2003.

246 See FAO. 2004b.



The obligation of states to prioritize the most vulnerable groups calls for special measures to compensate them for the disadvantages they suffer. Preferential treatment, where the law confers an explicit benefit on disadvantaged groups, would facilitate the realization of their right to food (see above, section 4.5.1). Where the law envisions this kind of incentive and support measures for disadvantaged fishers, these groups should be promptly and appropriately informed about such measures and how to benefit from them. This ensures compatibility with human rights principles of participation, transparency and the rule of law.

## 4.6 GENETIC RESOURCES FOR FOOD AND AGRICULTURE

As mentioned earlier, the Right to Food Guidelines require states to “facilitate sustainable, non-discriminatory and secure access and utilization of resources consistent with their national law and with international law and protect the assets that are important for people’s livelihoods” (Guideline 8.1). States are also called to “consider legal instruments and supporting mechanisms to prevent the erosion of, ensure the conservation and sustainable use of genetic resources for food and agriculture, including, as appropriate, for the protection of relevant traditional knowledge and equitable participation in sharing benefits arising from the use of these resources” (Guideline 8.12).

Biological resources (biodiversity), with agrobiodiversity as their vital subset, are a prerequisite for human survival and food security. Genetic resources for food and agriculture (GRFA) are the raw material contained in plants and animals that farmers and breeders all over the world have used to develop their crops and raise new breeds.<sup>247</sup> Traditionally, genetic resources have been freely and widely exchanged, not only among farmers in a particular place, but also more widely across the world’s continents and regions. This is most notably true for genetic material of plant origin. All regions and countries are today dependent, to a greater or lesser degree, on plant GRFA from other regions or countries.<sup>248</sup>

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247 Genetic resources comprise the wide variety of living organisms; they constitute material of actual or potential value for food and agriculture that is contained in plants and animals. As such, they are to be differentiated from crops, trees and animals as commodities, i.e. biological resources. Every state has a different combination of *in-situ* (i.e. within ecosystems and natural habitats or on-farm) and *ex-situ* (i.e. outside the natural habitat, in base collections) genetic resources.

248 See Palacios, X.F. 1998.

Continued and not unduly restricted access to and use of genetic resources is vital to food security: a high genetic diversity allows breeders to increase productivity of plant varieties and animal breeds, to adapt them to new pests and diseases and to respond to environmental challenges (e.g. drought, flood, salinity) and new climatic conditions. In this way, access to a diverse range of plant and forest varieties, animal breeds and fish breeds strengthens resilience of people and assists in risk management.<sup>249</sup> Access to genetic diversity also facilitates the development of new crops or animal breeds with features better adapted to local needs and demands. Wild, weedy and local crops contribute substantially to livelihood security, especially through to a nutritious diet of rural and poor communities which have limited capacity to produce food or to access market mechanisms.<sup>250</sup>

Ensuring that all final users – farmers, breeders, pastoralists and the research community – have regular access to GRFA is thus one of the key mechanisms for realizing the right to food for all. As in some other sectors, national norms regulating control over access and use of genetic resources have been greatly influenced by the relevant instruments developed at the international level (see Box 72).

#### **BOX 72. International legal instruments dealing with plant genetic resources**

As plant genetic resources have historically been defined as a common heritage of humankind and thus freely accessible to everyone, the users of genetic resources have not been required to share the benefits deriving from their use with the country of origin or with those individuals or communities that may have been the ultimate providers. Between 1989 and 1991, the issue was discussed within FAO, and a series of “agreed interpretations” of the International Undertaking on Plant Genetic Resources (which had been adopted by FAO Conference in 1983) were adopted in order to reach an equitable balance between the interests of developing and developed countries. In 1989 FAO Conference Resolution 4/89 recognized farmers’ rights, and in 1991 Resolution 3/91 recognized the sovereign rights of states over their plant genetic resources. At about the same time, during the negotiations that led in 1992 to the adoption of the UN Convention on Biological Diversity, developing countries pressed for redefining historic benefit flows from the use of genetic resources, including plant genetic resources, in a legally binding international treaty. The Convention recognizes the sovereign rights of states over their genetic resources and defines the rights and obligations of contracting parties regarding access to these resources and “fair and equitable” sharing of benefits derived from their use (Art. 15).

249 See Hawtin, G.C. 2000.

250 See Mechlem, K. 2005 and Moore, G. & Tymowski, W. 2005. See also Seshia, S. & Scoones, I. 2003.

### **BOX 72. International legal instruments dealing with plant genetic resources (cont.)**

The International Convention for the Protection of New Varieties of Plants (UPOV Convention) establishes plant breeders' rights, which aim to protect new varieties of plants in the interests of both agricultural development and commercial breeding. There are two exemptions to the right conferred by plant breeders' rights: farmers' privilege, which amounts to a right to save seed for replanting; and breeders' exemption, i.e. the right to freely use protected varieties for research and development. The most recent revision of the UPOV Convention (1991) increased the list of prohibited acts relating to the protected varieties and introduced a requirement that all plant varieties fulfilling the criteria be eligible for protection.

In 1994, member countries of the World Trade Organization adopted the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS). The TRIPS Agreement calls on states to introduce patent protection for inventions, whether products or processes, in all fields of technology – including agriculture (Art. 27.1). Some exceptions are granted and states can, for example, exclude plants and animals from patentability. With regard to plant varieties, they should be protected “either by patents or by an effective *sui generis* system or by any combination thereof” (art. 27.3b). While the UPOV system can be seen as a *sui generis* system, there may be other ways of introducing an effective *sui generis* system.

The special nature of plant genetic resources for food and agriculture (PGRFA) and the need to seek special solutions for these resources as separate from other genetic resources led to the adoption of the International Treaty on Plant Genetic Resources for Food and Agriculture (ITPGRFA) in 2001. The Treaty provides for the conservation and sustainable use of PGRFA, recognizes farmers' rights as the rights of farmers to be rewarded for their contribution to the conservation and development of PGRFA and establishes the Multilateral System of Access and Benefit-Sharing (MLS) to facilitate access to genetic resources of major food crops and forage species and to share, in a fair and equitable way, the benefits arising from their use. The MLS includes resources of major food crops and forage species that are in the public domain and under the management and control of the states that are contracting parties to the Treaty. Annex I to the Treaty sets out a list of crops to be included in the MLS, selected according to their importance for food security and their interdependence.

Legal provisions relevant for GRFA can be found in many different national laws: some countries have included provisions on genetic resources in general environmental and nature conservation laws, laws on sustainable development or biodiversity laws, while others have adopted specific legislation on access to genetic resources. Some countries have also modified their existing intellectual property laws or developed new ones, in order to reflect new standards developed at the international level.

There will thus be many laws and many different issues that can have right to food implications in this area, and the constellation of laws and regulations will depend on specific national circumstances. The next sections explore some of the issues either raised by existing national legislation or which governments should address when implementing the right to food, and which a national review team should look at in depth. Although the topics covered here are relevant for all genetic resources, they are most applicable to resources of plant origin.

#### **4.6.1 ACCESS TO RESOURCES AND SHARING THE BENEFITS DERIVING FROM THEIR USE**

Since the adoption of the Convention on Biological Diversity, some 50 countries have adopted or are in the process of developing national legislation to regulate access to genetic resources and the sharing of benefits derived from their use<sup>251</sup> (e.g. research results, development, technological and economic benefits). Where access to genetic resources is regulated through national legislation, the relevant laws should be examined for their right to food compatibility.

From the right to food perspective, conditions under which access is granted and the applicable procedures are among the primary issues that may raise concern as they can make more difficult and more expensive the exchange and use of genetic resources by farmers and breeders. Most existing and proposed national laws subject access to genetic resources to mutually agreed terms between the applicant and the state; the terms include the requirement of prior informed consent of state authorities and concerned persons or communities, or both, and negotiating how to share the benefits deriving from the use of the resources. Many laws and draft laws cover *all* genetic resources (of both plant and animal origin), including those for food and agriculture, from *in-situ* and *ex-situ* sources, as well as those of the Consultative Group

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251 They include: the Andean Pact (Bolivia, Colombia, Ecuador, Peru and Venezuela [Bolivarian Republic of], Australia, Brazil, Cameroon, Costa Rica, Fiji, Malaysia, Mexico, the Philippines, Seychelles and Uruguay. A number of countries are also envisaging adopting specific legislation on access to plant genetic resources for food and agriculture (e.g. Madagascar, Pakistan, Syrian Arab Republic and United Republic of Tanzania). Potential measures by which access to resources can be ensured and benefit sharing can take place can be very different and vary according to different types of genetic resources. See FAO. 2007d; GRAIN. 2002 and see also Glowka L. 1998.

on International Agricultural Research (CGIAR) centres;<sup>252</sup> some also apply to traditional knowledge, innovations and practices of indigenous peoples and local communities related to genetic resources.<sup>253</sup> Subjecting access to PGRFA, which are vital for global food security, to rigid conditions may significantly affect the capacity of persons to exercise their right to food. Similarly, having to negotiate agreements for access to genetic resources on a case by case basis may be deleterious for both farmers and breeders because of the consequent high transaction costs and difficulties associated with estimating the value of genetic material to be incorporated in the future variety. In this sense, stringent conditions under which access is being granted as well as the coverage of a whole range of activities, including research, non-commercial or customary use of resources, respectively a lack of appropriate exemptions for small farmers and informal breeders, local communities and indigenous peoples may prevent the sustainable use of genetic resources and hinder the realization of the right to food in a country.

Participation is another area where existing legislation can be weak. According to the Right to Food Guidelines, states should ensure “participation of local and indigenous communities and farmers in making national decisions on matters related to the conservation and sustainable use of genetic resources for food and agriculture” (Guideline 8.12). Relevant regulations should thus reflect simple and accessible procedures allowing concerned populations to be actively involved in decision making regarding the conservation and use of resources found within land and territories they hold or occupy and regarding sharing the benefits deriving from such resources. This would guarantee the application of the principles of participation and empowerment in the legislation.

### Farmers’ rights

The concept of farmers’ rights, internationally recognized in the International Treaty on Plant Genetic Resources for Food and Agriculture (ITPGRFA)<sup>254</sup> (see above, Box 72), is based on the idea that farmers should be rewarded for their contribution to the conservation and development of agricultural biodiversity, and thus to global food security. Farmers’ rights are seen as one of the main means of ensuring their participation in the sharing of benefits deriving from the use of genetic resources, and as a counterbalance to the expansion of intellectual property rights (IPRs), which were considered major threats to the rights and practices of farmers of saving, exchanging and reusing seeds (see below, section 4.6.3). Legal recognition and implementation of farmers’ rights at

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252 International Agriculture Research Centres of the Consultative Group on International Agricultural Research.

253 For example, Andean Pact Decision No. 391, Costa Rica’s Law on Biodiversity.

254 Although the Treaty does not give a precise definition of this concept, it does elaborate on its three main components: protection of traditional knowledge relevant to PGRFA; the right to participate equitably in sharing the benefits arising from their use; and the right to participate in making decisions, at the national level, on matters related to the conservation and sustainable use of PGRFA (Art. 9). The responsibility for the realization of farmers’ rights is, however, devolved to the Contracting Parties to the International Treaty.

the national level can be seen as a vital means contributing to the realization of the right to food, as they can enable farmers to continue to live off traditional agriculture and to strengthen traditional agricultural systems.

Few countries have reaffirmed support for farmers' rights through their national legislation although several proposals are emerging (see Box 73 for two examples). From the right to food compatibility review perspective, the absence of a provision on farmers' rights in the national legislation relating to genetic resources, in IPR laws or in seed laws, can be seen as a gap in the assessed legal framework; the review team should thus include it in its final report and plan of action.

### **BOX 73. Implementation of farmers' rights – examples from state practice**

The Protection of Plant Varieties and Farmers' Rights Act of **India** (2001) aims at putting farmers' rights on a par with plant breeders' rights. The Act gives farmers the entitlement to apply for registration of a plant variety as well as for registration of a farmer's variety (Section 39(1)(i)). Under the definition of farmer's variety the Act includes also a variety that has been traditionally cultivated and evolved by the farmers in their fields, and a wild relative or landrace of a variety about which the farmers possess common knowledge (Section 2 (k)). Furthermore, the Act gives protection to existing varieties (Section 2(j)). The Act also provides for reward and recognition, and establishes a benefit sharing mechanism.

Another example is the Plant Variety Protection Act of the **Philippines** (2002), which recognizes the "traditional right" of small farmers to save, use, exchange, share or sell their farm produce of a variety protected under the Act. It also provides for the possibility of establishing inventories to protect locally bred varieties from misappropriations and unfair monopolization.

*Source: See Swaminathan, M.S. 2006. See also Moore, G. & Tymowski, W. 2005.*

#### 4.6.2 COMMERCIALIZATION OF SEEDS

In general, seed laws regulate the commercialization of seeds, i.e. what materials can be sold on the market and under what conditions (see Box 74). By ensuring that an adequate supply of good quality seed is supplied to farmers, seed legislation can contribute to increased food availability and to strengthening people's capacity to feed themselves by their own means and thus enhance their right to food. Nonetheless, seed laws can act as an obstacle to the development of a diversified seed system, thus hindering the availability of food sources. Strict variety release regulations that tend to delay the approval of seeds can limit the number of varieties available on the market. The registration system may favour highly homogenous varieties for large-scale high-input production but fail to approve varieties adaptive to marginal and ecologically diverse conditions. Mandatory registration of all seeds and strict restrictions on commercialization of seeds can thus favour private seed industries to the disadvantage of small-scale farmers, particularly in developing countries where agriculture relies on the informal seed sector, i.e. on seeds saved and exchanged and sold by farmers themselves. This may especially be the case when the requirements for registration strongly resemble those for plant variety rights.

##### BOX 74. Seed laws – example from India

The 2004 Seed Bill of *India* introduces the concept of mandatory registration of all seeds for sale (domestic or foreign). The aim of the bill is “to provide for regulating the quality of seeds for sale, import and export and to facilitate production and supply of seeds of quality and for matters connected therewith or incidental thereto”. All registered varieties are to be recorded in a National Register of Seeds database. Registration will be granted for new varieties for a period of 15 years in the case of annual and biennial crops and 18 years for long duration perennials. As with registered varieties in other parts of the world, varieties need to be field tested to determine their value for cultivation and use. Furthermore, seed producers, seed processing units, seed dealers and horticulture nurseries all have to be registered with the government of the state in which they operate. The bill protects the right of a farmer to save, use, exchange, share or sell his or her farm seeds and planting material. However, the farmer cannot sell seeds or planting material under a brand name. Also, all seeds sold by farmers need to conform to the minimum standards regarding germination, physical purity and genetic purity applicable to registered seeds.<sup>255</sup>

<sup>255</sup> For a brief analysis of the bill, see Madhavan, M.R. & Sanyal, K. 2006. For a critical view, see Kuruganti, K. 2005.



In the review of seed laws for their right to food compatibility, special attention should be paid to provisions intended to prevent or minimize the possible negative effects of seed certification and quality control regulations on small farmers and communities whose livelihood depends on the free exchange and use of seeds. For example, providing for more flexible seed certification procedures, provisions allowing compensation to farmers for failed seeds, recognizing and promoting diversified seed systems can strengthen the ability of farmers and communities to provide for themselves, and thus realize their right to food.

#### 4.6.3 INTELLECTUAL PROPERTY RIGHTS IN THE AGRICULTURE SECTOR

The introduction and strengthening of IPRs in the agriculture sector, notably in developing countries<sup>256</sup> has been – and remains – a contentious issue. This is particularly the case for patents, as plant variety rights are more limited in their scope and level of protection. The 1999 United Nations Development Program (UNDP) Human Development Report raised concerns about the impacts of the TRIPS Agreement (see above, Box 72), particularly in relation to food security, indigenous knowledge and access to health care.<sup>257</sup> The Sub-Commission on the Promotion and Protection of Human Rights as well as the Special Rapporteur on the right to food have addressed IPRs and the TRIPS Agreement in several reports.<sup>258</sup>

The human right to food requires states to respect the existing access to food, to protect it from interferences from private parties as well as to fulfil it by strengthening people's access to resources. Strong IPRs can provide incentives for agricultural research and improvement of conditions for more effective food production. The opportunities of agro-biotechnology to contribute to various components of food security and the right to food seem boundless: higher productivity on the same amount of land and an increase in the overall availability of food; improved nutritional values thus contributing to ensuring adequate and nutritious food for all; the development of crops for saline, dry and other marginalized soils, etc., thus facilitating the realization of the right to food in a country.<sup>259</sup> At the same time, however, IPRs encourage the cultivation of a narrow range of modern varieties that offer higher yields, which tend to

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256 There are many different forms of IPRs; the two main forms relevant for genetic resources are plant variety rights and patents. Until relatively recently, most developing countries had no form of intellectual property protection for agro-biotechnology. This changed with the adoption of the TRIPS Agreement, coupled with other factors. See Chapman, A.R. 2002. and UNDP. 2000.

257 See UNDP. 1999, p. 68.

258 See, for example, UN Sub-Commission on Human Rights. 2000 and UN Economic and Social Council. 2001, para 73.

259 See Mechlem, K. & Raney, T. 2007, p. 132.

displace landraces; this process of displacement in turn promotes homogenization in agricultural fields (i.e. monocultures), which leads to a loss in diversity and generally reduces the crops' resilience to pests and diseases.<sup>260</sup> Strong plant variety rights and patents applied to agricultural innovations can also prevent farmers from engaging in traditional practices of saving, replanting, sharing or selling seed. If a plant variety is patented, unless exceptions are provided for, seeds of the patented variety may not be resown or exchanged for cultivation purposes, and thus farmers may be required to purchase new seeds every year. This can negatively affect small farmers and rural populations that base their livelihoods on traditional farming systems based on free exchange and use of seeds and thus limit their capacity to feed themselves and their communities.<sup>261</sup> Where product patents on genes are granted, and the scope of such patents embraces any uses of the patented gene, patents may considerably increase costs of agricultural research and hinder progress,<sup>262</sup> and thus also the accessibility and availability of new and improved seeds.

When assessing the IPR laws from the right to food perspective, the review team should focus especially on provisions regarding their scope, conditions for the granting of protection and exemptions. In order to be right to food compliant, the legislation should provide for mechanisms ensuring the right balance between the need to protect agricultural innovations and the need to protect interests of both farmers (in particular, small-scale and subsistence farmers) and researchers,<sup>263</sup> including by using the flexibility of the TRIPS Agreement<sup>264</sup> (see above, Box 72). As in the case of seed laws, the conditions of the seed market and agriculture sector in a country will also play a role in the assessment of the right to food compatibility of a given IPR law.

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260 See, for example, Swaminathan, M.S. 1997, p. 7; Cullet, P. 2003.

261 See Haugen H.M. 2007, Rajotte, T. 2008. It should be noted that patent laws can provide for exceptions to the exclusive rights conferred by a patent.

262 See Mechlem & Raney, 2007, pp. 151–152.

263 See, for example, The Crucible Group. 2001.

264 Notably its Articles 27.3(b) and 30. The recognition of a broad farmers' privilege in national laws may also be seen in the context of Article 8(1) of the TRIPS Agreement that invite states to "adopt measures necessary to protect public health and nutrition, and to promote the public interest in sectors of vital importance to their socio-economic and technological development /.../" (See Mechlem, K. & Raney, T. 2007, p. 157).

## 4.7 TRADE IN AGRICULTURAL PRODUCTS

The Right to Food Guidelines invite states to improve the functioning of their markets, in particular their agricultural and food markets, to put legislation, policies, procedures and regulatory and other institutions in place to ensure non-discriminatory access to markets, and to prevent non-competitive practices (see Guideline 4). States are also asked to increase productivity and to revitalize the agriculture sector including livestock, forestry and fisheries (Guideline 3.7). This should be carried out in consultation with CSOs and other key stakeholders at national and regional levels, including small-scale and traditional farmers (Guideline 3.8).

For a large number of developing countries, agriculture remains a pivotal sector that underpins food security, foreign exchange earnings, industrial and rural development and employment generation. It typically represents the basic economic activity on which other economic activities are subsequently built; growth in agriculture can therefore have huge positive impacts.<sup>265</sup> As such, agriculture remains critical to realizing the human right to food, i.e. ensuring that every person has access to sufficient and adequate food.

In 1996, the Rome Declaration on World Food Security recognized that, in today's globalized world, "trade is a key element in achieving world food security". While generally trade in agricultural products has positive impacts on economic growth and food security, there are no automatic correlations. Developing countries with similar levels of agricultural trade show very different amounts of hunger and poverty, which suggests that the impact of agricultural trade on food security depends on factors such as markets, natural resource endowments, human capacity, institutions and policies, and the degree of equity with which benefits are distributed.<sup>266</sup>

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265 See Byerlee, D. Diao, X. & Jackson, C. 2005, p. viii.

266 See FAO. 2003d, p. 18.

Many important changes have taken place in the agricultural sector in particular throughout the developing world since the 1980s and notably since the WTO came into existence in 1995.<sup>267</sup> Many governments have implemented market reforms and extensively liberalized the domestic economic environment by dismantling existing trade restrictions and transferring to private players many of the functions previously undertaken by governments. Liberalization of trade has been said to contribute to economic growth and thus to poverty reduction and food security;<sup>268</sup> it has also been said to help expand the sources of food supply, in particular, for the least developed countries.<sup>269</sup> Indeed, the opening of markets does have the potential to help the realization of the right to food by improving income and employment opportunities, and diffusion of technology and capital; agricultural imports can complement local production, increase dietary choices and provide alternative sources of nutrition. At the same time, the potential gains from trade liberalization are not guaranteed and will not necessarily be reflected in improved food security in a country: in particular, there are likely to be significant differences between the impacts on small-scale versus commercial farmers, and rural non-farm producers versus urban consumers, both within and across countries.<sup>270</sup> In many developing countries, the livelihoods of small-scale farmers and agricultural labourers as well as the urban poor have worsened due to import competition following liberalization processes and their inability to compete with imports or larger farmers that can access international markets.<sup>271</sup>

The international dimension is therefore particularly important in this sector; sometimes multilateral commitments oblige countries to effect particular changes to the existing national legal framework or to devise laws where none existed.<sup>272</sup> Policies, laws and decisions of individual states can have significant consequences for the lives of people in other countries.

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267 See Mosoti, V. & Gobena, A. 2007.

268 See FAO. 2003e.

269 See UNCTAD. 2002; UN Economic and Social Council. 2002, para. 3.

270 See FAO. 2003e, Ch. 1, p. 16.

271 See 3Dthree/IATP. 2005, p.2. FAO has studied the impact of the WTO Agreement in Agriculture on 14 developing countries, finding possible negative impacts of liberalization on certain individuals and groups. See FAO. 2000, p. 25. See also UN. 2002, para. 35 and UN Special Rapporteur on the right to food. 2008, para. 7.

272 See Mosoti, V. & Gobena, A. 2007, p. 13.

In the Declaration of the World Food Summit: five years later, FAO members urged “all members of the WTO to implement the outcome of the Doha conference, especially commitments regarding the reform of the international agricultural trading system /.../ given that international agricultural trade has a role to play /.../ in promoting economic development, alleviating poverty and achieving the objectives of the World Food Summit, in particular in developing countries” (para. 12). Despite multilateral rules for the liberalization of agricultural trade negotiated within WTO and adopted through the Agreement on Agriculture (AoA),<sup>273</sup> and the Marrakesh Decision,<sup>274</sup> agriculture remains one of the most distorted areas of international trade.<sup>275</sup> Trade distorting agricultural policies of developed countries are often mentioned as being among the key factors constraining the development of the agriculture sector in developing countries.<sup>276</sup> A compatibility review in developed countries could thus also assess the extraterritorial effects of their legislation on the right to food in other countries.

There are many issues related to trade in agricultural products that can affect the availability, accessibility or adequacy of food, and thus the realization of the right to food at the national level. The number of laws dealing with these issues or some aspects thereof is equally high. Selection was therefore necessary; the following sections examine some of the issues linked to legislation governing trade in order to assess their effects on the realization of the right to food.

#### 4.7.1 DOMESTIC SUPPORT FOR LOCAL FOOD PRODUCTION

Enhancing the capacities of the agriculture sector is crucial for achieving food security and realizing the human right to food for all. From the right to food perspective, in promoting the agriculture sector, the national law should not only reflect policy proposals geared towards greater productivity, but should also support the creation of an enabling environment allowing people to achieve these objectives in a way that strengthens their capacity to provide for themselves.

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273 The AoA came into force in 1995.

274 The Marrakesh Ministerial Decision on Measures Concerning the Possible Negative Effects of the Reform Programme on Least-Developed and Net Food-Importing Developing Countries.

275 See Mechlem, K. 2006, p. 118.

276 These policies include price guarantees, income support measures, and input-related and crop insurance subsidies that stimulate farm production. They also include tariffs and tariff-rate quotas and export subsidies. According to IFPRI, “by blocking market access and driving down world prices for agricultural commodities, developed country policies reduce agricultural exports from the developing world by \$37 billion (25 percent ) annually”. See Von Braun, J., Gulati, A. & Orden, D. 2004. See also, for example Tyers, R. & Anderson, K. 1992 and Mowbray, J. 2007.

In many developing countries, agricultural policies prioritize high value crops for export over staple crops for domestic production. Because a large majority of small-scale farmers in developing countries lack the necessary support and capacity, the burgeoning export markets mainly benefit large-scale farmers and agro-industries, leading to the marginalization of poorer producers and farm labourers. Under international human rights law, special measures are necessary to ensure protection of the most vulnerable persons and groups. There is solid evidence<sup>277</sup> today to suggest that measures targeted towards basic food staples, as opposed to other food crops, are critical to realizing the right to food. Using existing flexibilities under the AoA, a degree of domestic support and protection providing incentives for local, small-scale and subsistence production would assist in fulfilling the realization of the right to food in a country.<sup>278</sup> Indeed, food security crops are often cultivated for local consumption more than for export; where this is the case, special measures targeted at such crops should improve food security at the national level, while remaining minimally trade distorting in world markets.<sup>279</sup>

In its compatibility review of agricultural trade rules, the team should therefore look, among other issues, at whether there are agricultural input subsidies, credit support measures, crop insurance programmes, measures for improving transport and functioning of local, regional and national markets, and environmental protection subsidies, all of which would contribute to creating an enabling environment for the realization of the right to food in a country.<sup>280</sup> Box 75 provides some examples of successful national domestic support measures.

#### **BOX 75. Domestic support measures – example from state practice**

In *Malawi*, according to government crop estimates, significant fertilizer subsidies and lesser ones for seed, abetted by good rains, helped farmers produce record-breaking maize harvests in 2006 and 2007. Maize production leapt to 2.7 billion metric tons in 2006 and 3.4 million in 2007 from 1.2 million in 2005, according to the governmental report. Malawi's successful use of subsidies is contributing to a broader reappraisal of the crucial role of agriculture in alleviating poverty in Africa and the pivotal importance of public investment into the basics of a farm economy: fertilizer, improved seed, farmer education, credit and agricultural research. ▼

277 See UN Special Rapporteur on the right to food. 2002b, para. 48. The report also states that the existing trade rules should be improved and modified so as to bring in social, cultural and human rights concerns. See also 3Dthree/IATP, 2005.

278 See, for example, Article 6 and Annex 2 (1) of the AoA. See, e.g. FAO. 2000.

279 See UN, 2002, para. 48.

280 Such measures can be used under the AoA flexibility provisions (e.g. exemptions under the de minimis threshold, special and differential treatment provisions, and the "green box"). See FAO. 2000.

**BOX 75. Domestic support measures – example from state practice (cont.)**

Following a substantial reduction in agricultural production in the 1990s, the Government of **Kazakhstan** changed its policy and decided that developing the agriculture sector would require a sound regulatory framework coupled with a certain amount of state support. Thus, for example, Article 10 of the Law on State Regulation in Agriculture provides for a state loan programme to agricultural producers to finance investments in infrastructure and agricultural machinery. According to Article 10(2)(3-6), the state provides loans to credit companies, which in turn provide loans to farmers, non-agricultural companies in rural areas and microfinance organizations.

*Source: See Mosoti, V. & Gobena, A. 2007, pp. 280–287 (Kazakhstan); see also Dugger, C.W. 2007.*

From a human rights perspective, the relevant laws and regulations should ensure that the domestic support measures target small-scale farmers and producers, rural communities and other vulnerable groups. This conforms to the Right to Food Guidelines, which require states to “adopt measures to ensure that the widest number of individuals and communities, especially disadvantaged groups, can benefit from opportunities created by competitive agricultural trade” (Guideline 4.6).

**4.7.2 PRICE SUPPORT**

Food price instability raises particular concerns for producers and consumers: high unstable prices can induce ineffective production decisions; commodity price instability can distort resource allocation when markets for credit and risk are incomplete or weak. Poor producers and consumers are most exposed to instability in the prices of a dominant food staple as staples often constitute a large share of small farm incomes or poor consumers’ expenditures (up to 70 percent). Price stability is therefore an important element in protecting the welfare of the poor and accordingly their right to food.<sup>281</sup> Although price instability on world markets affects all countries, the consequences are much greater for a rural population that earns a living from food production and for those who spend a relatively large share of household income on food.<sup>282</sup>

In many developing countries, state trading enterprises (also known as statutory marketing boards, marketing authorities or control boards) are the most commonly used means to ensure domestic price stability. Trade reforms have already significantly reduced the powers of state trading enterprises (STEs), and

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281 See FAO. 2003e.

282 For more information see [www.fao.org/Worldfoodsituation](http://www.fao.org/Worldfoodsituation)

further constraints to statutory powers are strongly advocated within the WTO.<sup>283</sup> This may, however, in some circumstances be inconsistent with the state obligations to respect and fulfil the right to food. In the developing world, the role of STEs is not limited to trade and market issues but extends into rural development and food security. Considering that the impact of most developing country STEs globally on price distortion and international markets is minimal, some argue that STEs can and should be used to ensure a base price for commodities and augment farm incomes.<sup>284</sup>

From the human rights perspective, any state intervention in price control should guarantee that both producers and consumers benefit, including by introducing, where needed, compensatory mechanisms and safety nets for the most vulnerable categories of persons.

#### 4.7.3 BORDER PROTECTION AND MARKET ACCESS

In the last decade or so, there has been an increase in the incidence of import surges and many observers relate this phenomenon to the opening up of domestic markets with the implementation of the AoA. The effect of these liberalization reforms in developing countries combined with the export and domestic subsidies of developed countries has left the former vulnerable to the flooding of their domestic markets with products sold on the world market at less than their cost of production.<sup>285</sup> In some cases, this has resulted in increasing food insecurity by displacing much of the domestic production and increasing dependency on imported foods.<sup>286</sup> Difficulties for small farmers' and producers' livelihoods are exacerbated when the dumped agricultural product affects the country's staple food production, where farmers and other agricultural workers are dependent on such production.<sup>287</sup> In other instances, the influx of cheap imports has also resulted in changed local diets, which in some cases affected people's access to *adequate* food.<sup>288</sup>

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283 See Ackerman, K.Z. 1998, pp. 43-47 and FAO, 2002a.

284 See Mosoti, V. & Gobena, A. 2007.

285 See FAO. 2003f.

286 See 3DThree/IATP. 2005; see also, UN Special Rapporteur on the right to food, 2008, para. 6.

287 See Gray, K.R. 2003, p. 12.

288 See for example, Paasch, A., Garbers, F. & Hirsch, T. eds. 2007.



Market access restrictions present another area of concern with regard to a country's right to food commitments. High tariff and non-tariff barriers in place in developed countries have traditionally made it difficult for developing countries' food producers to access those markets.

In the context of compatibility review of legislation relating to trading, the application of human rights principles would require that relevant legislation clearly defines the roles, responsibilities and powers of institutions dealing with unfair trade practices such as dumping, subsidies, predatory pricing<sup>289</sup> or import surges, in both countries that are implementing these policies as well as in those being affected by them. This includes in particular the responsibility for establishing appropriate safeguard measures to counter their negative effects, and rational procedures and sanctions for violations of the law.<sup>290</sup>

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289 Generally speaking, predatory pricing is the practice of a firm selling a product at very low price with the intent of driving competitors out of the *market*, or creating a *barrier to entry* into the market for potential new competitors.

290 See Mosoti, V. & Gobena, A. 2007, p. 210.

## 4.8 LABOUR

As noted earlier, the right to food is interrelated with other economic, social and cultural rights, including the human right to work.<sup>291</sup> The Right to Food Guidelines invite states to provide opportunities for remunerative work that allow for an adequate standard of living for rural and urban wage earners and their families, and to promote and protect self-employment (Guideline 8.8). Employment and protection from unemployment ensuring the procurement of food constitute the primary means for the realization of the right to food for many people.

Box 76 gives an overview of the main international instruments relating to the right to work and labour standards (also called “labour rights”). These instruments should be used as a support for analysis when assessing the selected national labour legislation.

### **BOX 76. The human right to work and international labour standards**

The Universal Declaration of Human Rights guarantees everyone “the right to work, to free choice of employment, to just and favourable conditions of work and to protection against unemployment” (Art. 23). All these rights are reiterated in the ICESCR, which extends this right to include “the right of everyone to the opportunity to gain his living by work” (Art. 6) and the right to “fair wages and equal remuneration for work of equal value without distinction of any kind” (Art. 7).



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<sup>291</sup> On the relation between the right to food and the right to work, see Vidar, M. 2005.

**BOX 76. The human right to work and international labour standards (cont.)**

The right to work thus includes several interdependent rights, such as the right to free choice of work, to just and favourable conditions of work, to a safe and healthy working environment, to equal rights for men and women with respect to access to work, working conditions and equal remuneration for work of equal value. The right to work also includes the corollary right to form and join trade unions for the promotion and protection of class interests as well as the right to strike. Of course, states must also prohibit forced or compulsory labour and prevent child labour. State Parties to the ICESCR are also committed to taking appropriate steps to promote full, productive and freely chosen employment; such steps include supporting vocational guidance and training programmes as well as protection from unemployment.

Moreover, the ILO has adopted an important number of international labour conventions and recommendations relevant to the promotion and protection of the right to work and rights at work. The ILO's eight fundamental labour conventions related to freedom of association and collective bargaining, non-discrimination in employment and occupation, the elimination of forced labour and child labour are very widely ratified.

The main issues linked to labour rights that will affect the right to food are wage rates and remuneration, and increased employment opportunities, especially for women. Each of these will now be addressed in turn.

**4.8.1 WAGE RATE AND REMUNERATION**

According to the African Commission on Human and Peoples' Rights, "unremunerated work is tantamount to a violation of the right to respect for the dignity inherent in the human being".<sup>292</sup> Many states guarantee the right to just and favourable remuneration, aiming at ensuring an existence worthy of human dignity and an income at least sufficient to meet one's basic needs. The primary objectives of setting a wage floor are: achieving greater fairness by restricting the degree of wage inequality; fighting poverty by guaranteeing a minimum level of earnings to workers; avoiding exploitation by reducing the power imbalance in employment relations between employers and vulnerable groups of the workforce; and shaping work incentives through coordination with the tax and

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<sup>292</sup> See *Malawi African Association vs. Mauritania*, Nos. 54/91, 61/91, 98/93, 164/97 & 210/98, 1999–2000.

welfare systems.<sup>293</sup> According to the Indian Supreme Court, “non payment of minimum wages amounts to ‘forced labour’ /.../ and an employer has no right to conduct his enterprise if he cannot pay his employee a minimum subsistence wage”.<sup>294</sup> Many countries have adopted a minimum wage, in the form either of a single national minimum wage or a system of legally backed minimums set by employers and workers and applicable to certain industries or regions.<sup>295</sup> These “minimums” generally comprise food, clothing and housing, and in certain cases health, medical care, social service and security. Box 77 gives some examples of legislative provisions on minimum wage. By enabling people to feed themselves by their own means, minimum wage legislation can facilitate the realization of the right to food.<sup>296</sup> By establishing comparable wages across sex-segregated occupations and dissimilar workplaces, minimum wage legislation can also address discrimination embedded in the overall structure of pay and rewards,<sup>297</sup> since women, migrants and other disadvantaged groups are most often disproportionately represented and most often remain in low paying jobs.

#### **BOX 77. Minimum wage in national legislation**

In **Argentina**, the National Council for Employment, Productivity and the Adjustable Minimum Living Wage periodically determines, among other issues, the adjustable minimum wage. Wages are set by collective agreement. Wage rates may not be lower than the minimum wage determined by the Government or the National Council. The legal definition of minimum wage implies the minimum salary in cash that all workers over 18 years of age must receive irrespective of the category of labour or the activities carried out, so that adequate food, respectable living conditions, education, clothing, sanitary assistance, transport, recreation, vacations and provisions are assured (National Employment Law, Art. 139; Law on Contract on Employment, 1976, last amended in 1991, Art. 116).

293 See Saget, C. 2001.

294 Quoted by Chamaraj, K. 2006.

295 The ILO’s database on minimum wage provides information on the minimum wage systems in different countries, including the criteria used for the determination of the level of the minimum wages (<http://www.ilo.org/travaildatabase/servlet/minimumwages>).

296 See Rubery, J. 2003.

297 See Rodgers, J. & Rubery, J. 2003 and Gregg, P. 2000. pp. 133-146.

**BOX 77. Minimum wage in national legislation (cont.)**

In the **United Kingdom of Great Britain and Northern Ireland**, the minimum wage is a legal right that covers almost all workers above compulsory school-leaving age. There are different minimum wage rates for different groups of workers (for example, the main rate for workers aged 22 and over increased on 1 October 2006 to £5.35 an hour, the development rate for 18–21 year olds increased to £4.45 an hour and the development rate for 16–17 year olds increased to £3.30 an hour) (see National Minimum Wage Act 1998, last amendment 2003).

In the **Russian Federation**, a minimum wage cannot be lower than the minimum subsistence level for an able-bodied individual (see Labour Code (N 197-F) of 30 December 2001, last amendment 30 June 2006 and Act on Minimum Wage (Text No. 3818), last amendment October 2003).

To ensure right to food compatibility, the established minimum wage must be clearly defined, must not be lower than the subsistence level<sup>298</sup> and must be applied in accordance with human rights principles. When assessing minimum wage legislation, the review team should take into account the relevant ILO instruments relating to minimum wage standards.<sup>299</sup> For example, the absence of clear criteria for setting the minimum wage can open the way to administrative discretion and possible discrimination. To ensure subsistence, the minimum wage should consist of a basic food basket, and legislation should include specific criteria for determining what constitutes a basic food basket. Legislation should not overlook certain employment sectors, so as not to widen the gap between workers in regulated and non-regulated sectors (e.g. non-standard forms of work, home work and work in the informal sector). Specific measures may be needed to ensure that persistent wage gaps between men and women are eliminated. Of course, the process of calculating the minimum wage should be based on the principles of participation and transparency, and ensure that all social partners are actively involved.

To be effective, a minimum wage must be updated regularly, either by being linked to the consumer price index or by comparison with a reference wage.<sup>300</sup> To comply with the state's protective role under the right to food, the relevant legislation should include clear and fair procedures, accessible recourse mechanisms and real penalties for non-compliance with the established minimum wage.

298 See, for example, Minimum Wage Fixing Machinery Convention of 1928 (No. 26) and Minimum Wage Fixing Convention 1970 (No 131).

299 Notably, Minimum Wage Fixing Machinery (Agriculture) Convention, 1951 (No. 099), Equal Remuneration Convention, 1951 (No 100), and Minimum Wage Fixing Convention, 1970 (No. 131).

300 See Grimshaw, D. & Miozzo, M. 2003.

To improve the economic productivity, some countries have adopted specific legislation on worker's access to food. Such legislation provides for the right of certain categories of workers to receive a so called "food bonus".<sup>301</sup> This type of measure contributes to the realization of the right to food of low-paid workers, enabling them to work fruitfully by fulfilling their basic food needs.

#### 4.8.2 WOMEN WORKERS AND WORKERS IN THE INFORMAL SECTOR

Employment opportunities for women are critical for empowerment and food security as well as for the realization of their right to food. Studies show that increasing the share of women's income in the household considerably improves family and social welfare, and accordingly the realization of the right to food, given women's tendency to apply their income towards the nutrition and health of their family members and the schooling of their children.<sup>302</sup> Legislative measures to strengthen women's literacy, education and training can improve their access to the labour market and thus strengthen their capacity to enjoy their right to food. At the same time, one of the major constraints for women's access to employment is the division of their time between economic work and family responsibilities. Thus, labour legislation should include provisions relating to women's specific workplace needs (i.e. maternity entitlements including maternity leave, breastfeeding time and facilities for childcare).

In many countries, the majority of poor and extremely poor workers are employed in the informal economy, where the proportion of women is particularly high. In developing countries, the informal sector represents from 50 to 75 percent of non-agricultural employment; its proportion of overall employment is even greater when agriculture is taken into account. The contribution of the informal sector is thus critical both in terms of providing employment as well as in creating income to procure food. Yet, the vast majority of these workers have low pay and are not covered by minimum wage legislation. Female workers do not have maternity entitlements. Such workers are therefore at greater risk of becoming food insecure and being unable to provide for themselves.

To ensure the right to food of workers in the informal sector, a proper legal framework consistent with human rights principles is needed. When addressing this issue, the review team should prepare its recommendations taking into

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301 A food bonus may be given in the form of a meal, food stamps or an electronic debit card. See for example, Venezuela (*Ley de Alimentación para los Trabajadores* (2004), and *Reglamento de la Ley de Alimentación para los Trabajadores*, 2006).

302 See, for example Jahan, S. 2005; see also Deutsch, R., Duryea S. & Piras, C. 2001.

account the recent developments at the international level relating to work in the informal economy, in particular within the ILO.<sup>303</sup>

Beyond applying minimum wage regulations to the informal sector, some countries have explored social assistance-based, community-based and other non-formal security schemes.<sup>304</sup> Social security legislation is related to labour legislation and is explored in section 4.9.

### 4.8.3 PUBLIC WORKS

The right to food requires states to respect and protect people's existing access to adequate food and to provide food directly to those persons or groups that are not able to provide for themselves, which would include unemployed people. While developed countries generally have well-established unemployment benefit legislation, in developing countries protection for unemployed and underemployed people often consists of employment intensive programmes, introduced during periods of crisis. "Food for work" schemes have also blossomed in chronic food-deficit regions as a means of ensuring access to food while simultaneously contributing to a country or region's development by creating or improving infrastructure.<sup>305</sup>

Box 78 gives a few examples of government schemes that improve food security and assist in the realization of the right to food by providing working opportunities.

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303 See ILO. 2002.

304 See Reynaud, E. 2006. See also Vidar, M. 2005, pp. 147–148. Generally speaking, "non-formal" security schemes cover informal and traditional approaches to social security: traditional security systems refer to those forms of security that have a close link to social tradition, and that are frequently binding for members of the community on the basis of common law or custom. By contrast, informal social security systems tend to develop independently from traditional origins, and are based on principles of solidarity and reciprocity, which arise from circumstances imposed by social and economic change. Various kinds of non-formal social security schemes exist. An example of informal security schemes are market associations in Zambia: they are generally semi-formal associations of marketers often established with government assistance, which look after the welfare and needs of their members mainly through provision of loans (see Mukuka, L., Kalikiti, M. Musenge, D.K. 2002.

305 On food for work programmes, see for example, Barrett, C.B., Holden, S. & Clay, D.C. 2004 and Lorge Rogers, B. & Coates, J., 2005.

### BOX 78. Public employment guarantees and food for work programmes – examples from state practice

**South Asia** pioneered public employment programmes aimed at ensuring food security for poor households. The most well-known programme was initiated during a severe drought in the early 1970s in the **Indian** state of **Maharashtra**. The Maharashtra Employment Guarantee Scheme provided opportunities for unskilled, manual labour on a small-scale, labour-intensive rural infrastructural project. Studies showed that the scheme targeted the poor and reduced poverty. The scheme is internationally known as one of the most effective attempts to make the right to work a reality and thus enable people to provide for themselves. In 1977, the scheme was given a legal basis through the Maharashtra Employment Guarantee Act, which established the right of any adult person registered in the scheme to unskilled work. The Act is often quoted as an example of how sectoral legislation can be conducive to and facilitate the realization of the right to food in a country.

In 2005, the **Indian** Parliament adopted the National Rural Employment Guarantee Act,<sup>306</sup> according to which every household in rural India has a right to at least 100 days of guaranteed employment every year for at least one adult member (willing to do unskilled manual labour) at the statutory minimum wage (Art. 3). If employment is not provided the applicant will receive a daily unemployment allowance (Art. 7). The Act also includes various provisions for transparency and accountability: it requires, for example, that: the process of registration is carried out in public, with facilities for people to verify their own details, or those of others; every work sanctioned under the Act has a local Vigilance and Monitoring Committee, details of work are displayed on a board at every worksite, in a reader friendly manner, and wages are paid directly to the person concerned and in the presence of independent persons of the community on pre-announced dates.

In **Africa**, such programmes are less common, although there are exceptions.

In **Ethiopia**, for example, between 1999 and 2003, the food for work programme employed an average of 1.4 million people per year.

Public employment programmes have also been developed in **Bangladesh**, **Sri Lanka** and **the Philippines**, as well as in **Argentina**, **Brazil**, **Bolivia**, **Chile** and **Peru**.

Source: See Subbarao, K., Braithwaite, J. & Jalan, J. 1995, pp. 10–13; Dey, N., Drèze, J. & Khera, R. 2006 and Seekings, J. 2006.

306 For a critical analysis of the Act, see [www.sentinel-venugopal.in/reports.html#eight](http://www.sentinel-venugopal.in/reports.html#eight)



These kinds of measures can be instrumental for fulfilling the right to food of those who are not able to provide for themselves,<sup>307</sup> so long as they are managed properly, implemented in full respect of human dignity, and susceptible to achieve a double function: providing a safety net to persons in times of stress and facilitating the desired transition to autonomy, i.e. the capacity to feed oneself. It is equally important that adequate childcare facilities be provided so that women can also participate. In India, the Maharashtra Employment Guarantee Scheme registered participation of about 45 to 60 percent of women. This high participation rate has been achieved with the help of childcare services provided near the workplace and the contribution of non-governmental and community organizations building awareness among women and ensuring accountability for women's participation.<sup>308</sup> The recently adopted National Rural Employment Guarantee Act of India (see Box 78), with the objective of ensuring people's "livelihood security" by establishing an entitlement to work as a legal right, enforceable in court, is potentially a powerful tool for the realization of the right to food.

There is a strong link between labour legislation and social security legislation; it is therefore necessary, when reviewing national legislation, also to look at synergies between these two areas and ensure that they both support the poor and disadvantaged in achieving the income security needed to access sufficient and adequate food.

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307 Affirmative action measures are generally temporary and are intended to last only until the structural disadvantages have been overcome, either through compensation or through the creation of a more equitable system.

308 See Howell, F. 2001, p. 298.

## 4.9 SOCIAL SECURITY

Alongside paid employment and reliance on savings and assets (such as land and resources), a person can achieve the security of income needed to realize his or her right to food through social security mechanisms. The Right to Food Guidelines invite states to consider establishing and maintaining social safety and food safety nets to protect those who are unable to provide for themselves (Guideline 14). The Guidelines also provide practical suggestions for using a right to food approach when designing, implementing and financing social safety nets. Box 79 provides an overview of the main international human rights instruments that recognize social security as a basic human right, and which should also be taken into account by the review team when assessing social security legislation. The objective of most social security mechanisms is to prevent deprivation or vulnerability to deprivation,<sup>309</sup> through formal (government regulated or public) and informal arrangements (e.g. family self-support structures, community based supports).

### BOX 79. Human right to social security

At the international level, social security is recognized in the UDHR (Art. 22) and the ICESCR (Art. 9). More detailed standards in the field of social protection are established in the ILO Convention No. 102 on Social Minimum Standards (1952). The Convention identifies nine branches of social security and defines the corresponding contingencies covered: (i) medical care; (ii) sickness; (iii) unemployment; (iv) old age; (v) employment injury; (vi) family; (vii) maternity; (viii) invalid; and (ix) survivor's benefits. ▼

309 See Drèze, J. & Sen, A. 1991, pp. 3-5.

**BOX 79. Human right to social security (cont.)**

The Convention allows for the step-by-step extension of social security coverage by ratifying countries. The minimum objectives of the Convention relate, for all the nine branches, to the percentage of the population protected by social security schemes and the level of the minimum benefit to be secured to protected persons, as well as to the conditions for entitlement and the period of entitlement to benefits. In order to take account of the situation of countries “whose economy and medical facilities are insufficiently developed”, temporary derogations are allowed as regards the population covered and the level of benefits. Other conventions and recommendations adopted after Convention No. 102 set out higher standards for particular branches of social security.<sup>310</sup> Drawing on the model of Convention No. 102, they offer a higher level of protection, both in terms of the population covered and of the level of benefits.

In general, social security covers health care and family benefits and provides income security in cases of old age, unemployment, sickness, invalidity, work injury, maternity or loss of a main income earner. The concept of social security combines the idea of social insurance (protecting people against risks on the basis of their contributions) with social assistance (providing benefits to those who lack resources) (see above, section 4.8.3). The latter has greater right to food implications, as the right to food implies a state obligation to directly assist those who are not able to provide for themselves (see above, sections 1.1 and 3.5).<sup>311</sup> As noted above, in such circumstances, the government has a duty to provide to everyone at least the minimum amount of food needed to ensure freedom from hunger (see above, section 3.5.4). The following sections explore some of the issues related to providing social assistance.

**4.9.1 LEGAL GUARANTEE**

Whereas developed countries generally have strong social security legislation, in most developing countries food safety nets have generally been set up through governmental regulations or decrees adopted by various state agencies on a temporary basis. From the human right to food perspective, ensuring that everyone has access to

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310 Employment Injury Benefits Convention (No. 121) and Recommendation (No. 121), 1964; Invalidity, Old Age and Survivors' Benefits Convention (No. 128) and Recommendation (No. 131), 1967; Examination of Grievances Recommendation (No. 130), 1930; Employment Promotion and Protection against Unemployment Convention (No. 168) and Recommendation (No. 176), 1988; Equality of Treatment (Social Security) Convention (No. 118), 1962; Maintenance of Social Security Rights Convention (No. 157, 1982) and Recommendation (No. 167, 1983).

311 There is some controversy about the social and economic effects of social assistance and its supposed negative effects on the capacity of people to ensure their livelihoods by their own means and efforts. For a summary of the main arguments, see, for example, ILO. 2001.

food is not enough. It is also important that they have so as a matter of *right*, and that corresponding obligations be imposed on public and private actors who may have an impact on the enjoyment of that right. When such food schemes are not established by law, they leave the identification of beneficiaries to the discretion of government officials and do not provide for the procedures and sanctions for non-implementation or violations.<sup>312</sup> Establishing social assistance benefits including food safety nets as a legal entitlement empowers people to claim their rights and makes the administration accountable for complying with its obligations. In this sense, when reviewing social assistance schemes from the right to food perspective, countries should ensure they have a clear legal basis, stability, regularity and effective mechanisms for the protection and vindication of rights. Box 80 gives an example of a legislation serving as a framework for various social assistance programmes in a country.

#### **BOX 80. Providing a legal framework for food safety nets in Argentina**

The Law on the National Programme on Food and Nutrition of **Argentina** (2003) was adopted to coordinate all existing social welfare programmes related to food security in a holistic manner. The Law states as its purpose the implementation of “a duty of the state to guarantee the right to food for all”. The law targets children under 14 years, pregnant women, disabled people and the elderly living below the poverty line. The Law promotes decentralization by creating a national framework to which the provinces adhere through an agreement. The designated implementing authorities are the Ministry of Health and the Ministry of Social Development while national, provincial and municipal commissions on food and nutrition function as coordinating bodies. The National Commission on Food and Nutrition is charged with, among other issues, setting criteria and conditions for receiving benefits from the National Programme, ensuring equity in distribution, setting up a single registry of beneficiaries and establishing mechanisms of control and evaluation of the state of nutrition in the country.

### **4.9.2 TARGETING AND DESIGN OF BENEFITS**

Unlike public health services, which are broadly applicable, social assistance is generally targeted at those most in need. There are many different targeting methods, including targeting based on means, demography (children, elderly, disabled) or geography, along with self-targeting and community-based targeting.<sup>313</sup> On the whole, targeting has often failed to reach many of those in greatest need,<sup>314</sup> thus failing to facilitate the realization of the right to food. Among the reasons are:

312 See Coady, D. Grosh, M. & Hoddinott, J. 2004.

313 See Subbarao, K., Braithwaite, J. & Jalan, J., 1995 and Coady, D. Grosh, M & Hoddinott, J. See also, FAO, 2006b. pp. 26–27.

314 See, for example, ILO, 2001, Krishna, A. 2007.

complicated and time-consuming procedures; costs and difficulties in obtaining accurate information; lack of awareness among possible beneficiaries; lack of legal identity documentation; wide administrative discretion opening the way to favouritism and discrimination; and poor implementation. Targeting has also had perverse effects, including social stigmatization of intended beneficiaries.

Universal assistance is advocated by some as a possible solution<sup>315</sup> to targeting problems, since it can reduce official discretion to determine whether a person qualifies for benefits or not. It can also prevent stigmatization, discriminatory practices and abuses, and enhance equality, in particular gender equality. As such, universal assistance could be instrumental in implementing the right to food. On the other hand, universal assistance could be a challenge in terms of costs, organization and resources, and might not be realistically possible in many countries.<sup>316</sup>

To ensure a rights-based approach and compatibility with the right to food, the targeting mechanism must cope with increasing complexity: it should focus not only on households but also on groups and individuals. This would facilitate ensuring that each person and group receives the type and form of assistance most adapted to their needs. This implies, *inter alia*, identifying different types of vulnerability among the right holders and the severity of the difficulties they face. This requires an adequate level of data disaggregation (e.g. gender, age distribution, membership of certain ethnic groups and indigenous peoples). Such identification and characterization of the right holders may also involve significant costs; at the same time, however, the advantages of this approach in terms of reducing food insecurity and hunger and, more generally, improving people's autonomy in the short term and their income earning potential in the future may be far more important.

Furthermore, the established eligibility requirements should be transparent, fair and non-discriminatory; they should be made public and easily accessible to all; all registration or application procedures should be fair, simple and accessible and accompanied by proper safeguards, access to independent review and adjudication of complaints. It is particularly important that authorities in charge, their mandates and responsibilities are clearly designated without excessive discretion and that people are duly informed about their rights under the established forms of assistance. Affording competent authorities discretion with regard to benefits delivery would be contrary to human rights

315 See, for example, Künnemann, R. 2005; ILO. 2001; and Seekings, J., 2006.

316 Nonetheless, the idea of establishing a universal basic income as a tool to eradicate hunger and combat poverty has attracted much interest in recent years and a number of countries, including Namibia and South Africa, are currently envisaging its introduction. Brazil adopted a law in 2004 to introduce universal basic income (Law No 10.835). See Seekings, J., 2006. The Basic Income Earth Network (originally created in 1986 as "Basic Income European Network") has recently been created to serve as a link between individuals and groups committed to or interested in basic income, and to foster discussion on this topic worldwide (see [www.basicincome.org](http://www.basicincome.org); see also [www.usbig.net](http://www.usbig.net)).

standards, which require that assistance be provided to every person who fulfils the eligibility criteria. Thus designed, social safety nets would ensure the implementation of right to food standards and human rights principles.

In the context of the review of relevant legislation, the review team should also keep in mind that, in some situations, direct assistance is the necessary response on a continual basis: about a quarter of people suffering hunger and food insecurity are unable to work due to undernourishment, infirmity or responsibilities such as family care (e.g. HIV-positive people).<sup>317</sup> They should be entitled to receive the minimum food entitlement irrespective of age, employment status or other requirements to ensure freedom from hunger (see above, section 3.5.4).

### Design of benefits

Social assistance varies from one country to another; in some, it is the sole safety net, while in others it is part of a wider safety net including other allowances and associated rights. In developed countries, social assistance benefits generally guarantee an income intended to support a “decent standard of living” (e.g. consisting of food, housing, clothing, health care, education) thus going beyond the right to food. In most developing countries, food safety nets aim mainly to ensure a minimum amount of food consumption and to protect households against shocks (see above, section 4.8.3).<sup>318</sup> In some countries established benefits are provided in kind (i.e. food products); in others, they are delivered through cash-like instruments (food stamps, coupons) or cash transfers.<sup>319</sup> In some countries, social assistance contains a mixture of both in kind and cash benefits.

Each option has advantages and disadvantages. In general, distributing food in kind is costly.<sup>320</sup> In addition, it is frequently not possible to provide fresh food, which can result in not giving food that is nutritionally adequate. Providing food free of charge may also distort local food markets and harm farmers’ livelihoods, thus worsening their living conditions. However, where food is

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317 See Künnemann, R. 2005.

318 See FAO, 2006b. These include supplementary feeding programmes such as school lunch programmes, maternal and child nutrition programmes, community kitchens, emergency feeding programmes, food for work programmes, feeding and health programmes and conditional or unconditional income transfers (See Lorge Rogers, B. & Coates, J. 2005).

319 For more detailed information, see FAO. 2006a.

320 For example, in a maternal-child health programme in Honduras, it cost 1.03 lempiras to deliver 1 lempira of income transfer in the form of a cash-like coupon, while it cost 5.69 lempiras to deliver the same income transfer in the form of food (see Lorge Rogers & Coates. 2005, p. 2). For more information see, for example, Howell, F. 2001.

not available, it may be necessary to provide the assistance in kind. In the light of human rights principles, deciding on the most appropriate option for social assistance legislation requires a sound assessment of needs, including thorough consultation with and active participation of the people concerned.<sup>321</sup> To the extent possible, determination of appropriate assistance benefits should be centred on an individualized assessment of needs, to comply with international human rights standards (see above, Box 79). This implies, *inter alia*, that specific needs of infants, children, pregnant and breastfeeding women, disabled or sick persons should be taken as a basis for determining the amount of established benefits. The established level of benefits should also be regularly reviewed and adjusted in order to correspond to the determined minimum quantity of food. When benefits are given in kind, legislation should require that such food be nutritionally adequate and safe, bearing in mind local circumstances, dietary traditions and cultures (see Right to Food Guideline 14.5).

Whereas all benefit design options can increase the accessibility of food for the concerned individuals, they can affect their *ability to realize* their human right to food differently, i.e. their capacity to become self-reliant when they are able-bodied adults (see above). As noted above, the obligation to fulfil people's right to food also requires measures to facilitate people's gradual social and economic integration. The Right to Food Guidelines invite states to consider accompanying food assistance in safety net schemes with complementary activities to maximize benefits towards ensuring people's access to and use of adequate food (Guideline 14.6). In the context of the review of social assistance legislation, combining direct assistance with facilitating measures – such as access to health care, social integration programmes or employment opportunities – can assist in ensuring transition from relief to self-sufficiency and thus in realizing people's right to food.<sup>322</sup>

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321 However, in practice, the most appropriate form for each country will also depend, among other factors, on its institutional and administrative capacity, legal and economic system, state of corruption and insecurity, and coverage of benefits.

322 Conditional cash transfer programmes like *Oportunidades* in Mexico and *Bolsa Familia* in Brazil that link direct financial aid to the enrolment and regular attendance of children at school and attendance at the local health centre are increasingly being promoted as best practice in the social sector for developing countries in other parts of the world. At the same time, some have raised concerns about conditionality: among other issues, it is costly, difficult to monitor and can also impose costs on beneficiaries. See, for example, Reynaud, E. 2006; Davis, B. 2006.

## 4.10 NUTRITION, FOOD SAFETY AND CONSUMER PROTECTION

The right to adequate food means food that is not only sufficient in quantity but also safe and nutritious (see above, Part One). The Right to Food Guidelines therefore require states to ensure that all food, both locally produced and imported, is safe and consistent with national food safety standards (Guideline 9.1). Countries are also invited to increase the production and consumption of healthy and nutritious foods, especially those rich in micronutrients. To this end, the planting of gardens at home and at school can be central to combating micronutrient deficiencies and promoting healthy eating (Guidelines 10. 2 and 10.3).

Good nutrition and health depend, in large part, on the consumption of adequate amounts of good quality, safe food. Nutrition is essential for a person to grow, develop, work, play, resist infection and aspire to the realization of his or her fullest potential as an individual and as a member of society. In contrast, malnutrition increases the susceptibility to diseases, stunts mental and physical development and can lead to disability and death and, as a result, slows national development.<sup>323</sup> At the same time, malnutrition stemming from an excessive or unbalanced intake of food or certain types of food is emerging among all age and socio-economic groups, in both developed and developing countries and especially in those caught up in the swiftest societal transition. As a result, diet-related diseases, such as diabetes, cardiovascular disease, hypertension and stroke are escalating, placing an additional burden on precarious health systems. Poor food safety and inadequate nutritional quality are also major causes of undernutrition.

Furthermore, food-borne diarrhoeal diseases are estimated to kill more than 2 million people a year, mostly children, in developing countries.<sup>324</sup> Food-borne illnesses have serious social and economic consequences, including losses in income and income generating capacity. Unsafe food and food-borne illnesses contribute

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323 See WHO. 2000.

324 See FAO. 2003g.



to decreased worker productivity, disability and even early death, thus lowering incomes.<sup>325</sup> On the other hand, the application of good agricultural and hygienic practices in food production, processing and distribution improves food safety and reduces food losses, thereby increasing food availability and food security. Countries that are able to ensure food safety standards can also take advantage of international trade opportunities.<sup>326</sup> Labelling requirements can enable consumers to choose foods that are appropriate for their health needs and to avoid diets that can lead to undernutrition, obesity or chronic diseases. National legislation relating to food safety and nutrition is thus a key sectoral area relevant to the fulfilment of the right to food. The following sections examine a selected number of issues in this area.

#### 4.10.1 FOOD SAFETY STANDARDS

Many countries have adopted specific food laws and standards; in many others, food safety has been pulled under the umbrella of human health, addressed under a public health law or health protection law. Some countries do not have a specific legislation but rely on international instruments. Box 81 gives a short overview of the two main international instruments dealing with the formulation and application of food safety standards.

##### **BOX 81. International food standards**

Among various instruments developed at the international level, two are the most influential for national law and policy-makers: the Codex Alimentarius and WTO Agreements.

##### **Codex Alimentarius**

The Codex Alimentarius is a collection of international food standards, codes of practices, guidelines and other recommendations that have been adopted by the Codex Alimentarius Commission, a joint body of FAO and WHO. The Commission develops international food standards with the objective of protecting consumer health and ensuring fair practices in the food trade. Codex standards and related texts cover all the main foods, whether processed, semi-processed or raw.



325 See FAO. 2003h.

326 *Ibidem*.

**BOX 81. International food standards (cont.)**

They address, among other issues, food additives, contaminants, veterinary drug and pesticide residues and microbiological hazards. Codex standards also address food hygiene, nutrition, labelling and sampling methods. The use of Codex standards ensures that standards implemented at the national level are based on science. The SPS and TBT Agreements of the WTO (see below) have recognized the importance of Codex standards as a benchmark for international harmonization of food standards, for developed and developing countries alike.

**WTO Agreements**

The Agreement on the Application of Sanitary and Phytosanitary Measures (SPS Agreement) sets out the rights and obligations of WTO members wishing to apply measures to protect human and animal life and health (sanitary) and plant life and health (phytosanitary). Food safety measures must be justifiable on the grounds of protecting public health and must be based on a sound, scientific risk assessment. National SPS measures must not be applied in a manner that constitutes arbitrary or unjustifiable discrimination or a disguised restriction on trade. The SPS Agreement also encourages the participation of member states in the relevant international organizations (the Codex Alimentarius Commission, for food safety).

The Agreement on Technical Barriers to Trade (TBT Agreement) seeks to ensure that technical regulations and standards, including packaging, marking and labelling requirements as well as testing and certification procedures, do not create unnecessary obstacles to international trade. It covers all technical standards not covered by the SPS Agreement, and applies to all food products, including agricultural products. The product definitions, including essential quality provisions, and the food labelling requirements in the Codex Alimentarius, are considered as the relevant international benchmark for foods.

Sources: See Vapnek & Spreij, 2005, pp. 19–20.

[www.who.int/foodsafety/codex/general\\_info/en/index.html](http://www.who.int/foodsafety/codex/general_info/en/index.html)

[www.codexalimentarius.net/web/index\\_en.jsp](http://www.codexalimentarius.net/web/index_en.jsp)

[www.wto.org/english/thewto\\_e/whatis\\_e/tif\\_e/agrm4\\_e.htm#TRS](http://www.wto.org/english/thewto_e/whatis_e/tif_e/agrm4_e.htm#TRS)

Food safety legislation is necessary to reduce the risk of food-borne diseases. Although it was not conceptualized with the right to food in mind, food safety legislation ensures that all food produced, imported and consumed is safe, and thus consistent with the adequacy dimension of the right to food. While an absence of law regulating food safety would constitute a serious gap in the protection of the right to food, such legislation may also have a negative impact on the realization of the

right to food by affecting the accessibility and the availability of food. This is because adherence to food safety rules involves very high costs (e.g. investments in food production and processing, and establishment of quality monitoring processes). Such rules can cause hardship to small producers who might lack the resources to move to compliance, and who can as a result lose their ability to provide for themselves. Compliance with stringent food safety standards may also increase food prices, with negative consequences for economic accessibility of food or accessibility of adequate food for poor consumers who may opt for cheaper and possibly less safe food. Food safety measures can also have a negative impact on trade, by making market access more difficult for poor producers and poor countries, which in many cases lack the capacity to comply with international standards applicable to exports.<sup>327</sup>

The review team should thus consider whether legislation or other policies take account of those actors in the food chain that may have difficulties complying with established food standards: small farmers, traders and processors, market sellers and street vendors. To ensure that food is adequate and safe while at the same time available and accessible, governments should adopt parallel measures (e.g. facilitating access to technology for small producers, providing support for investments) that prevent or minimize possible detrimental effects on the livelihoods of actors through the food chain, while keeping in mind applicable international trade rules. Box 82 illustrates the importance of careful balancing of possible trade-offs resulting from the application of high food safety standards.

#### **BOX 82. Trade-offs linked to high food safety standards – examples from state practice**

##### **Brazil**

The application of food safety regulations in *Brazil* led to several minor crops and products being excluded from formal markets as they did not comply with established standards. Honey produced by small farmers in the Amazon is one example. Brazil has a great diversity of native bees. To take account of varying environmental conditions, a local farmer might keep 15 species of 6 genera of bees, harvesting honey with different flavours, colours and nutrition quality. But because of strict standards regarding moisture content, small farmers from the Amazon cannot sell most of their honey as it does not meet the high food quality standards. Complying with them would require buying very expensive equipment for dehumidification, something that small farmers and poor rural communities that still keep these bees cannot afford. Moreover, most of the rural communities that conserve native bees do not even have electricity.



327 See FAO. 2003h, para. 7.

**BOX 82. Trade-offs linked to high food safety standards – examples from state practice (cont.)**

Although the established standards were considered necessary to ensure the higher public interest (i.e. public health), by not providing the necessary safeguards (e.g. facilitating access to the necessary equipment, proposing possible alternatives to honey production and other support measures for the small producers), the legislation resulted in hindering their capacity to exercise their right to food.

Source: see Rodriguez-Amaya, D.B. 2005.

**India**

In 1998, the *Indian* Government issued the Edible Oil Packaging (Regulation) Order, which provides that edible oils including mustard oil can only be sold in packed form and the packers must be registered with a registration authority. The Order also requires packers to have their own analytical facilities for testing samples of edible oils to the satisfaction of the government. The Order states that only oils that conform to the quality standards specified in the Prevention of Food Adulteration Act, 1954, may be packed. Under the Order, each container or pack will have to show all relevant particulars so that the consumer can identify the packer and is not misled. The Order was adopted in response to outbreaks of “epidemic dropsy”<sup>328</sup> caused by contamination of mustard oil and other edible oils with argemone oil. Although the measure was necessary for protecting public health, imposing the ban on sale of edible oils in unpackaged forms had serious economic and social consequences for many small scale local oil mills and producers of local edible oils, as well as for the consumers. Producers who lacked the capacity to comply with the Order suffered negative impacts on their livelihoods whilst consumers lost access to food products they traditionally consumed. A careful balancing of interests was needed to ensure that the ban be accompanied by appropriate compensatory measures for those affected.

Source: *Tribune (India)*. 1998. (Online edition) 18/9; see also Shiva, V. 2005.

Another possible solution is a dual food production and distribution system – one for the local and another for the export market. The international standards used in international trade are very high and may in some cases be lowered with little or no risk to consumers, justifying a dual system. This may help ensure that the positive effects of food safety standards are maximized (so that food is safe and nutritionally adequate) while unwanted negative effects (on poor producers

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328 Epidemic dropsy is a form of oedema due to intoxication with *Argemone mexicana* (Mexican prickly poppy).

and on consumers' food security and right to food) are avoided.<sup>329</sup> Of course, the legislation should ensure that the standards for national markets remain high enough to protect people's right to adequate food. To conform to the human rights principle of transparency, standard setting procedures should be transparent and representatives of consumer groups, farmers and producers duly informed and, where appropriate, actively involved in taking decisions on food safety issues. This would also help with the difficult balancing of safety and affordability. Individuals must also be protected against harm caused by unsafe or adulterated food, including food offered by street vendors (see below, section 4.10.3).<sup>330</sup>

### Protection of consumers

Another relevant dimension of food safety is the protection of consumers. The Right to Food Guidelines require states to ensure that education on safe practices is available for food business operators so that their activities neither lead to harmful residues in food nor cause harm to the environment. States should also take measures to educate consumers about the safe storage, handling and utilization of food within the household (Guideline 9.6). The provision of advice to consumers on the storage, handling and preparation of foods is also a key element of the food chain approach,<sup>331</sup> and essential to ensuring the adequacy of food. Improper handling and preparation can negate food safety measures introduced at earlier stages of the food chain; thus, food safety legislation should address all stages of the chain. Although under the modern conception of food safety, producers bear the ultimate responsibility for the placement of safe food on the market,<sup>332</sup> states retain their obligation under the right to food to regulate their conduct, to ensure that food safety standards are effectively enforced<sup>333</sup> and to provide consumers with accurate information. The FAO Legal Office has prepared a legislative study containing a new model food law<sup>334</sup> that could be used as a

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329 See FAO. 2003h, paras 18, 19.

330 See Mechlem, K, Muehlhoff, E. & Simmersbach, F. 2005.

331 FAO defines the "food chain approach" as recognition that the responsibility for the supply of food that is safe, healthy and nutritious is shared along the entire food chain - by all involved with the production, processing and trade of food. See FAO. 2003g.

332 *Ibidem*.

333 See Vapnek and Spreij, 2005, p. 129.

334 According to Vapnek and Spreij, "food law" is generally used to refer to legislation regulating the production, trade and handling of food. The broader view would also look at all other legislative provisions, wherever they may be found, which are relevant to ensuring safe food. Falling into this category would be consumer protection or fraud deterrence laws, laws on weights and measures, customs laws, import and export rules, meat inspection laws, etc. It would also include regulation of food security as well as implementation of the right to food. See Vapnek & Spreij, 2005, p. 13.

reference during the review process.<sup>335</sup> WHO has also developed several guidance documents applicable to this sector.<sup>336</sup>

#### 4.10.2 NUTRITION STANDARDS

Implementing the right to adequate food means ensuring that all food that is available in the country is not only safe but also nutritionally adequate and in conformity with individual nutritional needs according to age, sex, health and occupation. The Right to Food Guidelines recommend that states maintain or strengthen dietary diversity (e.g. through the production of nutritious and culturally appropriate foodstuffs), and also improve production and consumption of a variety of nutritious foods (Guideline 10). States are also invited to consider adopting regulations to fortify foods to prevent and cure micronutrient deficiencies, in particular of iodine, iron and Vitamin A (Guideline 10.3).

To ensure that food is nutritionally adequate, countries should have legislation regulating its nutritional content. This will be especially important with respect to food for vulnerable persons and groups (e.g. adolescent girls, pregnant and breastfeeding women, infants and young children, people living with HIV/AIDS, people in institutional settings such as schools or hospitals). Nutrition standards should be in line with international dietary guidelines and rules on the composition and labelling of food products and health claims (see below). A number of jurisdictions are currently envisaging adopting or have adopted national rules on specific food ingredients considered as having deleterious effects on human health (see Box 83). In the context of the right to food compatibility review, the absence of adequate norms regulating nutritional content of food in a country can be considered by a review team as a gap to be addressed in the final report and a plan of action.

#### BOX 83. Regulating trans fats in food products – examples from state practice

In 2003, **Denmark** became the first country to enact legislation making it illegal for oils and fats to contain more than 2 grams per 100 grams of trans fats. This restriction applies to the ingredients rather than the final products. While it is still too early to assess the effect of the trans fat restriction on the health of Denmark's population (as the law only entered into force in 2004), the health ministry reported that cardiovascular disease has dropped by 20 percent from 2001 to 2006. **Switzerland** followed with a ban in April 2008. ▼

335 *Ibidem*. Countries could also usefully refer to the joint FAO/WHO, 2003.

336 See the WHO Web site: [www.who.int/foodsafety/codex/general\\_info/en/index.html](http://www.who.int/foodsafety/codex/general_info/en/index.html)

### BOX 83. Regulating trans fats in food products – examples from state practice (cont.)

Other countries, including Canada, are also considering setting limits on trans fat contents in food products. In both **Canada** and the United States of America, trans fat labelling is mandatory, and several cities, including Calgary, New York City and Philadelphia, have banned the use of trans fats in restaurants. **California** became the first state in the **United States of America** to ban all trans fats in restaurants, adopting legislation in 2008 that will be implemented starting in 2010.

Source: See Brady, M. 2008; Kage, B. 2006.

In some countries, fortification of some foods (e.g. wheat flour) with specific nutrients at specific levels is made mandatory through legislation. The fortification of foods with iodine, iron and vitamin A can be essential to ensuring adequate nutrition where there is a demonstrated need to increase the intake of an essential nutrient by one or more population groups.<sup>337</sup> Fortification of food with micronutrients is considered a valid technology and strategy when and where existing food supplies and limited access fail to provide adequate levels of essential nutrients in the diet, and where the fortified food is highly likely to be accessible to the target population.<sup>338</sup> When legislation relating to fortification includes provisions banning the sale of unfortified products, the review team should consider the impact on small producers and their right to food.

Although fortification is useful, it should be combined with strategies to increase the variety of foods consumed, with particular emphasis on fruits and vegetables and with a focus on physiologically vulnerable persons such as children, pregnant and breastfeeding women. A complementary longer-term approach is

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337 *Food fortification* has been defined as the addition of one or more essential nutrients to a food, whether or not it is normally contained in the food, for the purpose of preventing or correcting a demonstrated deficiency of one or more nutrients in the population or specific population groups. Other terminology exists for the addition of nutrients to foods. *Restoration* means the addition to a food of essential nutrients that are lost during the course of good manufacturing processes (GMP), or during normal storage and handling procedures, in amounts that will result in the presence in the food of the levels of the nutrients present in the edible portion of the food before processing, storage or handling. Enrichment has been used interchangeably with fortification, but elsewhere it has been defined as the restoration of vitamins and minerals lost during processing (see FAO. 1996).

338 See FAO. 2003i.

to promote a diversified dietary intake.<sup>339</sup> A more diversified diet and increased consumption of plant foods will provide most missing vitamins and minerals in addition to phytochemicals.<sup>340</sup> This is particularly true for population groups that suffer from multiple micronutrient deficiencies that – because they are mainly a result of insufficient total energy intake – cannot all be addressed by fortified foods.<sup>341</sup> The review team can thus consider including into the final report also recommendations in this regard.

#### 4.10.3 FOOD LABELLING, ADVERTISING AND MARKETING

In the context of the human right to food, the transparency principle requires states to protect consumers against deception and misrepresentation in the packaging, labelling, advertising and sale of food.<sup>342</sup> Consumers cannot procure an adequate supply of safe and nutritious food without clear and reliable nutrition information, and without protection from advertising and marketing campaigns that misleadingly represent foods as being nutritious and healthy. The Right to Food Guidelines require states, among other, to facilitate consumers' choice by ensuring appropriate information on marketed food, and provide recourse for any harm caused by unsafe or adulterated food, including food offered by street sellers (Guideline 9.7). Legal developments concerning regulation of nutrition and health claims on food labels and in advertising at the international and regional levels, in particular within the EU, can be a useful reference during the compatibility review of legislation relating to this issue (see Box 84).

Although all members of society, including the private sector, have responsibilities in the realization of the right to adequate food (GC 12, para. 20), the ultimate responsibility for its realization remains with states – under their obligation to protect this human right. States must ensure that activities by private actors do not infringe on people's right to adequate food. Because food labelling, advertising and marketing may affect the enjoyment of the right to food, they must be carefully regulated by the state. A label enables consumers to exercise choice in the food they buy. Most countries have enacted legislation requiring nutrition labelling. The review team should keep in mind that consumers can only make proper

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339 FAO's Nutrition Division is currently preparing a publication intended to document the benefits of food-based approaches (FBAs), particularly of dietary improvement and diversification interventions, in controlling and preventing micronutrient deficiencies. The publication will focus on practical actions for overcoming micronutrient deficiencies through increased access to, and consumption of, adequate quantities and variety of safe, good quality food. It will also gather a variety of relevant advocacy and technical material under one cover to encourage and promote further attention to and investment in such activities.

340 See FAO. 2003i.

341 *Ibidem*.

342 See GC 12, para. 11 and Right to Food Guideline 9.7.



choices if the food label conveys meaningful nutritional information about foods in a simple, clear, consistent format allowing them to understand the ingredients and use the food correctly. Legislation should require that labels be in the language or languages of the country or have a translation attached. This ensures the compatibility of the concerned legal provisions with human rights principles of transparency and empowerment.

#### **BOX 84. Regulating food labelling and nutrition and health claims – international and regional standards**

The Codex Committee on Food Labelling develops international guidelines on nutrition labelling and health claims. The 1979 General Guidelines on Claims were supplemented by the Guidelines for Use of Nutrition and Health Claims in 1997.<sup>343</sup> The Guidelines define the circumstances under which nutrients, nutrient content and nutrient comparative claims are permitted. Health claims are not as yet covered by a Codex standard or guideline although discussions are ongoing.

EU Regulation No. 1924/2006 on nutrition and health claims made on food is based on the principle that such claims may only appear on foods introduced into the Community market if they are not false or misleading and if they can be supported by scientific evidence, and the regulation aims to provide a higher level of consumer protection as well as harmonize legislation across the EU to facilitate intra-Community trade. More specifically, the regulation controls nutrition and health claims by means of positive lists of authorized claims that can be made on food together with the criteria a product must meet to use them. The annex of the Regulation contains a list of permitted nutrition claims and the Regulation puts in place processes for the compilation of the list of authorized claims.

Advertising is another key area requiring state regulation. A growing number of countries prohibit advertising food in a manner that is false or misleading (i.e. implying for example, that a product is nutritionally beneficial and part of a healthy lifestyle if regularly consumed, or failing to disclose the use of certain substances or manner of processing). In addition, advertising directed at children requires particular attention.

#### **Advertising and marketing to children**

Proper nutrition during childhood and adolescence is essential for growth and development, health and well-being, and eating behaviours established during childhood track into adulthood and contribute to long-term health and chronic

<sup>343</sup> See Codex Guidelines for Use of Nutrition and Health Claims (CAC/GL 23-1997, Rev. 1-2004).

disease risk. A joint report of a WHO/FAO Expert Consultation concluded in 2002 that the heavy marketing of fast food and energy dense, micronutrient poor foods and beverages is “probably” a causal factor in weight gain and obesity in children.<sup>344</sup>

Although many factors, including parental responsibility, influence childhood eating behaviours and food choices, one potent force is food advertising.<sup>345</sup> There is a growing trend to regulate marketing and advertising of food and drink to children (see box 85).<sup>346</sup>

### BOX 85. Legislation on marketing and advertising to children

The Children’s Food Campaign in the **United Kingdom of Great Britain and Northern Ireland** calls for a ban on marketing and vending machine sale of junk foods and fizzy drinks at schools, for mandatory quality guidelines regarding school meals and for providing food and nutrition education.<sup>347</sup> The campaign has twice introduced a Children’s Food Bill in Parliament, which garnered significant support.<sup>348</sup>

The Government of **France**, after the adoption of the Public Health Act (2005), removed vending machines from schools. **California (United States of America)** has also banned vending machines from schools.

**Québec (Canada)** has taken a particularly strong stance, completely banning *all forms of advertising* to children under 13. A push for a ban of junk food advertising is also in progress in **Australia**, and is being seriously debated or already on the way to implementation in, among other countries, **Brazil, Malaysia, South Africa** and the **Republic of Korea**.

Source: See Garde, A. 2006; Hawke, C. 2007.

344 See WHO. 2003b. Other causes include inadequate breastfeeding, changing dietary consumption towards high-energy, low-nutrient-dense food items including fat-rich snacks and drinks containing high levels of sugar or salt.

345 A systematic review commissioned by the United Kingdom’s Food Standards Agency found that advertising does affect food choices and does influence children’s dietary habits. See Hastings Report. 2003.

346 Of course, appropriate regulation must be accompanied by other measures such as, for example, the provision of healthy school meals, education and awareness raising about food nutrition standards and labelling, and measures ensuring that the private sector is also working to protect children’s best interest.

347 See <http://www.sustainweb.org/childrensfoodcampaign/>

348 See [www.publications.parliament.uk/pa/cm200506/cmbills/023/2006023.pdf](http://www.publications.parliament.uk/pa/cm200506/cmbills/023/2006023.pdf)

A useful resource for the review team will be the so-called “Sydney Principles” on marketing to children. These seven principles, adopted in 2008 by the International Obesity Taskforce, provide that actions to reduce marketing to children should: support the rights of children; afford substantial protection to children; be statutory; take a wide definition of commercial promotions; guarantee commercial-free childhood settings; include cross-border media; and be subject to evaluation, monitoring and enforcement. Box 86 provides a brief overview of the development of the Sydney Principles.

#### **BOX 86. “Sydney Principles” on marketing to children**

Subsequent to a WHO Forum and Technical Meeting on the issue of marketing to children in May 2006, the International Obesity Taskforce (IOTF)<sup>349</sup> developed a set of seven principles to guide action on changing marketing practices to children. The first draft of the so-called Sydney Principles was circulated to various persons and organizations active in the field, with the resulting study confirming that the vast majority of professional and scientific associations, consumer bodies, industry bodies, health professionals and other interested parties agree that a set of principles is needed. There was also wide support for each of the draft principles circulated except the third principle, which calls for statutory regulation, and not all industry respondents agreed with this. According to the study author, Professor Boyd Swinburn: “The momentum is building for an international code on marketing to children, so we expect that the Sydney Principles will underpin the content such a code.”

*Source: International Association for the Study of Obesity (see [www.iaso.org](http://www.iaso.org)); 2008.*

#### **Marketing of breastmilk substitutes**

The marketing of infant nutrition also warrants careful attention. For babies and infants, exclusive breastfeeding for the first six months of life, thereafter complemented by nutritionally adequate and safe complementary foods,

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349 The International Obesity Taskforce (IOTF) is a global network of expertise and the advocacy arm of the International Association for the Study of Obesity. It works to raise awareness of the risks of obesity and encourage governments to act.

See: [www.iotf.org/whatisiotf.asp](http://www.iotf.org/whatisiotf.asp)

is – according to current knowledge and except in specific cases<sup>350</sup> – the best way to ensure babies’ optimal growth, development and health.<sup>351</sup> Growing commercialization of infant food and the relative decline of breastfeeding in many countries led to the adoption of the International Code of Marketing of Breast-milk Substitutes under the auspices of WHO and UNICEF that aims at protecting and promoting breastfeeding (see Box 87).

### **BOX 87. International Code of Marketing of Breast-milk Substitutes**

The International Code of Marketing of Breast-milk Substitutes was prepared by WHO and UNICEF after a widespread consultation process among health professionals, civil society, NGOs and the baby-food industry. The aim of the Code is to encourage safe and adequate nutrition for infants by protecting and promoting breastfeeding, and by ensuring the proper use of breastmilk substitutes, where these are necessary, on the basis of adequate information and through appropriate marketing and distribution (Art. 1). It was adopted in 1981 by the World Health Assembly which includes the Ministers of Health of the world’s governments (Resolution WHA34.22) as a “minimum requirement” to protect infant health and is to be implemented “in its entirety.”

Manufacturers and distributors of products within the scope of the Code are invited to comply with it on a voluntary basis. However, under the obligation to protect the right to food of vulnerable groups such as children, states should adopt appropriate measures, including legislation, to implement the right at the national level.

The UN Committee on the Rights of the Child increasingly looks to whether governments have implemented the Code in assessing compliance with the Convention on the Rights of the Child.

*Source: Brady, M. 2008; The International Baby Food Action Network (IBFAN), What is the International Code? (available at: <http://www.ibfan.org/english/issue/code01.html>).*

350 For example, mothers suffering from stark undernutrition, probability of virus transmission (e.g. HIV/AIDS) through breastmilk.

351 See WHO. 2006.

A number of countries have adopted specific legislation to promote breastfeeding and to regulate the marketing of breastmilk substitutes. Good resources for the review team will be the International Code mentioned earlier (see Box 87) as well as subsequent World Health Assembly Resolutions on how infant food marketing can and should be regulated.<sup>352</sup>

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352 Among others, Resolutions on infant and young child nutrition WHA 43.3, WHA 49.15, WHA 54.2 and WHA 55.25 (which endorsed the WHO Global Strategy on Infant and Young Child Feeding (A.55/15) of 16 April 2002).

## CONCLUSION

Under international human rights law, states are under a duty to act and are accountable to the international community for the implementation of human rights to which they have committed. At the same time, however, each state has a margin of discretion as to the manner in which it fulfils its obligations under these rights. The margin of discretion given to states acknowledges and takes into account the many cultural, historical, religious, economic and development differences between states that have the same legal obligations. It does not mean that a state is free to pick and choose which rights to implement, or that it might ignore the rights of a particular section of the community.

In the context of the human right to food, while it is up to each State Party to the ICESCR to decide on the types of measures that are most appropriate to ensure the progressive realization of the right to food of its inhabitants, some form of legislative action is necessary and desirable.

Law is needed as a neutral arbiter.<sup>353</sup> It establishes objective principles, rules and criteria to regulate rights, responsibilities and conduct of individuals, communities, private industry, government and administrative agencies. While it is the government's function to design budgets and policies, the law ensures that government's discretion to do so is not abused.

This Guide has examined and discussed three options for legislative implementation of the right to food at the national level: the first is the explicit recognition of the right to food in constitutional provisions; the second is the adoption of a framework law on the right to food; and the third is a review of the relevant sectoral legislation for compatibility with the right to food. In most cases, legislative implementation of the right to food at the national level should comprise all three levels of legislative action.

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353 See Tomaševski, K, 2006, p.23.

Constitutional rights carry considerable symbolic weight. In addition, the explicit inclusion of the right to food in the state constitution as a fundamental human right is the strongest form of legal protection as constitutions are considered fundamental or supreme law of the country. It would provide individuals with a legal entitlement on which they could rely to challenge the limitations of state action in protecting their right to food.

Specific framework legislation clarifying various components of the right to food, and setting out the obligations of state authorities under this right, would enable people to understand what rights they are entitled to or are being denied, and would establish clear legal responsibility of public authorities for failure to meet them. It would also provide a basis for more efficient coordination among sectors and between central and decentralized levels. Special provisions could stipulate action in the fields of education and awareness raising, minimum food entitlements and recourse mechanisms. Framework law can provide human rights-based guidance to all authorities responsible for food and nutrition security.

Compatibility reviews of relevant sectoral legislation that affects the various dimensions of the right to food (e.g. accessibility, availability and adequacy of food) and people's capacity to feed themselves in dignity would ensure that a country's legislation as a whole constitutes an enabling legal environment for the progressive realization of the right to food.

This, however, may not be possible in every state. Based on the particular mix of national circumstances and available resources, each country will decide which approach to take. Whatever the preferred approach, under international human rights law, it must be adequate to ensure fulfilment of the obligations under the right to food as established by the ICESCR.

Through theoretical information, analysis and practical "how to" advice for each level of legislative action, this Guide is a tool that contributes to building and strengthening the capacity of countries to make the human right to food a reality. As part of their national planning process, states can draw on information this Guide provides as well as on a growing body of national experiences in legislating for the right to food. The Guide will also be useful for countries to gain understanding of the extent of changes required, and to request technical assistance and advice in the most efficient manner.

As more experiences with revision of other constitutions, adoption of new laws, and compatibility reviews come from various continents, the Guide will be updated and serve those countries that will begin to take legislative action in this important field.





## ANNEX

# CHECKLIST FOR FRAMEWORK LAW ON THE RIGHT TO FOOD

This checklist accompanies the Guide on Legislating for the Right to Food. Its objectives are to assist countries in the process of drafting a framework law on the right to food. By giving an overview of the key elements discussed in the Guide, it can be useful for countries to assess whether these elements are included in draft legislation, and ensure that the broad recommendations contained in the Guide are examined and considered. Of course, already adopted food security laws can also be measured against the checklist and possibly strengthened.

This checklist should be used in combination with the Guide. Questions included in the checklist are explained in the guide, where the rationale and different options for legislation are also discussed. The checklist is not intended to be a model for reviewers or drafters to follow, as legislation should be designed on the basis of the legal traditions and particular needs of each country. The format of this checklist allows for such flexibility and aims at stimulating debate within countries.

PROVISIONS	QUESTIONS
<b>Legal status</b>	What is the position of the framework law in the hierarchy of national legal sources? Does it have higher status than ordinary law?
<b>Title</b>	Does 'right to food' appear in the title of the law?
<b>Stated purpose and objectives</b>	What are the purpose and objectives of the law? Is the realization of the human right to food among them? Does the law specify that the purpose and objectives should be achieved in a way consistent with human rights principles?
<b>Definitions</b>	Are the terms such as 'food security', 'nutrition security', 'adequacy', 'availability' and 'vulnerability' defined? Is the definition employed for the right to food consistent with international law? Are all the key terms in the law clearly defined?



PROVISIONS	QUESTIONS
<b>Human rights principles</b>	<p>Does the law contain a section on fundamental principles that will govern the actions of all governmental bodies in charge of its implementation?</p> <p>Are participation, accountability, non-discrimination, transparency, human dignity, empowerment and rule of law/recourse part of such principles?</p> <p>How are they defined in the law?</p> <p>Does the law specifically require that public authorities in charge of its implementation exercise their functions in accordance with the established principles?</p>
<b>Human rights principles and substantive provisions</b>	<p>Are human rights principles given effect in substantive provisions of the law, other than the section on principles?</p>
<b>Substantive provisions establishing the right to food</b>	<p>Is the right to food explicitly recognized in substantive provisions of the law?</p> <p>Are its elements (accessibility, availability, stability, adequacy and utilization) further elaborated?</p> <p>Does the law also establish the fundamental right of every person to be free from hunger?</p>
<b>Limitations</b>	<p>Does the law contain a limitation clause?</p> <p>Does its wording reflect the general limitation clause established by the ICESCR?</p>
<b>Right not to be discriminated against</b>	<p>Is the right of persons not to be discriminated against explicitly included in the law?</p> <p>Are prohibited grounds of discrimination listed in the law in accordance with international law?</p> <p>Does the law also include the prohibition of discrimination against women?</p>
<b>Special measures</b>	<p>What type of special measures to remedy the effects of discrimination and to achieve formal and substantive equality does the law provide for?</p> <p>Are specific groups identified, such as women and indigenous peoples?</p>
<b>Obligations</b>	<p>How are obligations under the right to food elaborated in substantive provisions of the law?</p>
<b>Respect, protect, fulfil (facilitate, provide)</b>	<p>Does the law contain a general provision on state obligation to respect, protect and fulfil?</p>
	<p>Are specific entitlements to assistance provided for by the law?</p> <p>Is there an entitlement to a minimum amount of food?</p> <p>Does the law outline key elements underlying the minimum food entitlement, to be established through subsidiary legislation?</p>
	<p>Are there provisions on prioritizing the most vulnerable persons and groups?</p> <p>Are specific groups identified, such as children, pregnant and breastfeeding women and persons suffering from debilitating illnesses?</p>
<b>Impact assessments</b>	<p>Does the law contain provisions requiring a prior right to food impact assessment from state and non-state actors?</p>
<b>Information</b>	<p>Does the law stipulate for the right of persons to seek information of relevance to the right to food?</p>
	<p>Are competent authorities required to disseminate information and provide it upon request?</p>
<b>Education and awareness</b>	<p>Does the law include provisions on education and awareness-raising measures?</p> <p>Are there specific provisions for children and for adults?</p>
<b>Emergencies</b>	<p>Does the law include provisions on the right to food in emergencies?</p> <p>Does it contain provisions on institutional arrangements and coordination?</p>
<b>International cooperation</b>	<p>Does the law include provisions on international cooperation?</p>
	<p>Are there any provisions on extraterritorial obligations?</p>



PROVISIONS	QUESTIONS
<b>Coordinating institutions</b>	Does the law provide for the coordination of public activities?
	Does it create new institution(s)? Strengthen existing ones? Dismantle old ones?
	Are functions and mandates clearly spelled out? Is non-duplication among similar institutions ensured?
	What is the membership of the coordination body? Are all relevant public sectors represented? Does the law provide for civil society representation? Do civil society organizations participate in the selection of such representatives?
	Are there provisions on vertical coordination? Does the law provide for coordination bodies at regional or municipal levels?
<b>Roles of other agencies</b>	Are specific roles and responsibilities of different public authorities designated?
<b>Monitoring systems</b>	Does the law elaborate on monitoring the realization of the right to food and the implementation of the framework law itself?
	Are there provisions on human rights based monitoring?
	Is an institution designated for taking the lead in monitoring?
	Are there substantive provisions on benchmarks or indicators, such as who should establish them and how they should be revised?
<b>Civil society participation</b>	Are there substantive provisions on civil society participation: In the coordinating body (see also above)? In the monitoring institutions? In regular consultations processes with public authorities?
<b>Remedies</b>	Are there substantive provisions on remedies for right to food violations? Is the right to a remedy recognized/reaffirmed? Are the types of possible remedies listed?
<b>Administrative complaints</b>	Does the law identify with which authority administrative complaints can be lodged?
<b>Judicial remedies</b>	Does the law explicitly reaffirm the role of courts in upholding the law and providing remedies for violations of the right to food?
<b>Role of national human rights institutions</b>	Does the law contain substantive provisions on human rights institutions and their role in: Monitoring the realization of the right to food. Dealing with complaints of violations of the right to food.
<b>Compliance provisions</b>	Are there specific provisions on compliance? Are deadlines for the adoption of implementing legislation established?
<b>Sectoral review</b>	Does the law provide for the review of sectoral legislation for its compatibility with the right to food?
	Does it list sectoral areas, which must be reviewed as a priority?
	Does it provide for time frames?
<b>Financial provisions</b>	Are there provisions on financing arrangements for the implementation of the law?
	Are there any financial reporting obligations?
	Is the establishment of a special fund foreseen?



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