

Right to Food Forum
DISCUSSION PAPER

Panel 2: Accessible Justice - Legislation and Accountability

At the end of this discussion participants will identify:
a) **LESSONS LEARNED: What worked and what not? Why?**
b) **NEXT STEPS: What can Governments and stakeholders do?**

1) Background

Accountability can be defined as the obligation of power holders to account for or take responsibility for their actions. In the right to food context, four main types of accountability mechanisms based on the nature of the forum are of particular relevance: political, administrative, legal and social. Accountability through the application of law by government, independent human rights institutions and courts is the main concern here.

Right to Food Guideline 7 addresses the legal framework. It envisages possible domestic legal and constitutional provisions, including the direct incorporation of the right to food. It stresses that there should be adequate, prompt and effective remedies in case rights are not upheld and that right holders must be informed about existing rights.

It is useful in the discussion to distinguish between four related issues:

1. *Constitutional* recognition and protection of the right to food, which can be explicit or implicit, listed in the bill of rights or as a directive principle of state.
2. *Framework law* which spells out rights and obligations in more detail than constitutional provisions normally do, and provides for institutional framework for implementation, monitoring and further action
3. *Sectoral laws* which may help or hinder the implementation of the right to food, and thus should be reviewed for compatibility with the right to food and with human rights principles.
4. *Justiciability* of the right to food, or the potential capacity of violations of the right to be determined in a court of law and appropriate recourse provided.

2) Why are legal measures for the right to food important?

Human rights are international law and it is a specific duty of States Parties to the International Covenant on Economic, Social and Cultural Rights to undertake domestic legislative measures for the implementation of the right to food and other rights in the Covenant. Law generally provides stability and predictability, and works against arbitrariness. For the right to food, laws help combat the notion of food security as charity, in particular with regard to specific entitlements.

Constitutional provisions are important because they constitute the highest law of the land, making all other laws and acts of government subject to those principles.

Framework law is important because it can provide more detail than constitutional provisions, and can help officers of the courts to tackle right to food violations, as well as providing institutional framework and guidance to government officials.

Sectoral legislation is important because it regulates the economic environment in which people are or are not able to feed themselves in dignity; it regulates the adequacy of the food marketed and sold; it determines how markets, including labour markets, function; it regulates access to the natural resources by which people feed themselves or earn an income to feed themselves; and it provides for entitlements to state support given certain circumstances, and so on and so forth. While the above can be challenged in courts, it is more efficient and holistic to undertake reviews to ensure that all these sectors help, and do not hinder, people's ability to feed themselves and their families, or to receive social assistance in case of need.

Justiciability is important because laws that are not implemented and not enforced lose their value. Justiciability provides a safety valve against violations of the right to food, whether they are caused by callousness, indifference, oversight or other reasons. The courts are the final guarantors of human rights, and must be empowered to take all such rights into account, including the right to food.

3) What are preliminary findings?

The right to food or aspects thereof are recognized in most constitutions around the world. Fewer, under 20, recognize the right to food explicitly as a human right that is justiciable in a court of law. South Africa has made a clear provision, whereas India has nutrition only as a directive principle of state. The right to food is, however, protected through a broad interpretation of the right to life. Recent constitutional reforms in Bolivia and Ecuador have given prominence to the right to food.

Framework laws that recognize the right to food and seek to bring coherence and stability to their food security system have sprung up in recent years, for instance in Brazil and Guatemala. Drafts have been prepared and are at different stages of adoption in many more countries, including Nicaragua, Peru, Uganda and Mozambique.

The number of sectoral compatibility reviews and reform remains limited. Some assessments have taken place, for instance in Mozambique and Nepal.

Justiciability of the right to food at the national level remains unproven in most countries. The ongoing Right to Food case in India is a notable exception. Also worth recalling is the Swiss case on destitution, from 1996. This does not mean that the right to food is not justiciable in other countries, simply that it has not been successfully argued before the courts. Information on individual complaints about the right to food before national human rights institutions is incomplete.

At the regional and international levels there is some jurisprudence, for instance the *Ogoni (SERAC v. Nigeria)* case found the right to food to be implicit in the African Convention on Human and People's Rights and the *Yakye Axa (Indigenous Community) v. Paraguay* case found it to be part of the right to life. The ICJ Advisory Opinion on the Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory also includes the right to food as part of an adequate standard of living.

Once the new Optional Protocol to the ICESCR enters into force, there is likely to be more jurisprudence available.

4) What are the issues/challenges?

Legislative processes are complex undertakings, involving different and often diverging interests and leading to outcomes which reflect what was achievable under prevailing circumstances, rather than optimal solutions. Governments and legislators are often wary of adopting legislation with teeth; they are more comfortable with laws that do not imply major constraints or obligations. The lack of political will may be based on fear of legal accountability. It is not surprising that few countries argued for a strong Guideline on legislative measures during negotiations in the Intergovernmental Working Group.

Legislation, even if it is meaningful, may not be implemented in practice. This is a common weakness, especially in poorer countries, and easily leads to erosion of respect for the rule of law. Judicial systems in many countries suffer backlogs, high court costs, corruption and other challenges. In addition, judicial decisions are not always implemented.

Experience with framework law is very recent and still limited. Evidence demonstrating whether or not these laws have successfully struck a balance between making a difference and being realistic is still missing.

Rights have to be balanced against other rights. The tug-of-war can often not be addressed by laws but by policy decisions reflecting power relations that are often biased against the poor. In such a context, the rights of the poor people, such as the right to food, are likely to be considered less important than the rights of more influential groups, such as property rights or the right to set up a business.

International obligations of States may be in conflict, such as the right to food vs intellectual property rights or other trade-related obligations. In the current system, taking into account both the interests at stake and the enforcement systems, the trade interests are more likely to prevail.

Lawyers and judges have little or no experience in using the right to food as argument in legal cases. The capacity gap needs to be addressed through law schools and continuous education of judges and lawyers. The scarcity of precedence and jurisprudence also hinders other cases to be argued and won on the basis of the right to food.

Poor people have very little access to justice in practice. They lack knowledge of their rights and of laws. They cannot afford to seek legal representation and access to lawyers who are able and willing to take on their cases.

5) Questions for discussion

- What are the key elements in successful constitutional reform or framework law elaboration?
- What must be done to integrate right to food elements in sectoral laws?
- How should the legislative process be designed to make implementation effective?
- How can the law be made to work for the poor? How can right holders be empowered, and how can recourse mechanisms be made more accessible? How can information about laws and existing legal protection frameworks be made known to marginalized and poor persons around a country?
- What are best practices with regard to inserting recourse mechanisms in entitlement or service programmes?
- How can institutional responsibility be enhanced?
- What is the capacity of judicial and quasi-judicial bodies to determine violations of right to food?
- How relevant is right to food legislation for developed countries?

- What is the role of legislation in the context of the diagnosis and the response to the present food crisis? Are gaps in legislation part of the problem?
- How can legislation contribute to improving governance of the food systems at national and international levels?