

FEATURE

Some Legal Issues around the Adoption of Simplified Nutrition Labelling in South Africa: An Analysis of Draft Regulation R429

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Introduction

Non-communicable diseases (NCDs), specifically diet-related non-communicable diseases such as diabetes and cardiovascular disease, are a growing problem in South Africa (Nojilana et al. 2016; Shisana et al. 2014). These diseases share a number of risk factors, including being obese or overweight and consuming unhealthy foods high in saturated fat, salt and sugar.

Given the fact of these shared risk factors, many NCDs can be prevented by improving the healthiness of diets. Many of the recommended interventions for the prevention of NCDs are already legal and form part of the regulatory regimes of numerous countries (Magnusson & Patterson 2014). South Africa has adopted many of these interventions, including restrictions on sodium (salt) in foods, banning trans-fats and imposing a tax on sugary beverages (Ndinda et al. 2018). However, further action is necessary if we are to prevent NCDs and protect the health of South African citizens.

There is a growing consensus that the provision of simplified nutrition labels is an effective obesity-prevention tool (Dereñ et al. 2021; Riis et al. 2015). Though many countries have some form of nutrition-labelling on food items, consumers often have difficulty understanding and processing the given information, thus struggling to make informed decisions about food purchases.

The provision of simplified nutrition labels can improve consumers' awareness of how healthy or unhealthy particular food products are and assist them in making informed purchases (Dereñ et al. 2021; Riis et al. 2015). As a result, many governments are introducing simplified nutrition-labelling schemes, such as mandatory front-of-package labels (FOPL). Currently, more than 10 countries (including Chile, Peru and Uruguay) have adopted mandatory FOPL regulations (Jones et al. 2019).

Many agree that these measures also play a critical role in the realisation of socio-economic rights. In 2020, the then United Nations Special Rapporteur on the right to health, Dainius Pūras, issued a statement (endorsed by Michael Fakhri, the Special Rapporteur on the right to food) noting that FOPL (specifically warning labels) were fully in accord with state obligations in regard to the right to health:



...simplified nutrition labels can improve consumers' awareness of how healthy or unhealthy particular food products are and assist them in making informed purchases .

[NCDs] are a major challenge of this century highly rooted on overweight, obesity and unhealthy diets. As part of their right-to-health duties, States should address the diet-related NCDs' preventable risk factors and promote frameworks whereby the food and beverage industry convey accurate, easily understandable, transparent and comprehensible information on their products. Front-of-package warning labelling regulations are much needed in this regard (Pūras, 2020).

In this article, we consider the role of South Africa's constitutional and regulatory frameworks in the adoption of simplified nutrition labelling. Specifically, we assess the opportunities for and barriers to this as they stand in the existing legal system. We begin by outlining the relationship between human rights and diet-related-NCDs (DR-NCDs) under international human rights law and the South African Constitution (1996). We then look at the regulatory and legislative framework related to labelling and consider whether South Africa's draft FOPL regulations satisfy the mandate to implement FOPL under the right to health.

The rights-based rationale for simplified nutrition labelling

The right to health is recognised by a number of international treaties and conventions. In 1946, the right to the 'highest attainable standard of living' was recognised in the World Health Organization's constitution (1946). Two years later, in the Universal Declaration of Human Rights, the 'right to a standard of living adequate for the health and well-being' of all people was recognised in article 25. In 1966, the International Covenant on Economic, Social and Cultural Rights stated that everyone is entitled to the 'enjoyment of the highest attainable standard of physical and mental health'. Regionally, the African Charter on Human and Peoples' Rights (the African Charter) recognises that every individual has the right to 'enjoy the best attainable state of physical and mental health'.

In many instances, these documents also recognise a right to food as an underlying determinant of the right to health, as a component of the right to life, or as its own self-standing right. As Pūras (2020) noted in his statement,

[t]he right to health is an inclusive right extending not only to timely and appropriate health care but also to the underlying determinants of health, such as an adequate supply of safe food and nutrition. States' obligations therefore include ensuring equal access for all to nutritiously safe food as an underlying determinant of health.

Although the African Charter does not expressly recognise a right to food, the African Commission on Human and Peoples' Rights (the Commission) states that the right to food is implicitly recognised in the right to life and right to health. More directly, in *Social and Economic Rights Action Center and another v Nig*, the Commission noted that

[w]hile the right to food is not specifically enumerated in the African Charter, it is implicit in such provisions as the right to life (art. 4), the right to health (art. 16) and the right to economic, social and cultural development (art. 22) ... It is undeniable that food is central to the enjoyment of such other rights as health, education, work and political participation.

The Commission has also identified a clear link between the right to health (and other rights) and access to nutritious food, stating in a 2019 resolution that it is concerned that 'malnutrition which includes conditions such as under-nutrition, micronutrient deficiencies or excess, overweight, obesity and other diet-related non-communicable diseases seriously affects the health and well-being of individuals'.



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The Commission (2019) called on State Parties '[to t]ake appropriate policy, institutional and legislative measures to ensure the full enjoyment of the right to food which includes constantly accessible and quality food that meets the requirement of nutrition and cultural acceptability'.

Obesity and related health conditions place a significant burden on the health-care system...

This injunction is relevant to the South African context as the Constitution (1996) does not contain a right to health per se, but rather a set of entitlements which, when taken together, may provide an entitlement to health. Section 27(1) encapsulates these in the socio-economic rights of access to health care, food, water and social security. In addition, the constitutional mandate to consider international law when interpreting the Bill of Rights (section 39(1)(b)) strengthens the link between the right to health, the right to food, and access to nutritious, quality food.

Given these provisions, the adoption of an FOPL system to prevent obesity can find support within section 27, particularly so with regard to the right of access to sufficient food in section 27(1)(b). In addition, the significant burden that NCDs place on the health-care sector could support the view that the COVID-19 epidemic and corresponding prevention efforts have an indirect impact on the right to access to health-care services provided in section 27(1)(a).

Section 7 of the Constitution places obligations on the state to respect, protect, promote and fulfil all these rights. The adoption of measures that simplify labelling and improve consumer understanding of the nutritional content of food can promote and fulfil the right to food by enabling consumers to make informed decisions about their nutrition and their access to properly nutritional food. Obesity and related health conditions place a significant burden on the health-care system, and consequently, any measures aimed

at NCD prevention also serve to protect the broader community's right of access to health care.

Patterson et al. (2019) have argued that a rights-based approach to preventing NCDs may bring into play a number of other civil and political rights, many of which have been codified in the South African Constitution (such as the rights to life and bodily integrity). In addition, FOPL systems can be understood in terms of the realisation of the right to information, or may even negatively impact the right to freedom of speech vis-à-vis commercial speech.

Despite the complexity of the interaction between these rights, there is a clear basis on which one can find support for action on NCDs (specifically the introduction of a FOPL system) within the Bill of Rights.

Frameworks for adopting FOPL

South Africa has a number of laws which regulate labelling. These include the Consumer Protection Act 68 of 2008 (the CPA); the Agricultural Product Standards Act 119 of 1990 (APSA); and the Foodstuffs, Cosmetics and Disinfectants Act 54 of 1972 (the Foodstuffs Act).

The Consumer Protection Act (CPA) is broadly relevant to the introduction of FOPL systems and, in certain respects, provides support for their adoption, as one of the stated goals of the CPA is to provide consumers with accurate information in plain language.

Specifically, the purpose of the Act, as outlined in section 3, is that the CPA aims to advance the welfare of consumers whose ability to comprehend labels may be limited. In section 22, the CPA provides that a consumer is entitled to information of a kind whose 'content, significance and import' the 'ordinary consumer ... with average literacy skills and minimal experience as a consumer of the relevant goods or services, could be expected to understand'.

The CPA contains several other provisions that support the introduction of a simplified FOPL. There is a prohibition of marketing which is misleading or deceptive in any way as to the nature and properties

of goods (section 2), and a warning against failure to disclose relevant material facts to the consumer, including the disclosure of ingredients and qualities of goods (section 41). The CPA also mandates warning labels for goods that are hazardous or unsafe (section 58) (although this definition does not currently encompass unhealthy foods as risk factors for NCDs).

The Foodstuffs Cosmetics and Disinfectants Act 54 is the primary legislation concerned with the labelling of food items and products as well as the regulation of food composition. NCD prevention measures (such as the placing of limits on the amount of trans-fats and sodium in certain foodstuffs) were enacted through regulations under the Foodstuffs Act. Section 15 of the Foodstuffs Act empowers the Minister to make regulations 'prescribing, prohibiting, restricting or otherwise regulating [...] labelling [...] of any foodstuff'. At present, the regulations relating to the Labelling and Advertising of Foodstuffs (R146 of 2010) require that food items carry a back panel containing the nutritional information, and set parameters for any health or nutritional claims carried on food items.

The Agricultural Product Standards Act (APSA) has also been used to introduce labelling requirements that complement the nutritional labelling system prescribed under the Foodstuffs Act. Thus, the Fruit Juice Regulations R286 of 1980 determine that items are required to carry a country-of-origin label; prescribe the requirements for labelling a beverage as a fruit juice blend; and outline how ingredients should be disclosed on the nutrition label required by R146.

In 2014, the National Department of Health (NDOH) published a draft of Regulations Relating to the Labelling and Advertising of Foods: Amendment R429 of 2014 (R429). The draft R429 sought to introduce a voluntary FOPL scheme specifically to address NCDs, as evidenced by the definition of FOPL, which entails an emphasis on 'certain nutritional information associated with the risk of developing and contributing to non-communicable diseases, outside of the Table with Nutritional information' (NDOH 2014).

The FOPL scheme outlined in R429 is not a warning-label scheme such as that endorsed by Pūras (2020) and adopted in other countries. Instead, it utilises a

voluntary traffic-light type system whereby the key nutrients of energy, sugar, fat, saturated fat and sodium are given a red, green or yellow indicator, according to the healthfulness of the ingredients.

Does R429 meet the human rights imperative to prevent NCDs?

There are some significant differences between the labelling systems proposed in R429 and the FOPL warning system endorsed by Pūras (2020). The key question is whether the adoption of a voluntary traffic-light system would suffice to meet South Africa's human rights obligations.













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The answer hinges, most significantly, on whether the R429 can meet the stated purpose of reducing DR-NCDs by enabling consumers to identify unhealthy and healthy foods. Jones et al. (2019) propose a framework to evaluate FOPL systems as a regulatory public health intervention (Table 1). The framework is useful in assessing FOPL systems because it is designed for a legal assessment and can be used to identify areas where improvement is necessary.

Following this framework, we have evaluated the draft R429 in three key domains: regulatory form, regulatory substance, and regulatory governance. The high-level findings are outlined in Table 1, with a more detailed discussion given below.

Table 1: An analysis of R429 utilising a framework for improving FOPL regulations

Component	Summarised application to FOP nutrition labelling as outlined by Jones et al. (2019)	Adequacy indicator	Quotes from the media
Domain one: Regulatory form			
Regulatory framework	Governments should consider mandatory legal frameworks to overcome sub-optimal voluntary uptake.		Draft R429 is a voluntary FOPL despite the fact that the provisions of the Foodstuffs Act allow for the introduction of a mandatory FOPL system.
FOP nutrition-label format selection	The FOP nutrition-label format should be interpretive. Formats indicating unhealthfulness seem more effective in guiding consumers to nutritionally favourable products.		Draft R429 utilises a simple traffic-light system. Evidence from high-income settings indicates that these may be effective, but evidence from low-income settings indicates that a warning-label system is easier for consumers to understand, particularly where there are low levels of literacy
Domain two: Regulatory substance			
Regulatory objective(s) Operative terms and conditions	The aim of FOP nutrition labelling is to inform and guide consumers towards healthier food choices; a secondary aim is to stimulate the production of healthier foods by the industry.		The voluntary nature of draft R429 reduces its efficacy at achieving these objectives. Companies with unhealthy products can choose not to use the label rather than reformulate or discourage consumers from purchasing their products.
Policy coherence	Operative terms include display specifications that promote visibility and salience; nutrients and food components included that link to health evidence; valid scoring criteria and reference amount; justified scope. FOP nutrition labelling should be aligned with, and enhance the operation of, other national health and nutrition policies, food regulations and relevant WHO and Codex guidance.	 	Draft R429 does contain a nutrient profiling model to use in determining the healthfulness of food products; it also excludes certain products from its scope. However, R429 does not prescribe display specifications beyond colour. The evidentiary basis for the regulation is unclear. A FOPL system would enhance existing laws and public health initiatives. South Africa has existing interventions related to some key nutrients, as well as consumer protection legislation that seeks to improve the comprehensibility of labels.

Component	Summarised application to FOP nutrition labelling as outlined by Jones et al. (2019)	Adequacy indicator	Quotes from the media
Domain three: Regulatory governance			
Drafting regulatory rules and scheme design	Government retains ultimate responsibility and authority for setting regulatory objectives and scope. Information should be transparent and easily accessible. There should be appropriate safeguards for managing conflicts of interest.		R429 was open to public comment, but it is unclear what resulted. The consultation that gave rise to the draft, the submissions, and the issue of whether appropriate systems are in place for managing conflicts of interest are unclear, particularly given industry involvement in other regulations such as sodium restrictions.
Administration	Administration is granted to an independent statutory authority, government body or multi-stakeholder group with appropriate safeguards for managing conflicts of interest. The administrative body must be provided with requisite authority and resources to conduct monitoring and enforcement activities and to publicise performance outcomes.		Administration of the regulations will sit with the NDOH, which has previously administered other labelling and NCD prevention regulations.
Monitoring	Baseline and follow-up data to be collected on uptake and label compliance by industry; consumer understanding and use; product purchases; population dietary intakes; and nutrient composition of foods.		It is unclear whether monitoring has occurred.
Evaluation	Government-led and/or carried out by independent body or research group with authority to assess achievement of the regulatory objectives using a transparent framework and sufficient data to assess whether performance indicators are met in the specified timeframes.		It is unclear whether evaluation has occurred.
Enforcement	Enforcement may be supported by pre-market approval. The administrative body possesses a range of sanctions, including positive and negative publicity, written requests for action, withdrawal of right to use (positive) labels, fines or legal action under new or existing law.		Non-compliance with the regulation is an offence under the regulation but the voluntary nature of the regulation makes enforcement unlikely.

Source: Adapted from Jones et al. (2019)

Key for adequacy indicator, which indicates adequacy of R429 against the Jones et al. framework: ✓: Adequate; X: Inadequate; O: Adequacy uncertain; -: Needs more information)

Regulatory form

Right from the start, the voluntary nature of R429 severely compromises its ability to achieve any public health or other purpose since implementation cannot be enforced. A WHO review of FOPL systems in Europe demonstrated that voluntary labelling schemes have little uptake and do little to inform consumers about the unhealthiness (or not) of a product (Kelly & Jewell 2018). Voluntary measures are unlikely to achieve regulatory objectives.

In addition, it is questionable whether the traffic-light format adopted by R429 is 'most understandable to all population subgroups' (Jones et al. 2019): formats which directly indicate the unhealthfulness of a product are much more effective. While there is evidence that shows the traffic-light format can be effective in high-income (and high-literacy) countries such as Australia and New Zealand (Dodds et al. 2014; White & Signal 2012), evidence from low- and middle-income countries reveals that the traffic light can be confusing for some consumers and that warning labels may be more effective (Freire et al. 2017; Khandpur et al. 2018; Talati et al. 2016).

There is currently a need for evidence as to the kind of labelling system that would be most effective in South Africa.

Regulatory substance

As mentioned, the voluntary nature of R429 reduces its likelihood of achieving the objectives of consumer guidance (steering consumers away from unhealthy products and towards healthier ones, as well as trying to incentivise reformulation): companies with unhealthy products can simply choose not to label. Apart from prescribing the colour scheme, R429 offers little in the way of design specifications for FOPL. This results in inconsistent placement of labels, and, often, a reduction in effective invisibility.

Nonetheless, the broader policy and regulatory environment supports the adoption of FOPL. There are existing regulations that require the disclosure of nutritional information for foodstuffs; in addition, there is some supportive legislation, in the form of the CPA, that aims to improve consumer comprehension of labelling.

Regulatory governance

It is difficult to assess how the governance components of the regulation have worked in the six years since R429 was promulgated, seeing as little information has been made public. Comparative research on the adoption of sodium restrictions on South African food products revealed that industry actors were given early access to the terms of the regulation and were able to exert their influence to weaken it (Kaldor et al. 2019).

All in all, there is a worrying lack of transparency about the governance process, and many of its working parts remain unknown. However, the fact that the administration of the regulation has been placed in the hands of the NDOH is a positive sign, given the department's considerable experience in the administration of other regulations of this kind.

Recommendations

We find three key limitations in the FOPL system proposed in R429 (and note that these threaten to compromise its ability to effectively guide consumers towards healthier food choices).

- The first is the voluntary nature of the regulation, which actively undermines the possibility of both enforcement and evaluation.
- The second is the lack of clarity as to whether the format that has been adopted is evidence-based and likely to be effective in the South African context.
- The third major concern is that the process of formulating the regulation and FOPL system has lacked transparency and thus threatens to be susceptible to conflicts of interest and influences that have the potential to weaken and undermine it.

These three limitations also fall short of the recommendations from Pūras (2019) regarding the implementation of an FOPL system which is compliant with human rights:

Within the framework of the right-to-health, States are required to adopt regulatory measures aimed at tackling NCDs, such as front-of-package warning labelling on foods and beverages containing excessive amounts of critical nutrients. Front-of-package warning labelling should follow the best available evidence free from conflicts of interest, as a mechanism through which healthy choices can become the easier and preferred option.

The limitations we have identified in the draft R429 FOPL weaken the regulation's usefulness in the task of enabling the South African government to meet its constitutional obligations to prevent NCDs. To ensure that the FOPL labelling system adopted in South Africa complies with both human rights and constitutional obligations, the government needs to ensure the efficacy of the regulation.

This requires that the policy must be evidence-based and responsive to context; that its format be legible to South African consumer across the divides of class and culture; that the government makes the adoption of FOPL mandatory; and that it put in place a clear monitoring and evaluation framework, one which is developed transparently and can be independent of the vested interests that will seek to weaken the regulation and, in doing so, compromise public health.

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