

**THE RIGHT TO FOOD AND ACCESS TO LAND: TOWARDS A  
RIGHTS BASED APPROACH TO FOOD SECURITY IN MALAWI**

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## **1. INTRODUCTION**

Food security must focus on the household and availability of food therein in terms of quantity, quality and variety in the context of a given culture. Hence though it is universally acknowledged that the world produces food for everyone, not everyone, not every household has food security. Today more than 800 million people go hungry and many more, especially children, suffer from malnutrition even where there is food in a family.

### *Food as a human right*

Food is a human right recognized in international human rights instruments such as the Universal Declaration of Human Rights, 1948 and the International Covenant on Social, Economic and Cultural Rights, 1966. It is also entirely accurate to contend that deprivation of food would violate the right to life enshrined in the Malawi Constitution, 1995. It is in this context that instruments such as the world Trade Organization Agreement on Trade Related Aspects of Intellectual Property Rights (WTO/TRIPs) is considered by many as not only in conflict with biodiversity related instruments such as the CBD, ITPGRFA but also as a violation of human rights at international and national level. The WTO/TRIPs is however supported by the developed countries with financial, trade and aid assistance to influence developing countries to tow the line; but much more importantly TRIPs has binding judicial settlement mechanism capable of ordering trade sanctions against members who fail, refuse or neglect to comply with its provisions. Nevertheless these instruments provide opportunity for national governments to develop national policies and legislation that are appropriate for their specific situations.

### *Agro-biodiversity for food security*

International efforts have also focused on making food production, variety and quality sustainable secure for the expanding world population. The key to realizing this goal is dependent on agro-biodiversity that has witnessed significant reduction over the last 100 years. According to the United Nations Food and Agriculture (FAO) over 90 per cent of the world's crop varieties have disappeared in one century. Many contend that a

significant portion of this loss can be attributed to food standardization brought about multinational sold companies that have promoted certain varieties at the expense of others. They cite the use of intellectual property rights (IPRs) that grant private monopoly rights which in some respects determine, influence and or control what farmers grow, save or share. This may be determinable to crop varieties in that it deprives small-scale farmers of innovative practices arising from sharing, saving and breeding for improvement. Key international instruments regulating biodiversity in general and crop diversity in particular include the Convention on Biological Diversity (CBD), the International Treaty on Plants Genetic Resources for Food and Agriculture, (ITPGRFA) and the International Plant Protection Convention (UPOV).

#### *Other factors for food production*

In addition, the production of food is dependent on several factors; land resources are key but so is access to credit, input, market and extension facilities. For the majority of farmers in Malawi the state plays a critical role in providing these. This explains the why the commercialization of the Agriculture Development and Marketing Corporation generated such intense debate and controversy. Further, the failure of the private sector to satisfy the needs and interests of small scale farmers in agriculture produce marketing and input supply shows that the private sector cannot wholly substitute the State in these functions in a poor country. It follows therefore that there is need to regulate these factors of production in order to ensure adequate food production and food security.

This paper reviews the implications on food security of international and national instruments dealing with biodiversity trade and intellectual property rights. It considers the main issues Malawi needs to incorporate in its policies and legislation in matters of food security and in this context we consider provisions that can empower local communities, small-scale farmers and women who are usually food insecure in Malawi. We therefore analyze a rights based approach to achieving food security in the context of property rights, market liberalization, democracy and poverty reduction issues.

## 2. Property Rights, the Right to Food and Hunger

Hunger is the condition of a person who does not have enough food. It is now widely recognized that hunger and malnutrition cannot be adequately explained merely by climatic, demographic or natural resource decline factors leading to food availability decline. These may partly explain why people go hungry but it is not the whole story<sup>1</sup>. Amartya Sen<sup>2</sup> has identified failure of entitlement systems as a major cause of hunger today. To Sen entitlements refer to legal rights, the array of rights and arrangements that affect an individual's ability to obtain food. The resources a person has for his own use determines what they can obtain for their basic needs either through income generating work or through actual production of the goods<sup>3</sup>.

The presence of hunger and its prevention or eradication largely depends on how property rights are structured. In addition the private market currently in vogue in the world trading system brings further challenges especially to the vulnerable groups in society. So long as people's only or main claim for food is through the market and incomes and prices are volatile, many will die from hunger irrespective of the amount of food produced<sup>4</sup>.

In a functioning democracy however the distribution of goods should be in accordance with shared principles and a shared understanding of citizens' needs rather than unexplained wants. The goods distributed by public institutions are provided on non-exclusive basis, everyone and not just those that can buy have access. Unlike in a market citizens express their choices through voice rather than exit. They will not leave the country if their chosen representatives do not fulfill their desires. Again while in a market

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<sup>1</sup> See T L Myhrvold Hansen (2002) *Hunger, Private Property Rights and the Right to Food* (University of Oslo: Centre for Development and the Environment, Working Paper No. 2002/02).

<sup>2</sup> See A Sen (1981) *Poverty and Famine: An Essay on Entitlements and Deprivation* (Oxford: Clarendon Press).

<sup>3</sup> As an example Sen, *ibid*, in chapter 6, uses the 1943 Great Bengal famine when 3 million people died even though the total food production available was higher in that year than the previous two years when there was no famine. Shifting purchasing powers of various groups, especially rural labourers who were hardest hit, basically caused the famine.

<sup>4</sup> See Myhrvold Hansen, *ibid*, page 10.

the freedom to buy a car and the freedom not to go hungry have equal status<sup>5</sup>; this equality cannot be tolerated in a democracy.

The close relationship between property rights and hunger is understandable since hunger is primarily associated with lack of guaranteed access to enough food<sup>6</sup>. Property rights over food are derived from property rights over other goods and resources, through production and trade. It follows that the entire system of acquisition and transfer of property is heavily implicated in the emergence and survival of hunger and starvation. We examine here some aspects of property and public goods distribution frameworks that have a bearing on access to realizing material aspects of the right to food.

### **3. International Human Rights Perspectives of Food Security**

The starting point is the Universal Declaration of Human Rights (UDHR), 1948 which in its preamble reaffirms fundamental human rights, the dignity and worth of the human person, equal rights of men and women and to promote social progress and better standards of life. In addition to the civil and political rights the UDHR gives every person the right to a standard of living adequate for the health and well being of himself and of his family, including food, clothing, housing and medical care and necessary services and the rights to security in the event of unemployment, sickness, disability, widowhood, old age or other lack of livelihood in circumstances beyond his control (Article 25.1). Not only does this clause incorporate the essence of food as a necessary component for living; it also incorporates the concept of food security, especially for the vulnerable in society. An express right to food is clearly provided for<sup>7</sup>.

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<sup>5</sup> *Ibid*

<sup>6</sup> There are of course recognized exceptions such as intra-family inequitable food distributions based on gender and age.

<sup>7</sup> It is worth noting that the Universal Declaration of Human Rights has attained the status of customary international law and is therefore directly applicable and enforceable in Malawi. More importantly, the Supreme Court in *Chihana –vs- Republic* MSCA, Criminal Appeal Number 9 of 1992 declared that the UDHR is part of the law of Malawi. This was based on the fact that section 2 of the 1966 Malawi Constitution had provided for the applicability of the UDHR in Malawi law, a strange scenario considering the human rights situation at the time.

The International Covenant on Economic, Social and Cultural Rights (ICESCR) expands the right to food. In particular, the ICESCR, taking inspiration from the UDHR, declares that the ideal for freedom from fear and want (which should include food security) can only be achieved if conditions are created whereby everyone enjoys his, *inter alia*, economic, social and cultural rights (the preamble). In this respect Article 11 of ICESCR repeats the provisions of Article 25.1 of the UDHR. But the ICESCR goes further to oblige state parties to recognize the fundamental right of everyone to be free from hunger and undertake programmes and measures 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 a most efficient development and utilization of natural resources.

Children under the age of 5 are the most vulnerable to malnutrition. The World Health Organization links malnutrition to at least 10 million deaths per year. Young children are more susceptible to disease resulting from malnutrition and they also experience irreversible physical and mental damage that affects them throughout their lives. *The Convention on the Rights of the Child* (1989) was adopted to identify and protect the best interests of the child. Article 24 recognizes the ‘right of the child to the highest standard of health. State parties commit to take steps toward ending child and infant mortality and eliminate conditions that lead to child death including ill health and malnutrition. Government have an obligation to provide child food security. The convention ties the rights of the mother to the well being of the child. Article 24 acknowledges the mother’s right to pre and post-natal health care, access to information and education regarding child health and nutrition and others.

Table 1 below summarizes key provisions from international instruments on human rights that affect various entitlements including the right to food. Box 1 synthesizes key concepts in human rights instruments.

**Table 1: International Human Rights Instruments**

<i>Capital Asset</i>	<i>Relevant Rights</i>	<i>Principle references in Human Rights Convention</i>
Natural capital	Right to a health environment Right to safe and healthy working conditions Children’s rights to a healthy environment Right to own land and other property Land rights of indigenous and tribal peoples Right of all peoples to a general satisfactory environment favourable to their development	ICESCR 12b ICESCR 7b CRC 24 UDHR 17; CEDAW 16.1h; ICERD 5d,V ILO convention NO 169 African Charter 24 (see also the 1972 Stockholm Declaration & Rio Declaration (1992))
Physical capital	Right to food Right to own property Right to adequate housing Women’s right to own property Women’s right to equal treatment in agricultural reform and land resettlement Right to water and sanitation	ICESCR 11; CRC 24.2c UDHR 17 UDHR 25; ICESCR 11 CEDAW 15 CEDAW 14  CRC 24; CEDAW 14
Human capital	Right to education Right to health Right to reproductive health services Right to social security Right to freely chosen employment Labour standards Freedom of association Freedom from forced labour Right to non-discrimination in employment Minimum age employment Protection from worst forms of child labour Rights from home workers	UDHR 26; ICESCR 13,14; CEDAW 10; ICERD 5 CRC 28 ICESCR 12; CEDAW 12; CRC 24 ICESCR 12.2a; CEDAW 12.2; CRC 24.1d,f UDHR 22; ICESCR 9; CEDAW 11; ICERD 5; CRC 26 UDHR 23.1; ICESCR 6; CEDAW 11a; ICERD 5e.iv ILO 87, 98 ILO 29, 105 ILO 100, 111 ILO 138 ILO 182 ILO 177
Financial capital	Women’s rights to bank loans, mortgages and other forms of financial credit Women’s to agricultural credit and loans and marketing facilities	CEDAW 13b  CEDAW 14.2g
Social capital	Right to non-discrimination  Right to security of person Right to marry and equality within marriage  Freedom of association Freedom of thought, conscience and religion Right cultural life	UDHR 2; ICCPR 2.1; ICESCR 2.2; CRC 2; CEDAW 1.2,3; ICERD 1,2,3 UDHR 3; ICCPR 2.1; ICESCR 2.2; CRC 2, DEVAW 3a,c UDHR 16; ICCPR 23; ICESCR 10.1; CEDAW 16.1a,b,c; ICERD 5d,iv UDHR 20; ICCPR 21,22; ICERD 5d,ix; CRC 15 UDHR 18; ICCPR 18; ICERD 5d, vii; CRC 14 UDHR 27; ICCPR 27; ICESCR 15; CEDAW 13c; ICERD 5e,vi; CRC 30, 31
Political capital	Right to political participation Right to information and freedom of expression Freedom of association Right to be recognized as a person before the law Right to equal treatment before the law	UDHR 21; ICCPR 25; CEDAW 7; ICERD 5c UDHR 19; ICCPR 19; ICERD 5d, viii; CRC 12,13,17 UDHR 20; ICCPR 21,22; ICERD 5d,ix; CRC 15 UDHR 6; ICCPR 16; CEDAW! 5.2,3 UDHR 7; ICCPR 14.1; CEDAW 2c; ICERD 5a

*Adapted from C. Moses and A Norton (2001). To claim our rights: livelihood security, human rights and sustainable development (Overseas Development Institute)*

- ICRSCR: International Covenant on Economic, Social and Cultural Rights.
- UDHR: Universal Declaration of human Rights
- CRC: Convention on the Rights of the Child
- CEDAW: Convention on Elimination of all forms of Discrimination Against Women.
- ICERD: International Convention on Elimination of Racial Discrimination
- ILO: International Labour Organization
- ICCPR: International Covenant on Civil and Political Rights.

### **Box 1: Human rights, sustainable development and livelihoods: key normative principles**

***Human freedom:*** Expanding human freedom entails expanding human liberties, opportunities and capabilities. Deprivations in human freedom relate to the inability to avoid hunger, poverty, treatable illnesses and premature mortality as well as denial of civil and political liberties. A human rights perspective highlights the importance of processes and policies that expand human freedom and capability by respecting, protecting and fulfilling individual choices and enabling people to achieve what they value.

***Universalism and equality:*** Human rights are inclusive in character and apply to all people everywhere on equal basis. The principle encapsulates recognition of the equal dignity and worth of all beings. All people should be treated fairly in a consistent manner on the basis of non-discrimination.

***The multi-dimensional character of well-being:*** Human rights for the life, survival, integrity and development of the human person include human rights to liberty, security and well-being. These human rights reflect the principles of interdependence and indivisibility in the sense that achievement of all human rights should be given equal priority and urgent consideration.

***Transparency, participation and empowerment:*** In order to peoples' freedoms and capabilities, development processes and policies that respect people's human rights and entitlements are required. The principles of transparency, participation and empowerment can help to ensure that development institutions are responsible and accountable, and that people are fully informed and can influence and have a stake in the decision making processes that affect their lives.

***Responsibility and accountability:*** individuals, organizations and governments have responsibilities to respect, promote and fulfill all human rights for all. Governments have particular responsibilities and are accountable for respecting, promoting, and fulfilling internationally recognized obligations in the field of human rights.

***Sustainability:*** Development processes should respect the rights of future generations as well as the present. As Sen argues sustainability means 'development that promotes the capabilities of people in the present without compromising the capabilities of future generations' (2001).

#### **4. Human Rights, Food Security and Health in Malawi**

The Malawi Constitution is the supreme law and policy instrument in Malawi and even international law is subject to the Constitution (section 211). This is already an expression of sovereignty as enshrined in various international instruments including the United Nations Charter. In the context of biodiversity the principles of national policy in section 13 provides for the responsibility of Government to conserve and enhance the biological diversity of Malawi (paragraph d) while paragraph (d) calls upon the state to achieve adequate nutrition for all in order to promote good health and self-sufficiency in food. The effect of the principles of national policy in the Constitution is to provide direction for Governments action and is therefore not binding; but courts may take them into account in determining the validity of executive decisions and in interpretation of the Constitution.

##### *Right to food and right to life*

The Constitution does not provide for a readily enforceable right to food. However two provisions in the bill of rights may be interpreted as providing for a right of access to food or health facilities. The first is section 16 that provides for the right to life. It does not require too much analysis to conclude that the right to life is not confined to the physical aspects of a person's well being. It also includes the material aspects that enable a person realize that right. In that respect deprivation of food and health facilities would violate such a right and so would violation of a clean and healthy environment.

In the Pakistan case of *MS. Sheila Zia –v- WAPDA*, Human Rights case Number 15-K of 1992<sup>8</sup> the question arose regarding the meaning and content of the right to life enshrined under article 9 of the Constitution of Pakistan. The Supreme Court of Pakistan had no hesitation in declaring that the word life covers all facets of human existence. It does not mean nor can it be restricted only to vegetative or animal life. The Supreme Court stated that '*life includes all such amenities and facilities which a person born in a free country is entitled to enjoy with dignity, legally and constitutionally*'. In this particular case the right to life was considered in the context of exposure of people to electromagnetic fields

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<sup>8</sup> This case is reported in the UNEP/UNDP/Dutch Government (1998), *Compendium of Judicial Decisions in matters related to the Environment: National Decisions*, Volume at page 323.

which was considered a health hazard. This pronouncement however equally applies to a right to amenities that support life such as food, shelter and others.

It is also significant that the Supreme Court of Pakistan considered the right to life alongside other related rights such as the inviolability of the dignity of man as an essential component of the right to life. The Constitution of Pakistan protected, just like the Constitution of Malawi in section 19, the fundamental right to protect and preserve the dignity of all persons. Using this provision the Supreme Court of Pakistan held that where the life of a person is degraded, the quality of life is adversely affected. There can be no worse degradation than to lack food and nutrition which are the basis of life itself. Hence freedom from want and from hunger is the prerequisite of the right to life.

The foregoing is a circuitous route of establishing what should clearly be articulated in a direct manner in a country's constitution as well as supporting policy and legislation instruments.

#### *Right to food and right to development*

In addition section 30 of the Malawi Constitution provides for the right to development which, though at first glance appears communitarian in nature, is essentially intended to address individual needs. Subsection (2) is particularly relevant in relation to access to food and health facilities. It states 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 basic resources, education, health services, food, shelter, employment and infrastructure.”*

The services mentioned in the above provision are to be provided for all Malawians and for the benefit of individuals that require them. The section provides for equalizing opportunities of access to food, shelter, employment and infrastructure and health services to ensure that the material requirements for realizing the right to development

should be provided and facilitated. Hence there is no specific right to food or access to food as such. Access to food and other material requirements are merely part of the right to development. One can therefore enforce the right to development and through that specifically claim equal opportunity in their access to basic resources including food. On the other hand it seems that it is only when there are inequalities that a claim can be made; mere lack of food or access to food would be no ground for making a claim against Government. Section 30 is certain enough to exonerate the State from any specific obligations relating to food security or access to land.

Commentators have considered the measures a state should take in order to actualise the right to development. These include land reform, ensuring physical and economic access to credit, natural resources, new technologies, rural infrastructure, irrigation and provision of explicit farmers' rights through legislation<sup>9</sup>.

The state needs to deliberately put in place mechanisms to ensure that cash crops do not replace food crops at the expense of food security; that the private sector is regulated to prevent them violating farmers rights and that there is sufficient R & D with respect to under utilized crops of high nutritional value (*ibid*). On the other hand, the enforceability of these so-called 'third generation' socio-economic rights has been subject to several doubts. However the South African Constitutional Court<sup>10</sup> has come out quite clear and held these enforceable; though consideration need to be taken of availability of state resources in determining the type of executive or legislative action to be undertaken in fulfilling these rights. These rights would be quite instructive for Malawi; though it may be essential to strengthen the rights of access to food and health further under our Constitution.

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<sup>9</sup> See Phillip Cullet (2004) *Human Rights and Intellectual Property Rights: Need for a New Perspective* ([www.ielrc.org](http://www.ielrc.org)).

<sup>10</sup> In *Minister of Public Works and Others –vs- Kyalami Ridge Environmental Association* (case No CCT 55/00); *Government of Republic of South Africa –vs- Grootboom* (case CCT 11/00); and *Minister of Health –vs-Treatment Action Campaign* (case CCT 8/02), the Constitutional Court held that access to housing and access to health are enforceable under the South African Constitution. The South African Constitution of course is much more clear and direct than the Malawi Constitution; nevertheless the fact that the rights of access to food and health facilities appear in the bill of rights the reasoning in the above cases can be applied to Malawi for Government to provide core minimum to the plight of those suffering from deprivation and healthy problems.

*Intergenerational and intragenerational equity and food security*

Finally, it is important to note the intergenerational and intragenerational responsibilities and rights pertaining to food security and the right to food. Section 13 (d) of the Constitution provides for environmental responsibilities of the State which has the duty:

*‘To manage the environment responsibly in order to-*

- (i) prevent the degradation of the environment;*
- (ii) provide a healthy living and working environment for the people of Malawi;*
- (iii) accord full recognition to the rights of future generations by means of environmental protection and the sustainable development of natural resources; and*
- (iv) to conserve the biological diversity of Malawi.*

It follows that in our quest for food security and to facilitate the right to food we must ensure that we do not deplete or degrade the natural capital to such an extent that future generations will be unable to achieve sustainable development. Sen’s definition of sustainable development incorporates this principle. Sustainable development is development which promotes the capabilities of people in the present without compromising the capabilities of future generations<sup>11</sup>. Intergenerational equity has various implications on the right to food and its intergenerational impacts. Firstly, fulfilling human rights today fulfills aspirations and rights of future generations. This is because the more equal opportunities there are the more there are likely to be reduction on excessive or destructive consumption patterns. Potential conflicts between the interests of present and future generations can only be addressed by equalizing opportunities between the poor and the rich today. Secondly, the poor are unlikely to accept restrictions or moderations on their use of natural resources unless

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<sup>11</sup> A Sen (2001) *The Ends and Means of Sustainability* quoted in A Moser and A Norton (2002) *To Claim Our Rights: livelihood security, human rights and sustainable development* (Overseas Development Institute)

intragenerational inequalities are addressed and there are equal opportunities and fulfillment of basic rights such as the right to food<sup>12</sup>.

One lesson from this analysis is that civil society seeking to address resources inequalities and promote the right to food and food security must have long term vision in their work plan. They must transcend a ‘relief’ approach to their development planning and advocacy campaigns.

### **5. The Right to Food and Economic Liberalization**

Malawi and many other countries have in recent years been required by lending institutions such as the World Bank to liberalize their economies. Liberalization includes many economic strategies but in general it has entailed the withdrawal of the state from the production sector and even provision of factors of production. It has also included removal of subsidies in many production sectors including agriculture. The retreat of the state has also been accompanied by reduction in staffing from service departments including agriculture extension services, even when it is clear the private sector could not invest in them. No wonder these strategies have been blamed by various quarters of contributing to chronic low agriculture productivity in general and food insecurity<sup>13</sup>.

In addition, the retreat of the state from the market in Malawi meant that the State had to disinvest in the Agriculture Development and Marketing Corporation that had been responsible for promoting small-scale agriculture development and acted as the market for agriculture in put supply and produce market. The divesture has adversely affected access to the input supply market and the produce market for small-scale farmers as the private sector can hardly be relied on to fill the gap. The privatization/commercialization of ADMARC has therefore met stiff resistance from various sectors and has had to be reversed.

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<sup>12</sup> See C Moser & A Norton, *Ibid*

<sup>13</sup> See for example community views recorder in CISANET (2004) *The People’s Voice: A community consultation report on Malawi Food and Nutrition Policy Formulation Process* (CISANET, Lilongwe).

It is interesting to note that section 13 (n) of the Constitution directly addresses economic liberalization. The State has an obligation to:

*‘...achieve a sensible balance between the creation and distribution of wealth through nurturing of a market economy and long term investment in health, education, economic and social development’*

It is clear therefore that the State does not advocate economic liberalization or the retreat of the State from the market as such. Rather the state must not only put in place policies that promote economic growth; it must also regulate the market and ensure equitable distribution of the proceeds of economic growth. This includes investment in social services. Further, when this provision is read with section 30 of the Constitution it is quite clear that the State has an obligation to invest in social services that can empower the poor and assist in poverty reduction. These policy directions are provided for in the Malawi Poverty Reduction Strategy Paper 2002 and hence are already part of Government policy. What is required is to reflect these policy directions in legislation that empowers vulnerable groups through investment in economic and social services including infrastructure for agriculture in put supply as well as markets that can enhance food security. Hence legislation that would mandate ADMARC in this regard would be fully compliant with the Constitution and existing economic policy frameworks.

## **6. The Right to Land and Food Security**

Ownership, use and management of land have gone through several shifts in the last century. Authority and control over land has moved from community to state and as society has been monetised land has become a commodity detachable from the inhabitant or the tiller and tradable in the market. In addition, distribution of land has become less even<sup>14</sup>, as the rich and powerful have amassed more land causing landlessness to the poor and vulnerable. Paradoxically, it is the poor and the vulnerable that need land more than the rich since the former have no other alternative means of production; such that landlessness is the best evidence and perhaps major cause of food insecurity.

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<sup>14</sup> Alden Willy, L & S Mbaya (2001): *Land, People and Forests in Eastern and Southern Africa in the 21<sup>st</sup> Century. The Impact of Land relations on the role of local communities in the forest future* (Nairobi, IUCN-EARO). Page 75

The English conception of land is that people do not necessarily own the land itself but that they hold interests in land; even seemingly absolute and exclusive land rights such as freehold titles are merely forms of holding that denote the type of interest that one has in the land. Thus under English land law the crown is the owner of land and the rest hold interests of varying duration in that land. The principle of *eminent domain* that provides state supervision over land has been imported into the Malawi. In the Malawi Constitution, section 207 provides a curiously worded reflection of this principle. It states that subject to the Constitution, all lands and territories of Malawi are vested in the Republic. In international law the Republic of Malawi denotes the state of Malawi that comprises the territories and people of Malawi. Legally, the state cannot be vested with land; rather the land would be vested in the Head of State.

The vesting of the land in the Republic seems to be an expression of the fear of what the heads of state can do to land when it is 'in their name'. Section 207 is therefore more of a political statement rather than a legal provision. It needs to be given legal force. The Law Commission has proposed that the land and territories be vested in the Government<sup>15</sup>. We disagree on the ground that the political statement that the framers of the Constitution had in mind is important save that the land should be vested in the people of Malawi and, if legal technicality must be adhered to, then we should vest all lands in the President as Head of State on express trust for the people of Malawi. The people are therefore the chief landlord and everyone else would be the tenant of the people.

What is significant however is to provide mechanisms for local ownership, control and management of land. The first step would be to vest all the categories of land in appropriate authorities. Hence customary land, the largest category, should be defined territorially and vested in traditional authorities as trustee for the people in their jurisdiction<sup>16</sup>. This would entail removing the sweeping powers the Minister responsible

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<sup>15</sup> Malawi Government (1998) *Law Commission Report on the Technical review of the Constitution*, Malawi Government Gazette, General Notice Number 230, page 326

<sup>16</sup> This a recommendation the Presidential Commission on land made in its report in 1998 but the Malawi National Land Policy, 2002 has not adopted.

for lands under the Land Act and which significantly led to unsustainable depletion of customary land resources through leaseholds granted to middle classes from the 1970s to the early 1990s. These leases are currently largely idle and rural landlessness is increasing.

The law should also deal with customary tenure in that though the Land Act defines customary land as land that is held in accordance with customary law applicable where the land is located, there is little customary law that actually regulates customary land. In essence customary land can be accurately defined by the fact that its regulatory framework is *informal*, rather than customary law<sup>17</sup>. This informality provides ammunition for unscrupulous land dealers and state officials to exploit the vulnerable and the poor. The only enduring feature of customary land tenure is its communal reference<sup>18</sup>. Here then lies opportunity to develop a workable tenure arrangement together with the local communities. The decentralization process offers a chance to put a system in place that can combine written local rules and some informal governance structures on customary land.

In addition to tenurial arrangements, mechanisms should be put in place to control wide disparities in land holdings. Hence while the National Land Policy and the Land (Amendment) Act 2003 concentrate on restricting ownership of land by non Malawians and prohibits them from holding freeholds, these non Malawians have the legal right to hold large pieces of leasehold land up to 50 years, in some cases merely for speculative purposes. Yet landlessness among Malawians is increasing and there is very little attempt to redistribute land. The tenure restrictions are merely political gimmicks intended to win political sympathy but have little to do with making land available to the landless<sup>19</sup>.

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<sup>17</sup> Alden Willy, *supra*, page 77.

<sup>18</sup> On the other hand, the informality has advantages in that rules change according to societal needs and have acceptability and adherence from the community.

<sup>19</sup> It should be observed that the only programme intended to distribute to the landless is a project of the World Bank. There is no national process to redistribute land

Under the Malawi Constitution as in many others the right to land is expressed or subsumed in the provision protecting private property in general. Section 28 states that every person shall be able to acquire property alone or in association with others and that no person shall be arbitrarily deprived of property. This embodies the market access to property and does not deal with redistributive aspects of property such as land. Section 30 (2) of the Constitution comes close to dealing with the redistribution of land in that it imposes an obligation on the state to provide equality of opportunity for all in access to basic resources. Although basic resources are not defined, land clearly is a basic resource and in that regard, Government has an obligation to provide equal opportunity for all in access to land.

In addition, since equality of opportunity of access to food is expressly provided for and land resources are an essential component of food production, Government must put the constitutional measures for promoting equal opportunity for access to land including introducing reforms aimed at eradicating social injustices and inequalities. No doubt such reforms should include land redistribution and providing for ceilings regarding the amount of land that one can be allowed to hold considering the use, investment and capacity of the person or entity in question.

Again this analysis shows that to arrive at a constitutional right of access to land one has to go round several bends; this is not conducive to an enabling policy and legal framework to protect basic human needs such as land. There is need therefore for a clear constitutional provision giving the right of access to and specifying government responsibilities, the details of which can be provided for in basic land legislation.

## **7. Agro-Biodiversity and Food Security**

The provisions of the UDHR and ICESCRs set the direction State Parties should take in guaranteeing and protecting social, cultural and economic rights of their people. More importantly for our purposes they provide the linkage between human rights, food security and sustainable biodiversity conservation and utilization. The United Nations conference on Environment and Development developed these ideals further when in 1992 it adopted the Rio Declaration including the CBD with specific commitments by

parties to actively involve local communities in order to facilitate effective environment and natural resources management.

The CBD noted the importance of biodiversity for evolution and providing life sustaining systems of the biosphere. It provides *inter alia*, for *in situ* and *ex situ* measures for sustainable management of biodiversity, as well as access to genetic resources and access to and transfer of technology required for exploitation of genetic resources: Articles 8,9,15 and 16. The provisions on access to genetic resources are particularly critical to food security issues in that they provide mechanisms through which state parties can provide and obtain access to biological resources as well as the sharing of benefits arising from exploitation of genetic resources such as plant and animals that can enhance food security.

The preamble to the CBD clearly points out that regulating conservation, sustainable utilization and access to biological resources is a national responsibility. It further points out however that conservation of biological diversity is a common concern of mankind. Hence other countries have interest and may be involved in, subject to national law, biodiversity issues. Further, while regulating access is a national responsibility CBD parties have a duty not to unduly restrict access to biodiversity. Article 19 provides for sharing of benefits arising from technological exploitation of genetic resources and parties are obliged to institute appropriate mechanisms to enhance sharing of such benefits. State parties are required to take necessary measures for the private sector to facilitate access to, as well as joint development and transfer of technology.

The International Treaty on Plant and Genetic Resources for Food and Agriculture was adopted in 2001 and came into force in 2004. The ITPGRFA transformed the previously non-binding IUPGRFA into a binding treaty. As its name suggests it deals mainly with plant genetic resources for food and agriculture and is therefore very critical for food security issues. The overall aims of the ITPGRFA are to promote sustainable agriculture and food security. Following the CBD, the ITPGRFA radically changed the legal status of plant genetic resources in international law. Hence while the previous instrument – the

International Undertaking for Plant Genetic Resources for Food and Agriculture-promoted sharing of plant genetic resources, the new Treaty affirms the sovereignty of states over their plant genetic resources and allows for introduction of intellectual property rights. Its main contribution to the international legal framework especially for developing countries is its focus on farmers' rights and their contribution to conservation of agro-biodiversity and, to some extent, the question of tradition knowledge. The Treaty gives broad guidelines on the scope of farmers' rights to be protected but leaves the responsibility for realizing farmers' rights to member states. This includes protection of traditional knowledge, benefit sharing issues and participation in decision-making regarding management of plant genetic resources. The main significance of the ITPGRFA however is its regime of access and benefit sharing and thereby linking directly to IPR issues. In this respect the Treaty establishes a Multilateral System of Access and Benefit Sharing and provides for a facilitated access to the Multilateral System which will hold plant genetic resources in *ex-situ* collections by the Consultative Group on International Agriculture Research as well as those provided by states parties and natural and legal persons from member states in accordance with the Treaty<sup>20</sup>.

### *Plant Breeders Rights*

The TRIPs agreement on the other hand requires introduction of IPRs to protect plant varieties and offers parties to it to institute patent protection or *sui generis* systems which has been interpreted to mean adopting patents or plant breeders' rights. The latter are closely related to patents and were first defined in the UPOV Convention. PBRs grant commercial breeders exclusive rights over their inventions but have more exceptions than patents in that they can provide for exceptions to allow breeders research and for farmers to save and exchange seed. PBRs are certainly a component of a *sui generis* system which can be construed in a different way and therefore providing for more options. TRIPs itself does not define *sui generis* and therefore it is for national legislation to define in accordance with national circumstances.

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<sup>20</sup> For an exhaustive discussion see G Mkamanga and G Banda (2004) 'Biodiversity, Modern Biotechnology Policy and Food Security in Malawi' (Paper presented to a workshop on Modern Biotechnology, Sun 'N' Sand Holiday Resort, Mangochi).

### *Implementing international regulation*

The above discussion should show a window in the international legal framework for the protection and management of plant genetic resources essential for food security. The CBD and ITPGRFA address the effects and role of IPRs on traditional knowledge while TRIPs is silent and may seem hostile to traditional knowledge or indeed environment and natural resources management. Since there is no one institution to harmonize these differing perspectives the ball is in the court of national implementing authorities that international obligations are given equal and thorough consideration subject to constitutional provisions which protect fundamental rights and sets national policy.

### **8. Food Security and Biosafety**

Modern biotechnology has introduced new technologies that promise higher yielding, disease resistant crop varieties that may enhance food security. Both draft Food and Nutrition Policy and the National Environmental Policy address the question of biotechnology. The draft Food and Nutrition Security, for example, seeks to promote biotechnology and biosafety issues by regulating use of genetically modified foods. The National Environmental policy on the other hand, will regulate development and use of modern biotechnology including GMOs in order to enhance biosafety. These complementing policy statements suggest Government policy is to welcome GMOs for food security; the safety of such food will be regulated. It is however important to note that in times of food crisis, these policy statements may not mean much, especially considering the inadequate capacity in the country to deal with biosafety issues. Further although the Biosafety Act provides the necessary legal framework for regulating biotechnology, the institutional framework remains uncoordinated and therefore vulnerable to abuse and manipulation. In addition, the Consumer Protection Act and the Biosafety Act make labeling of GMO products mandatory. However the implementation of this requirement will continue to be a challenge due to low levels of public knowledge and capacity to detect and monitor GMOs in the country.

## **9. Recommendations for Policy Change**

Malawi has in recent years experienced chronic food shortages. These shortages are mainly explained by physical factors to which the country has no control. It is however increasingly becoming clear that there is a human hand to food insecurity and hence a great need to consider appropriate policy responses to this problem. We have examined here one angle of possible responses through a rights based approach that considers the array of legal rights and arrangements that determines a person's ability to have access to food. In a predominantly agriculture economy such as Malawi that is dominated by small-scale poor farmers, the role of the state is critical. Malawi has not reached and is not about to reach a point when the state can withdrawal from agriculture and let the private sector sort it out with subsistence farmers.

We therefore recommend the following policy responses to promote food security issues at various levels:

### *9.1 The Constitutional Response*

The ongoing Constitutional review provides a unique opportunity to raise the profile of food security in national development. We have noted that the provisions of the Constitution that have a bearing on food security do not come out clearly to confer the right to food to citizens and stipulate the obligations of the State in facilitating these. We therefore recommend that a specific right to food be included in the Constitution which will not leave room for much debate and interpretation as to its content and meaning. There should also be a corresponding right to a minimum piece of land for food production for subsistence farmers. This would oblige the state to resettle families that cannot afford such minimum land sizes. Such a stipulation will reduce land pressure and enhance environmental conservation where the carrying capacity of land cannot be maintained.

It will also be important to put in place specific provisions for promoting women's rights as food producers. In particular, the Constitution must provide for protection of women's land rights as well as other factors of production so as to safeguard and enhance their role

as food producers and processors. The Convention on the Rights of the Child needs to be considered as well so as to bring women's rights to food and land within the context of child rights and welfare. The state must provide additional support to mothers so as to ensure the nutritional well being of children.

### *9.2 Decentralizing control of local resources*

The intervention of the State in the control of land at local level has greatly contributed to depletion of land available to local people. This has been especially so with regard to allocation of customary land for leases to be used for cash crop production. Unfortunately, when these leases expire they become State property and the land is permanently alienated from the local land pool. The result has been that while population levels continue to rise, available land resources have declined.

The National Land Policy has proposed that expired leases should revert to customary tenure. There is need however for new land legislation to provide for this change and put in place mechanisms for ensuring that local land resources benefit local people for food security purposes before alienating land for cash crop production. Further, the new land law should impose obligations on local leaders or institutions to exercise their powers on trust for local people and thereby make them accountable for decisions that adversely affect the local community resource pool. In addition, these institutions and powers should be integrated in the decentralization policy framework and therefore provide the link between local and national institutions through which claims and entitlements can be made and processed.

### *9.3 Protect community and farmers' rights*

The rights of farmers to save, exchange and reuse seed is essential for reducing farmer's dependence on commercial seed companies and therefore enhance food security. Further, there is need to promote the participation of farmers in decision making in issues that affect them. These rights have been recognized and protected under the International Treaty on Plant Genetic Resources for Food and Agriculture to which Malawi is party. The country now needs to put in place policy and legislation instruments that domesticate

these provisions. Malawi does not have a plant variety legislation to deal with plant breeders' rights, farmers' rights or protection of community technology; the application of the ITPGRFA would therefore fill this gap. The African Union Model Law on Community and Farmers Rights provides a starting point for developing an appropriate instrument.

#### *9.4 Consumer protection*

The Consumer Protection Act provides for safeguards that would protect consumers from unwholesome and other safety concerns. This includes safety concerns arising from biotechnology related food products. However safety issues have relevance when knowledge and choice are available. Hence, where people do not know or appreciate the dangers of certain foodstuffs the Consumer Protection Act or any other legislation that protect consumers will have little or no relevance. In addition, in times of food crisis there is unlikely to be options available regarding which food one would consume. The protection that legislation may provide would have less meaning especially for vulnerable groups.

#### *9.5 Limitations of rights based approach*

It may be concluded from paragraph 18.4 above that food security is in the availability of food that is acceptable to the community; the critical issue however is to design policy responses that will put food on the table. The rights considered in this paper require the intervention of the State; the experience for Malawi so far is such that too much trust on Government is less likely to bring food on the table considering that several factors will determine whether a Government will respond positively. These include how open and transparent a Government is in its transactions, accountability of state officials and how susceptible they are to corruption as well as political interests which may affect food distribution.

For these reasons a rights based approach requires sustained agitation and advocacy on the part of those who have a voice to speak for the voiceless especially civil society groups. Hence once a policy and legislation instrument has been put in place, there is

need to intensify campaigns to widely disseminate the new policy or legislation instruments to critical stakeholders as well as local communities who are directly affected by its provisions. There must also be sustained engagement with the institutions responsible for the implementation of the policy and or legislation so as to ensure that state obligations are performed. Finally, civil society institutions need to test the applicability of the rights that have been enacted by insisting on implementation and where this is not done then legal action should be taken accordingly to enforce these rights. Cooperating partners must be requested to budget for these activities since mere enactment of legislation is no guarantee that the right will actually have meaning to the beneficiaries.