



TECHNIUM
SOCIAL SCIENCES JOURNAL

Vol. 30, 2022

**A new decade
for social changes**

www.techniumscience.com

ISSN 2668-7798



9 772668 779000

Construction of Food Law Based on Rights Approach to Realize the Right to Food

Ahmad Zazili¹, Mochammad Bakri², Yuliati³, Rachmad Safa'at⁴

¹Doctoral Student Faculty of Law Brawijaya University, ^{2,3,4}Lecturer Faculty of Law Brawijaya University

zazy_01@yahoo.co.id¹, bakri@ub.ac.id², yuliaticholil@ub.ac.id³,
rachmad.syafaat@ub.ac.id⁴

Abstract. Countries ratified the International Covenant On Economic, Social and Cultural Rights (ICESCR) have obligation to implementation in national level. The purpose of this study is to construct a national food law based on a rights approach realize the right to adequate of food. The importance of this research is because Indonesian national food law is not in accordance with the standards and norms contained in the ICESCR. The research method used is normative legal research using a statutory approach, a philosophical approach and a conceptual approach. The research findings, firstly, the Indonesian national food law is oriented towards the food security paradigm so that it does not regulate rights and obligations in fulfilling the right to food. Second, the formation of a national food law in the future must emphasize the rights of the community and the obligations of the state in fulfilling the right to food, as well as special treatment for food vulnerable groups. Recommendation, the need for the Indonesian government to establish a Food Sovereignty Law in order to realize the right to adequate and adequate food.

Keywords. ICESCR, Right to Food, National Food Law

Introduction

Every human being has the right to adequate, adequate, quality, affordable, medically safe food to meet basic needs and be free from hunger. The existence of the right to food is guaranteed in the Article 25 Universal Declaration of Human Rights, and other international human rights law instruments, but the most important are contained in the "International Covenant on Economic, Social and Cultural Rights" (hereinafter abbreviated as "ICESCR"). ICESCR is an international agreement in the field of economic, social and cultural rights that has been ratified by almost all countries in the world, including Indonesia. ICESCR has the characteristics of legal force binding the parties, creating obligations for participating countries, including the obligation to adjust rules at the national level with the norms and standards contained in the ICESCR.

In Indonesia's national legal system, the regulation that specifically regulates food is Law Number 18 of 2012 concerning Food. This regulation was formed to coincide seven years after Indonesia ratified the ICESCR, namely in 2005, Law No. 18 of 2012 concerning Food should contain regulations on the right to food for citizens, as well as regulations on state

obligations in fulfilling the right to food, however. it turns out that in substance it has not yet adopted ICESCR. It is interesting to study, why has the establishment of Law Number 18 of 2012 concerning Food not yet adopted the ICESCR standards and norms even though it has ratified it?

The Research Method

The research method used is normative legal research by examining the provisions contained in the written law contained in various laws and regulations. The legal materials used are primary legal materials and secondary legal materials. Primary legal materials are in the form of legislation and official records or treatises in making laws. This primary legal material is grouped into two parts, namely the first group is international law related to food such as ICESCR, General Comment CESCR No 12 of 1999 concerning the Right to Adequate and Adequate Food (hereinafter abbreviated as GC 12). The second group is Indonesia's national food law, namely Law Number 18 of 2012 concerning Food, along with official notes or Minutes of its Formation in the form of Academic Papers, Minutes of Meetings, Final Opinions of the Factions in the DPR RI while the secondary legal materials used are books, final assignments, and legal journals. The legal materials were analyzed using a statutory approach, a philosophical approach and a conceptual approach.

Research result and discussion

“Human rights are usually understood as rights inherent in humans. The concept of human rights recognizes that every human being has the right to enjoy his or her human rights without distinction of race, color, sex, language, religion, political or other opinion, national or social origin, property, birth or other status. One type of human rights is the right to adequate food (Philip Alston, Katarina, 1984). Food as a human right is regulated in Article 11 of the ICESCR which states:

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 cooperation 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”.

Article 11 of the ICESCR has the meaning in the form of affirming the overall purpose of economic, social and cultural rights, namely the realization of a decent standard of living for every human being, essentially this is an interpretation of a decent standard of living that guarantees the dignity of the human person, namely the ability of everyone to enjoy the

necessities of life, the basic needs of life without having to take a path that demeans or dehumanizes (Asbojrn Eide, 1999).

Mashood A. Baderin in his dissertation stated “Article 11(1) ICESCR apart from explicitly mentioning the existence of the right to food, clothing and housing, it also recognizes the right of everyone to continuous improvement of living conditions, this shows that the right to a decent life is not static, but instead places ongoing dynamic obligations on the state in line with economic and social development (Mashood A. Baderin, 2003). Specifically regarding food, Article 11 of the ICESCR contains three important and basic things, namely:

1. Affirmation that the right to food is part of the right to an adequate standard of living
2. Recognition of the basic right to be free from hunger; as well as
3. Commitment of States to take special measures and programs to free people from hunger.

Article 11 of the ICESCR also emphasizes two things, namely: first, the State is responsible for fulfilling the right to food; second, it is not only related to improving production methods through the use of science and technology, but also regarding structural aspects such as distribution mechanisms to improving the agrarian system (Revrisond Baswir, 2003).

According to Par 6 GC 12, “The right to adequate food is realized when every man, woman and child, alone or in community with others, have physical and economic access at all times to adequate food or means for its procurement. The right to adequate food shall therefore not be interpreted in a narrow or restrictive sense which equates it with a minimum package of calories, proteins and other specific nutrients. The right to adequate food will have to be realized progressively. However, States have a core obligation to take the necessary action to mitigate and alleviate hunger as provided for in paragraph 2 of article 11, even in times of natural or other disasters”. Par 8 GC 12, while core content right to food : ”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; The accessibility of such food in ways that are sustainable and that do not interfere with the enjoyment of other human rights”.

Related with right to food, Asbojrn Eide said: ”The general concept of adequate food can be broken down into several elements: the food supply should be adequate, which means that the types of foodstuffs commonly available (nationally, in local markets and, ultimately, at the household level) should be culturally acceptable (fit in with the prevailing food or dietary culture); the available supply should cover overall nutritional needs in terms of quantity (energy) and quality (it should provide all the essential nutrients, including micronutrients such as vitamins and iodine); and, last but not least, food should be safe (free of toxic elements and contaminants) and of good quality (in terms of, for example, taste and texture)” (Asbojrn Eide, 1999)

In addition to asserting rights, ICESCR also determines the state's obligations in fulfilling economic, social and cultural rights including the right to food which can be seen in Article 2 which states:

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 recognized 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.

This article describes the nature of the general legal obligations that must be carried out by the signatory countries to the Covenant, namely obligations of conduct and obligations of results.

Specifically related to state obligations in the right to food, it is described in GC 12: “The right to adequate food, like any other human right, imposes three types or levels of obligations on States parties: the obligations to respect, to protect and to fulfil. In turn, the obligation to fulfil incorporates both an obligation to facilitate and an obligation to provide. The obligation to respect existing access to adequate food requires States parties not to take any measures that result in preventing such access. The obligation to protect requires measures by the State to ensure that enterprises or individuals do not deprive individuals of their access to adequate food. The obligation to fulfil (facilitate) means the State must proactively engage in activities intended to strengthen people’s access to and utilization of resources and means to ensure their livelihood, including food security”.

Substantively, the commitment to take steps to eradicate hunger is a normative order as referred to in article 2 of the ICESCR, namely to take legislative and other steps to ensure effective enforcement, including legislation in the food sector. Thus, the State must also ensure that appropriate provisions are made to ensure food safety. The norms and standards for the right to food should be integrated by each country that has ratified the ICESCR in the formation of regulations in the food sector, including Indonesia which has ratified the ICESCR.

The current special food regulations in force in Indonesia are Law Number 18 of 2012 concerning Food. This law replaces Law Number 7 of 1996 concerning Food. Theoretically the reasons for the replacement of this food law such as:

1. The protection of the people's right to food by the state is an essential obligation;
2. The law can be a guarantor for the fulfillment of the government's responsibility in the welfare of its people through the fulfillment of sustainable food;
3. The food crisis that has hit the world (since 2007) is a valuable lesson about the importance of a nation having sovereignty over food to ensure sufficient food for its citizens; and
4. Economic development can be sustainable if the fulfillment of the people's basic right to food is fulfilled (Irham, 2008; Tulus Tambunan, 2010).

In addition to the four things above, it is also added that in Law No. 7 of 1996 eliminates the obligations and responsibilities of the state in fulfilling the right to food, namely by giving part of the burden of these obligations to the community. Transferring the burden of obligations to the community in an effort to fulfill the right to food is contrary to the principle of the state's obligation as the bearer of obligations or the duty barrier and the community is the right holder.

Reviewing a law, the first step that must be done is to examine the preamble because the preamble is a representation of the philosophical basis, sociological basis, and juridical basis. In addition, the preamble is a reflection of the overall regulatory material content of a law.

Noting that by comparing the considerations for considering the Draft Food Bill with the considerations for considering the Food Law, it is found that there are differences, namely in the draft version of the Food Bill there are six considerations while in the Law there are four considerations, meaning that there are two omitted considerations, namely the elimination of ICESCR as a philosophical consideration. In the Academic Paper of the Draft Law on Amendments to Law no. 7 of 1996 concerning Food on the second issue, emphasized that "with the existence of Law Number 11 of 2005 concerning Ratification of the International Covenant

on Economic, Social and Cultural Rights (International Covenant on Economic, Social and Cultural Rights), where food is part of human rights (rights to food), and is a human rights in the economic, social and cultural fields, thus, the State is responsible for respecting, protecting, and fulfilling the right to food and ensuring the availability of food for its people (especially the distribution and ease of access of the people to food). In the body of Law Number 18 of 2012 concerning food, there is also no definition of the right to food and it does not clearly state standards and indicators related to the right to food, thus causing a lack of clarity regarding state obligations and citizens' rights regarding access to food. The results of research on all documents related to the process of establishing Law no. 18 of 2012, both in the Academic Paper of the Food Bill, the draft of the Food Bill, as well as the Minutes of Trials, the view documents of the DPR RI factions also did not find any discussion on food affordability as regulated in GC 12.

GC 12 is an authoritative interpretation of the right to adequate and adequate food, this guide should be used as a reference or main reference when discussing or assessing the right to food. International human rights legal instruments relating to food should be used as a reference in the process of forming legislation in the food sector. not using GC 12 as a reference in the formation of regulations related to food also indicates that the Food Law is not based on human rights. The not adoption of ICESCR in the formation of national food law will have an impact on efforts to fulfill the right to food. People's rights are ignored because the legal basis is there are no rules for food vulnerable groups, there is no lawsuit mechanism for the government's failure to realize the right to food, there is no clarity regarding community involvement in efforts to fulfill the right to food. This condition will certainly be detrimental to the community and not good for the development of human rights in the social sector, especially food, so that in the future it is necessary to make changes to the current food law by establishing a new food law that adopts human rights principles in fulfillment of the right to food such as strict rules regarding state obligations, legal protection for vulnerable groups, legal remedies in the form of citizen law suits if the state fails to meet the food needs of the community, and the existence of rules regarding food sovereignty. The food bill only looks at the issue of food availability, but does not detail the quality of food, economic aspects and food fulfillment (<https://finance.detik.com>, 2012). Whereas food accessibility by the ESCR Committee consists of two forms, namely physical accessibility and economic accessibility. The two types of food accessibility are not found in the Food Law. If food accessibility is not regulated in this Food Law in the perspective of the theory of transformation of international treaties, it can be argued that the Food Law is not a transformation or legislation implementation of the ICESCR, especially with regard to the right to food 'the rights adequate of food' because there is no clarity on rights and obligations regarding rights to food.

Other evidence shows that the Food Law is not a transformation of the ICESCR, namely it does not regulate the right to food for food-vulnerable people such as indigenous peoples, even though this is important to make regulations because it is a form of legal protection in particular to provide legal protection for indigenous peoples because the practice so far is that many indigenous peoples are evicted from their wiliyah or customary forests are used for plantations or mining owned by corporations. Because these groups are explicitly stated in GC 12 to be protected and require special programs. The Food Law, from the beginning of its formation, has been controversial. The National Human Rights Commission (Kornasham) once asked that the discussion of the Food Bill be stopped because it was deemed not to have adopted human rights principles. There are at least four indicators that used by the National Human Rights Commission to assess the realization of the right to food, namely Availability,

Access, Acceptance and Quality. Availability indicator, Indonesia still relies on imports for food availability. As a result, the price of imported rice is cheaper than local rice. Import policies for food needs are subject to low taxes, even up to zero percent. Then food is seen as a mere commodity. Farmers are encouraged to grow crops for export, while to obtain seeds and the latest agricultural technology is only owned by a number of international companies. From that analysis, Indonesia is only after cheap food prices (<https://www.hukumonline.com>, 2012). Regarding access indicators, the government pays less attention to agrarian productive access for the people, especially to farmers, fishermen and indigenous peoples. The ability of the community to access food is related to the extent to which the fulfillment of the right to life with decent standards and access to agrarian resources, especially land. In addition, farmers are also limited in their movements to gain knowledge and develop seeds.

Bill on Amendment to Law No. 7 of 1996 concerning Food is part of the 2010-2014 National Legislation Program. The direction and policy of the 2010 – 2014 National Legislation Program is to form laws in order to: increase food security for all Indonesian people (Keputusan Dewan Perwakilan Rakyat Republik Indonesia Nomor : 41A/DPR RI/I/2009-2010).

By attention to the 2010-2014 National Legislation Program above, it is at number 5, "Improving food security for all Indonesian people". This confirms that since the beginning of the formation of the Food Law, it has been seen that the mindset of forming the national food law is a food security paradigm, not based on the right to food approach. Rachmad Safa'at stated that the development of Indonesia's national food law when viewed based on the paradigm of "legal constructivism" means that Indonesian national food law adheres to the paradigm of food security, this can be seen from the construction of Article 1 number 7 of Law no. 7 of 1996 concerning Food, which explicitly uses the phrase Food Security, namely "the condition of meeting food needs for households as reflected in the availability of sufficient food, both in terms of quantity and quality, safe, equitable and affordable" (Rachmad Safa'at, 2013). Meanwhile, in Law Number 18 of 2012 concerning Food, food security is defined as "the condition of fulfilling food for the state to individuals, which is reflected in the availability of sufficient food, both in quantity and quality, safe, diverse, nutritious, equitable and affordable. and does not conflict with the religion, belief, and culture of the community, in order to live a healthy, active and productive life in a sustainable manner" (Rachmad Safa'at, 2013). Food security is a paradigm that is officially used by the government in fulfilling food for the population and agriculture related to food in general Syahyuti, Sunarsih, Sri Wahyuni, Wahyuning K. Sejati, dan Miftahul Azis, 2015). The choice of this paradigm will have implications for the formation and preparation of regulations, policies and food development programs carried out by the government. Food supply also uses a pragmatic approach such as food imports. The choice of food regulation with a food security paradigm cannot be separated from its relationship with Indonesia's position as a member of the World Trade Organization (Law of the Republic of Indonesia Number 7 of 1994 concerning Ratification" Agreement Establishing The World Trade Organization).

In addition, the factors causing the inconsistency of Indonesia's national food law with ICESCR are closely related to the theoretical problems of the applicability of international law in national law. The legal system in Indonesia has not shown a clear direction, embracing which understanding is dualism, monism, or both. Indonesia does not yet have a standardized conception of the dynamic and interactive relationship between international treaties and national law, because it has not yet been regulated in the Indonesian constitutional law system (Eddy Pratomo' 2011). This problem arises because until now there is no clarity about the theory adopted by Indonesian law regarding the relationship of international law (international

agreements) with national law, so that in its development there are two lines of thought, namely the line of thought that places international agreements that have been ratified as part of national law (monism/incorporation), while another line of thought argues for the need for separate national legislation to implement the ratified international agreement (dualism/transformation).
Establishment of a Rights-based National Food Law

The Rights-Based Approach is a framework based on human rights values and principles. It is based on the premise that every human being, by being human, is a right holder. Rights require obligations from the government and can be sued. Rights are always associated with 'being'. The principle of rights includes:

- Rights must be realized
- The right to demand responsibilities and obligations
- Rights are universal
- Rights can only be realized through the interests of outcomes and processes
- All rights are equally important. (<https://equitas.org/>, 2009).

A Rights-Based Approach in the framework of the right to food is a framework based on the values and principles of food human rights. Its form is in the form of international Food Human Rights norms, standards and principles that need to be integrated into the national food law system. The importance of the right-based approach in the formation of food law because it relates to the state's obligations in fulfilling the right to food. The formation of a national food law based on a human rights approach in the future needs to contain provisions regarding the state's obligations in fulfilling the right to food, namely in the form of an obligation to respect, an obligation to protect, and an obligation to fulfill. In addition, the establishment of a national food law based on a human rights approach needs to also emphasize the state's obligation to provide special treatment for food vulnerable groups, as well as regulations regarding the mechanism for citizen lawsuits if the right to food is violated and or not fulfilled.

Conclusion

1. Indonesia's national food law does not yet reflect the norms and standards of the right to food contained in the ICESCR and its derivative legal instruments. This discrepancy is because the formation of Indonesia's national food law does not use a human rights-based approach.
2. Considering that Indonesia has ratified the ICESCR, it is necessary to establish a national food law based on a human rights approach by integrating the standards and norms for the right to food contained in the ICESCR. Research recommendations, for the Indonesian government to amend Law No. 18 of 2012 concerning Food, and form a law on food sovereignty.

Acknowledgment

Thanks to BUDI DN and LPDP for providing funding among my study in Doctoral Programe Law faculty of Brawijaya University.

References

- [1] Asbjørn Eide, The human right to adequate food and freedom from hunger. 1999.
- [2] Eddy Pratomo, Hukum Perjanjian Internasional Pengertian, Status Hukum dan Ratifikasi, Penerbit Alumni, Bandung, 2011.
- [3] Irham, Kovenan Ekosob dan Soal Pangan, KOMPAS, SABTU, 14 JUNI 2008

- [4] Mashood A. Baderin, *International Human Rights and Islamic Law*, Oxford University Press, Oxford, 2003.
- [5] Philip Alston, Katarina, *International Law and the Human Rights to Food*, Dordrecht, Netherlands: martinus Nijhoff, 1984.
- [6] Rachmad Safa'at, *Rekonstruksi Politik Hukum Pangan: Dari Ketahanan Pangan Ke Kedaulatan Pangan*, UB Press, Malang, 2013.
- [7] Revrisond Baswir, *Pembangunan Tanpa Perasaan: Evaluasi Pemenuhan Hak Ekonomi, Sosial dan Budaya*, Penerbi ELSAM, Jakarta, 2003.
- [8] Syahyuti, Sunarsih, Sri Wahyuni, Wahyuning K. Sejati, dan Miftahul Azis, *Kedaulatan Pangan Sebagai Basis Untuk Mewujudkan Ketahanan Pangan Nasional*, jurnal forum penelitian agro ekonomi, vol. 33 no. 2, jakarta, desember 2015.
- [9] Tulus Tambunan, *Pembangunan Pertanian dan Ketahanan Pangan*, UI Press, Jakarta, 2010.
- [10] UNICEF Canada, *Children's Rights, CIDA, Continuous Learning Human Resources*, December 2001, World Health Organisation, *25 Questions & Answers on Health & Human Rights*, Health & Human Rights Publication Series, Issue No. 1, July 2002.
- [11] <https://finance.detik.com>.
- [12] <https://www.hukumonline.com>
- [13] <https://www.un.org/en/universal-declaration-human-rights/>.
- [14] *Human Rights: A Basic Handbook for UN Staff*, OHCHR, UN Staff College Project 1999.
- [15] *International Covenant on Economic, Social and Cultural Rights*.
<https://www.ohchr.org/EN/ProfessionalInterest/Pages/CESCR.aspx>