



**A STUDY ON DRFAT LEGAL FRAMEWORKS ON THE  
RIGHT TO FOOD – EXISTING GAPS AND HOW THEY  
CAN BE ADDRESSED: A POLICY BRIEF**

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## 1. INTRODUCTION

- 1.1 The right to adequate food is a fundamental and basic human right.<sup>1</sup> Its realization is a necessary precondition for the realization of panoply of other rights such as the rights to health and education, among others. The right to adequate food, including the right of freedom from hunger, is provided for in Articles 11(1) & (2) of the International Covenant on Economic, Social and Cultural Rights (ICESCR). The ICESCR is the framework (comprehensive) treaty on economic, social and cultural rights (socioeconomic rights). According to the United Nations Committee on Economic, Social and Cultural Rights (CESCR),<sup>2</sup> the right to adequate food is realized when food is available in a quantity and quality sufficient to satisfy the dietary needs of individuals, free from adverse substances, and acceptable within a given culture; and when such food is accessible in ways that are sustainable and that do not interfere with the enjoyment of other human rights.<sup>3</sup>
- 1.2 In Malawi, the Constitution provides, in Section 13, for what are referred to as “Principles of National Policy” (PNP). These PNP are important signposts for successive administrations of the Government of Malawi, providing them with an overarching Constitutional policy framework and guide that transcends partisan policies driven by particular political parties. In other words, political organizations in and out of Government are expected to fashion their policy manifestoes or agendas in ways that do not deviate from the PNP.
- 1.3 According to Section 13(b) of the Constitution, the State must “actively promote the welfare and development of the people of Malawi by progressively adopting and implementing policies and legislation aimed at achieving adequate nutrition for all in order to promote good health and self-sufficiency.”
- 1.4 The question of food and nutrition under the Constitution of the Republic of Malawi (the Constitution) however is not merely a matter for and of programmatic policies or aspirations.<sup>4</sup> It is also a matter of human rights. The right of access to food is guaranteed by the Constitution under Section 30(2) of the Constitution. The Section provides that “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...food.”

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<sup>1</sup> H Shue, *Basic Rights: Subsistence, Affluence, and US Foreign Policy* (1983) 139,140

<sup>2</sup> The CESCR is the UN body set up by the Economic and Social Council (one of the Principal Organs of the United Nations) to monitor and supervise the implementation of the ICESCR.

<sup>3</sup> CESCR, *General Comment No. 12: The Right to Adequate Food* (Art. 11), Para.8. See also J.M Greene, “Localization: Implementing the Right to Food”, 14 *Drake J. Agric. L.* 377 2009

<sup>4</sup> RE Kapindu, “Policies, aspirations, or rights? A case for mainstreaming of socio-economic rights in the Malawi Development and Growth Strategy (MDGS)” (2011) Vol. XIV, Issue II, *Yale Human Rights and Development Law Journal*, 34-65

1.5 The Constitution proceeds, under Section 30(4), to place the question of Government policies relating to socioeconomic rights such as access to food, within the legal framework of the Constitution. It provides that “The State has a responsibility to respect the right to development and *to justify its policies* in accordance with this responsibility.” Law in turn follows policy.

1.6 This Policy Brief is made against this background, and the critical importance of adopting specific framework legislation, providing both the normative as well as institutional framework for the guarantee and enforcement of the right to adequate food.

## **2. NATURE AND MAGNITUDE OF THE PROBLEM**

2.1 The right to adequate food includes the right of freedom from hunger. Freedom from hunger has been described as the minimum core content of the right to adequate housing.<sup>5</sup> Malawi has suffered periods of hunger on several occasions in the not too distant past, and successive United Nations Development Programme (UNDP) Human Development Reports have consistently classified Malawi as one of the least developed countries in the world, suffering from a deficiency of a host of human development indicators that include access to adequate food.<sup>6</sup> The World Food Programme (WFP) has properly summarised the enormity of the problem of food in Malawi. In its overview on Malawi, it states that:

With a majority of livelihoods dependent on agriculture, the population is highly vulnerable to the effects of natural disasters such as annual dry spells and flooding. Large parts of Malawi continue to suffer from food insecurity on an annual basis, particularly during the lean season (usually between December and March), due to high food prices and insufficient household crop production caused by prolonged dry spells and/or flooding. According to the Malawi Vulnerability Assessment Committee (MVAC), an estimated 695,600 people will experience acute food insecurity during the 2014/15 lean season. Women are particularly vulnerable to food insecurity as their extensive home-based workload and care work does not usually translate into economic gain, limiting their ability to afford nutritious food.<sup>7</sup>

2.2 WFP further explains that Malawi’s food security situation is further aggravated by a high HIV infection rate, currently at 11 percent, which is ranked as the ninth highest rate in the world. It states that nutrition insecurity is also high, and further that the stunting rate for children under age five is 42 percent, with little

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<sup>5</sup> CESCR General Comment No. 12: The Right to Adequate Food (Art. 11), para. 17.

<sup>6</sup> See UNDP, *Africa Human Development Report 2012: Towards a Food Secure Future*

<sup>7</sup> WFP, *Overview: Malawi*, <<https://www.wfp.org/countries/malawi/overview>> (accessed on 05 June 2015)

improvements seen over the past decades.<sup>8</sup> The UNDP's characterisation of the food problem in Malawi winds up with the following astute description:

Malawi's food related challenges include: chronic food insecurity among poor and vulnerable households, including refugees; recurrence of natural disasters such as drought and floods; high prevalence of chronic undernutrition and widespread micronutrient deficiencies; high rates of school drop-outs, repetition and absenteeism among primary schoolchildren from food-insecure households; and low incomes among smallholder farmers as a result of poor agricultural market structures and policies.

2.3 These factors are compounded by Malawi's rapid population growth that puts a severe strain on available food resources in the country. According to the UN Special Rapporteur on the right to food, Olivier De Schutter, who conducted a visit to Malawi from 12 to 22 July 2013 at the invitation of the Government,<sup>9</sup> Malawi:

has one of the highest population growth rates in the region (2.6 per cent per year). It has been designated by the United Nations Population Fund (UNFPA) as one of the 15 "population hotspots" across the globe: its population is expected to triple to over 40 million by 2040.<sup>10</sup>

2.3.1 It is therefore imperative that a policy and legislative framework be in place in order to come up with sustainable measures of addressing this perennial food problem in the country, which problem can only grow if no such measures are adopted. This situation also speaks to the urgency of the moment.

### **3. MEASURES TO DEAL WITH THE PROBLEM**

3.1 Article 11(2) of the ICESCR sets out what can be considered as a chronicle of treaty-based measures to be adopted in order to address the problem of hunger in States Parties to the Covenant. A reading of that Article shows that the following are non-exhaustive measures that are envisaged:

- (a) To improve methods of production;
- (b) To improve methods of conservation; and
- (c) To improve methods of distribution of food

3.2 These measures, according to the ICESCR, are to be achieved by:

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<sup>8</sup> Ibid.

<sup>9</sup> See Report of the Special Rapporteur on the right to food on his mission to Malawi (12–22 July 2013), UN Doc. A/HRC/25/57/Add.1

<sup>10</sup> Ibid

- (a) making full use of technical and scientific knowledge;
- (b) disseminating knowledge of the principles of nutrition; and
- (c) developing or reforming agrarian systems in such a way as to achieve the most efficient development and utilization of natural resources;

3.3 These are indeed appropriate measures to be adopted in addressing the food problem in Malawi, and that of hunger in particular. However, these measures would not be sufficient to address the problem. The UNDP has captured the challenges posed by the food problem lucidly in its *Africa Human Development Report 2012: Towards a Food Secure Future*.<sup>11</sup> The UNDP states that:

The knowledge, technology and resources for closing the food security deficit are available today, and breakthroughs will continue to emerge from research and development. But no one believes it is possible simply to distribute better seeds and more fertilizer to African farmers and then to walk away. Nor will economic growth alone solve the problem. The failures that add up to food insecurity are pervasive, from agricultural, health, education and nutrition policies to research, extension services, sanitation, local government, commerce and transport. An effective response to a challenge this broad cannot be narrowed to a single intervention, discipline or institutional mandate. It will take a coordinated response across sectors.<sup>12</sup>

3.4 The UNDP's observations are most critical strategically. The policy of the Government must include the adoption of framework legislation that recognises and regulates these interventions, disciplines, institutional mandates as well as other critical determinants of food security and nutrition, to achieve a cross-sectored coordinated and effective response to the food problem.

3.5 It is based on these normative and policy considerations that the Food and Nutrition Bill (FNB) prepared by the Department of Nutrition and the Food Security Bill (FSB) prepared by the Ministry of Agriculture have been examined and analysed in the Analytical Report that has been submitted along with this Policy Brief.

#### **4. RECOMMENDED ACTION STEPS**

4.1 The Report identifies gaps in both the FNB and the FSB in guaranteeing the right to adequate food – inclusive of adequate nutrition, freedom from hunger and food security, and also highlights the strengths and weaknesses of each Bill as against the other. The Report observes that there are significant overlaps between the two Bills, as the right to nutrition is an essential subset of the right to adequate food,

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<sup>11</sup> Note 6 (above).

<sup>12</sup> Ibid.

and that no effective comprehensive legislation addressing food and nutrition or food security matters can be effective if matters of food security and nutrition are dealt with separately, as if they are mutually exclusive. In this regard, the Report recommends that the two processes be harmonised and that a single comprehensive framework Bill on the right to adequate food be fashioned bringing together the issues currently addressed by the two Bills.

- 4.2 On careful examination, the Report proposes that of the two Bills, **the FNB which focuses on the issue of nutrition and food standards, is better suited to be further developed into a comprehensive framework piece of legislation on the right to adequate food, factoring in the issues addressed by the FSB. The FNB accords more to the multidisciplinary approach advocated by the UNDP.** It is more detailed and comprehensive, unlike the FSB. This is not to suggest that the FSB is not generally well-drafted, as it clearly is; but this is the inescapable practical consequence of choice in order to achieve a merger of the two Bills, based on an objective comparative analysis between the two Bills.
- 4.3 The use of male pronouns in both draft Bills is not consistent with gender equality principles. The Constitution has already set the ideal standard by using gender balanced language in its provisions. **Legislation on food to be adopted by the legislature must similarly adopt a gender balanced approach in its use of language.**
- 4.4 Both Bills lack necessary detail in defining the right to adequate food, its precise content, and the nature of obligations that it engenders on the State and applicable non-State actors. Such definitional detail is vital when it comes to implementation and enforcement. **The two pieces of legislation must have a provision drawn from Article 2 of the ICESCR, tailored to Malawian circumstances, in order to define in broad contours, the nature of the obligations imposed by the right to food.**
- 4.5 The obligation to fulfil is very vital in the context of Malawi as one of the least developed countries (LDC's) in the world. This obligation is of particular significance to vulnerable groups of people. The respective Bills generally fail to identify vulnerable groups of people and to spell out special measures that should be adopted to ensure the enjoyment and realisation of the right to adequate food. The Report recommends that provision be made in this regard. **Vulnerable groups to be specifically listed in the legislation include (a) children, (b) pregnant mothers, (c) lactating mothers, (d) the elderly, (e) persons suffering from debilitating or incapacitating illnesses; and (f) persons, especially indigent persons suffering from chronic food-related illnesses, among others categories as may be determined by relevant authorities (the Minister) from time to time.**
- 4.6 The Report observes that the distribution of food in times of dire need or emergency has frequently been politicised, and that those responsible for distribution have oftentimes discriminated against those that do not share political

allegiance to the political party for the time being in Government administration. **The Report recommends that such politicisation and discrimination in the distribution of food be made a felonious offence to be sanctioned by a significant prison term and fine.**

- 4.7 The Report recommends that provision be made in the Bill to be adopted defining the responsibilities of State agencies mandated to stockpile, conserve, market and/or distribute food in Malawi such as the National Food Reserve Agency (NFRA) and the Agricultural Development and Marketing Corporation (ADMARC), and any other organisation that is or may be set up by the State for these purposes, and **requiring them to prioritise vulnerable groups in their decisions and activities, and also to apply the human rights based-approach in their programming.**
- 4.8 The framework legislation on the right to adequate food **should have a provision stating its primacy over other pieces of ordinary legislation touching on the same.** Currently, the Report notes that the Food and Nutrition Bill (FNB) has such a provision whilst the Food Security Bill (FSB) does not.
- 4.9 It is imperative that the legislation adopted should **clearly outline the framework for the fundamental principles of participation, accountability, non-discrimination, transparency, human dignity, empowerment and rule of law** and how these will be upheld within the context of the legislation.
- 4.10 The Report notes that both Bills are silent on genetically modified foods (GMOs). The Report recommends that the Bill to be adopted should clearly make provision for the regulation of GMOs. It **recommends that there should be a compulsory requirement to clearly label all GMOs in order to let consumers make informed decisions, but also that provision be made for taking into account other important considerations relating to GMOs including food safety; environmental impact, perceived risks and benefits, transparency, accountability and equity.**
- 4.11 Considering that the **right to be free from hunger** constitutes the minimum core content of the right to adequate food, it is imperative that it **be clearly provided for in the legislation to be adopted, and, in particular, that specifics as to how this will be ensured, especially in times of emergency or disaster** be provided. There should also be provision **empowering the responsible Minister to promulgate subsidiary legislation (Regulations) providing more detail on who and when persons in Malawi are to become entitled to direct provision of food by the State as of right.** Currently, the FSB makes provision for freedom from hunger but weaknesses extant in the current formulation of this right in the FSB remain.
- 4.12 Both Bills are silent on the question of impact assessments on the right to food before implementation of certain projects. Such rights to food impact

assessments are critical in order to ensure the respect and protection of the right to adequate food. **It is recommended that provision be made in the proposed legislation on prior right to food impact assessments before certain projects are implemented.**

4.13 **It is important that the State must classify certain types of food items as essential, and in respect of which prices will be regulated by the State.** The appropriate monitoring and regulatory body should be given the power to regulate food prices, in consultation with the Minister Responsible for Food and/or the Parliamentary Committee responsible for food. **Food price regulation should be coupled with an incentivization scheme for producers in order to encourage production of essential food.**

4.14 The Report observes that there are no Reporting obligations by the National Nutrition Council under the FNB, whilst the reporting obligation of the National Food Security Council under the FSB makes for reporting once every two years which the Report observes is rather too long, considering the fluid nature of food related issues from year to year. In the premises, the Report **recommends that the oversight/regulatory body established under the unified Bill should have annual reporting obligations akin to those of the Human Rights Commission under the Human Rights Commission Act.**

4.15 Once the framework legislation is adopted, all **sectoral legislation touching on food matters should be reviewed within a given timeframe for compatibility with the framework legislation** to be adopted.

4.16 There must be put in place, under the framework legislation, **a monitoring system with regard to the implementation of the right to adequate food and indeed monitoring the effective implementation of the framework legislation.** The Report recommends that the **Malawi Human Rights Commission** should be accorded the Monitoring responsibility.

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The Universal Declaration of Human Rights

