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# LEGAL ANALYSIS OF THE DRAFT LAW ON AGRICULTURE, FOOD SECURITY AND NUTRITION

DRAFT

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# INTRODUCTION

## SOCIO ECONOMIC FRAMEWORK

The Government of Mozambique took the initiative to elaborate a multi-sector Law on agriculture, food security and nutrition, the preliminary draft of which will be the subject of this legal analysis.

This initiative is in keeping with the current socio economic circumstances and is based on the guidelines from the World Food Summit (WFS) held in Rome in 1996, where participating countries committed to reduce hunger by half by the year 2015.

A number of policies, strategies and plans have already been established in the same vein and are aimed at ensuring that *Food Security and Nutrition is a right of all Mozambicans, in a Mozambique that is Healthy and free from Hunger*, an example being the Food Security And Nutrition Strategy and Action Plan 2008-2015.

With this Law the Government intends to create a legislative framework aimed at ensuring the Human Right to Adequate Food.

Within the context of the large investments now underway in the country and the international commitments entered into by Mozambique, in particular the Millennium Development Goals (MDGs), in particular objectives 1 and 8 (eradicate poverty and extreme hunger and develop a global partnership for development respectively and other guidelines of the Food and Agriculture Organization (FAO), it is natural that the Government of Mozambique (GoM) is feeling some pressure from civil society, the domestic private sector, foreign investors and the international community to urgently establish a legal framework that encourages more investment in the agrarian sector, especially in large-scale and mechanized food production, given that currently agriculture is predominantly family-based and practiced for subsistence purposes.

Mozambique has entered into various international agreements, such as the MDGs and the New Alliance, aimed at reducing absolute poverty based on the development of the agricultural sector.

## OBJECTIVES AND METHODOLOGY OF THE REPORT

Given our understanding of the terms of reference, we take it that the objectives to be achieved by this report are essentially the following:

- (i) Offer an analysis that serves as support or guidance for the advisory team of the Ministry of Agriculture (MINAG) in charge of reviewing the legislation;
- (ii) Allow the private sector to assess the legislation in question and submit comments concerning it;
- (iii) Facilitate or contribute to consultancy work on objectives and/or options concerning nutrition and food security based on international best practices, to be undertaken by an international consultant.

With the above objectives in mind, we primarily focus on examining the statement of the draft law within the existing legislative framework - i.e. the Constitution of the Republic, International Conventions, Laws, Regulations, Policies, Strategies and multi sector Plans and Programs - and compare the wording of the analyzed draft law with these.

Our report will only refer to those articles that, by their relevance or their wording, according to our interpretation, are potentially at odds with the CRM or other Laws or legal acts in force in Mozambique.

It should be noted that the submission of a report making an in-depth analysis of this Draft Law on Agriculture, Food Security and Nutrition would require a longer period of work.

# ABBREVIATIONS

AR – Assembly of the Republic;

CRM – Constitution of the Republic of Mozambique;

CAEA - Agriculture, Economy and Environment Commission;

CCOM – Mozambican Commercial Code;

CPLP – Community of Portuguese Speaking Countries;

CNDRSAN – National Council of Rural Development, Food and Nutritional Security;

ENSAN – National Food and Nutritional Security Strategy;

FDRSAN - Rural Development and Food and Nutritional Security Fund;

FAO – Food and Agriculture Organization;

GoM – Government of Mozambique;

LA – Environmental Law;

LFFB – Forestry and Wildlife Law;

LT – Land Law;

MINAG – Ministry of Agriculture;

MGDs (Portuguese) – Millennium Development Goals;

SIDA (Portuguese) – Acquired Immunodeficiency Syndrome;

OE – State Budget;

PPP – Public - Private Partnership;

SETSAN – Technical Secretariat for Food and Nutritional Security;



# EXECUTIVE SUMMARY

In our view the draft law intends to focus on the development of rural and family agriculture as a solution for the eradication of absolute poverty in Mozambique, while almost ignoring the agricultural industry in the process.

On a number of occasions the analyzed Law seriously contradicts the CRM and other relevant legislation, leading to unconstitutionality and inefficiency due to the impracticality of the future law;

Where the law establishes articles with good content, these will remain a dead letter until their future regulation. Apart from being a lengthy process this will imply costs that will result not only in increased costs to the OE itself, but also costs resulting from establishing additional infrastructure and financial and human resources for the creation of new public entities needed to implement, operate and supervise this normative instrument. These are substantive costs not provided for in the OE.

Besides being costly in terms of institutional feasibility, its implementation is rather difficult, which leads us to the conclusion that the present law on agriculture with its focus on food security and nutrition does not seem to be very relevant for Mozambique at this stage.

We encountered situations of conflict between various articles within the same legal instrument.

There are also conflicts between this law and laws having equal value, due to this Law not establishing any rules concerning repeal or transition.

# CHAPTER ONE: LEGAL ANALYSIS OF THE DRAFT LAW ON AGRICULTURE, FOOD SECURITY AND NUTRITION

## ARTICLES 1, 2 AND 3

The draft law to be analyzed aims at providing the foundations for the development of the agricultural sector and rural areas, and at promoting food security and nutrition and the progressive development of the human right to adequate food, in order to achieve the objective of a society free from hunger and with healthy and active human capital.

There is no doubt that in Mozambique agriculture is the basis for the socio-economic development of the country. Most of its population depends on agriculture for their livelihood.

This is confirmed in Chapter II of the Constitution of the Republic of Mozambique (CRM), entitled “Economic Organization”, which defines agriculture as the foundation of national development, while it is incumbent upon the State to guarantee and promote rural development in order to increasingly and variedly meeting the needs of the people and the economic and social progress of the country (see art. 103).

However, it seems that the draft law intends to focus on the development of rural and family agriculture as the solution for eradicating absolute poverty in Mozambique, almost ignoring the agricultural industry in the process.

It should be noted that the very CRM considers business a key driver of the economy irrespective of the sector it is active in (see art. 104).

It seems to us that the socio-economic progress of the country cannot rely solely on rural and family farming. However, the letter of the law in question seems to convey that the promotion of food security and nutrition is fully focused on this, not taking into account the role of agribusiness.

Moreover, the law in question intends to establish the right to food as a fundamental right. It seeks support for the establishment of this human right from a treaty of the Community of Portuguese Speaking Countries (CPLP), because despite Mozambique also being a signatory to the Rome Declaration on Food Security, our CRM does not explicitly enshrine the right to food as a fundamental right, nor the provision and guarantee of access to that right as an economic and social obligation of the State towards its citizens.

However, one can say that it does so implicitly, in particular in article 47 where it establishes children's rights to protection and necessary care and well-being; in article 95 where it provides for the right to assistance in disability and in old age and the duty of the State to promote and encourage the creation of conditions to realize these objectives; in article 97 where it aims at satisfying the essential needs of the population and the promotion of social well-being; and in article 121, which guarantees children the right to protection by the State, with a view to their integral development.

On the other hand, establishing the desired human right to healthy food would overburden the OE, all the more so without being enshrined in the constitution, as happens for example with the right to education, despite this being a fundamental right inherent to any human being and his or her dignity.

## **ARTICLE 4 (DEFINITIONS)**

With regard to article 4, its title seems to be misaligned. The description of the agricultural sector is well presented but it is deficient in that the legislative text focuses almost exclusively on the development of the agricultural sector, while completely and strategically overshadowing the other areas making up the agricultural sector as well as the elements indicating food security and nutrition. It thereby gives the impression of a the law concerning agriculture with scant attention given to food security and nutrition, something that clearly deviates from the objective and scope of application of the law as provided for in articles 1 and 2.

Discussing food security and nutrition is not easy, regardless of the perspective. It may be at global, regional, national, local or even household level and it gives rise to much controversy surrounding the issue itself as well as political and economic interests.

We admit that there is a concrete relationship between agriculture and food security and nutrition to the extent that food production is basically agrarian. However, food security and nutrition is not exclusively achieved by agriculture, it also involves the purpose of food products and production processes, in particular of industry, for the economic development of the country.

This is an ongoing and systematically monitored process to the extent that our understanding of food security is not a static concept, rather it is cyclical.

According to the FAO definition, food security is the adequate supply of food and food availability. This means stability of supplies and access to food and consumption by all. "Food security is achieved when all people, at all times, have physical and economic access to safe and nutritious food in sufficient and adequate quantities to meet their dietary needs and food preferences for an active and healthy life" (FAO, 1996). The right to food may be a basic human right, but it is not yet mandated in international law and recognized by all countries.

Food availability is necessary for food security, but it is not enough. Families with food insecurity may be in areas where there is enough food, but the family lacks income or means (production, trade or labor) to obtain it. Improving the means to obtain it means expanding economic opportunities and making markets work better for the poor. Furthermore, individuals with food insecurity may live in family households that enjoy food security. Ensuring that all family members have a proper diet means overcoming gender or age discrimination.

The state of world food security: There is not a shortage of food for those who can afford to buy it.

Poverty is the most common cause of food insecurity. Families are safe from the point of view of food when all members have access throughout the year to the quantity and variety of safe food needed to lead active and healthy lives. At household level, food security refers to the ability of family members to ensure adequate food to meet dietary needs, either from household production or through purchases.

The fact that in recent years Mozambique is registering a rapid economic development, and from 2001 onwards a noticeable shift from agriculture as pillar of socio-economic development to the mining and energy sector with the arrival of megaprojects in these areas and, more recently, with megaprojects in agro-processing, gives rise to the need to adapt the legal framework to this new reality.

## **ARTICLE 5 (PRINCIPLES)**

This article establishes the principles and assumptions of this law, which immediately seriously violate the fundamental principles of the CRM, that is to say:

Paragraph a) establishes as national priority the production of food aimed at, in the first place, meeting domestic food security and nutrition needs and subsequently at the external market. This intervention surpasses what is to be expected of the State in the economic sphere, by imposing obligations or duties on the way large-scale producers operate, rather than functioning as a mere regulator and promoter of growth and economic and social development.

This comes down to a violation of the fundamental principles laid down in paragraphs b), c), f) and g) of article 97 of the CRM and of the spirit enunciated by the principles of free enterprise and free competition enshrined in the Mozambican Commercial Code (CCOM). Moreover, besides being unconstitutional, this may constitute an obstacle to the socio-economic development of the country.

Paragraph c) of article 5 fails to define what specific ecosystems are and how to implement the principle of responsible and sustainable management of natural resources in terms of public policy.

Hence it leaves room for various interpretations. We take it to mean sensitive ecosystems, however, this contradicts the spirit of the environmental legislator who expressly prohibits any activity being carried out in sensitive ecosystems, such as mangroves and beaches, which would, given their ecological and nutritional characteristics or functions, result in their degradation, *ex vis* paragraph d) of article 4 and article 12 of the Environmental Law (LA), in conjunction with paragraph 1 of article 1, article 10 and article 31, all from the future food security and nutrition law.

Paragraph p) of the same article refers to international cooperation. We think it would be necessary to stipulate specific and predictable rules on how it will be applied in practice, for example in relation to the transfer of knowledge.

This rule may violate current labor standards, in particular with regard to quotas provided for foreigners in Mozambique (article 34 of the Labor Law) and legislation on hiring foreigners.

Here one encounters a conflict between laws of equal value, both being special laws concerning different areas of activity and overseen by different ministries. The current law does not establish any rules concerning repeal or transition, so a conflict between such laws is to be regulated by subsidiary rules of the Civil Code, which lay down that among laws of the same value the most recent law prevails.

However, since one cannot assume that the entities covered by other laws have knowledge of the standards applied in this specific law, these entities may not be aware of the tacit repeal of the rules that apply to them, thereby creating a situation of legal uncertainty.

## **ARTICLE 6 (OBLIGATIONS OF THE STATE)**

The obligations listed in this article contradict article 5, which provides for the sharing of the responsibility and obligation of the State to ensure that all citizens enjoy the universal right to adequate food with the private sector, civil society, the family and the citizen, again in clear violation of article 97 of the CRM.

Here one encounters a conflict between laws of equal value, both being special laws concerning different areas of activity and overseen by different ministries. The current law does not establish any rules concerning repeal or transition, so a conflict between such laws is to be regulated by subsidiary rules of the Civil Code, which lay down that among laws of the same value the later law prevails.

However, since one cannot assume that the entities covered by other laws have knowledge of the standards applied in this specific law, these entities may not be aware of the tacit repeal of the rules that apply to them, thereby creating a situation of legal uncertainty.

## **ARTICLE 12**

The state intends to encourage Associations and Cooperatives without paying attention to the whole process and the associated costs involved. Who will support these costs?

## **ARTICLE 17**

In number 1 of article 17 the State undertakes to take effective measures to promote greater security of tenure by producers and the effective and efficient use of arable land, especially for food production, in order to ensure food security and nutrition in the country. Here we can see a potential conflict with the Mining Law, namely with number 2 of article 43, which states that the use of land for mining operations has priority over other land uses when the relative economic and social benefit of the mining operation is higher.

Number 2 of the same article deals with a matter whose nature differs from the scope of the law itself, as established in article 2 of the law.

There is another conflict between laws of equal value, both being special laws concerning different areas of activity and overseen by different ministries. The current law does not establish any rules concerning repeal or transition, so a conflict between such laws is to be regulated by subsidiary rules of the Civil Code, which lay down that among laws of the same value the later law prevails.

However, since one cannot assume that the entities covered by other laws have knowledge of the standards applied in this specific law, these entities may not be aware of the tacit repeal of the rules that apply to them, thereby creating a situation of legal uncertainty.

It should be noted that the Mining Law is based on a plan and policy of the same Government that has set as priority the development of mineral resources for the purpose of generating major revenues for the State Budget and in order to give some assurance and legal certainty for investors and the mega projects.

## **ARTICLE 18**

This article provides for the State to take steps towards the improvement of infrastructure for agricultural production. Again, it does not mention what exactly this is about, how it intends to achieve the objective, or how it is going to fund its implementation.

This clearly seems to be a dead letter if one takes into consideration what is happening with the mega projects already operating which, in order to be able to transport their products, have to create the necessary infrastructure themselves, i.e. infrastructure that should be ready or planned at the time when the State opens an international tender for awarding concessions for the exploration of minerals or natural resources.

## **ARTICLE 31**

In Article 31 the legislator once again transfers obligations that are constitutionally and legally the government's to private parties, such as monitoring the activities of private entities.

This particular case concerns an area of activity that is awarded to private parties, for the management of river basins using dams, or concession holders of electric energy.

It should be noted that these private parties entered into concession agreements with the Government of Mozambique that are still in force, in which their planned and assumed legal obligations, including environmental contingencies that were subject to prior evaluation, depend on approval of the respective environmental impact studies (EIA) by MICOA .

This provision therefore not only violates Decree 11/2006 of 15 June (Environmental Law) but it also puts at risk the legal certainty of the Concession Agreements entered into with the Government in the event of these not providing a stability clause.

Also violated is the spirit of free contraction enunciated by the Law on Public-Private Partnerships (PPPs) and its regulations (Law number 15 /2011 of 10 August and Decree number 16/ 2012 of 4 June).

Where a stability clause exists a subsequent law cannot, in principle, prejudice the concession holder.

## **ARTICLE 6 NUMBER 2, ARTICLE 23 AND ARTICLE 34**

These rules are unconstitutional because they violate article 97 of the CRM by imposing State obligations relative to the commercial, agro-industrial and food sectors on private parties.

As indicated above, all the articles referred to will lead to a situation where this future law, after being approved and implemented, will be unworkable. In addition there will be conflicts of jurisdiction and powers, no or poor collaboration or coordination among sectors simply because it is influenced by factors internal and external to the development of intra and inter-institutional relations.

An example of a probable conflict of interests are the cases of entities such as SETSAN and two new public entities created by this draft law, namely the National Council for Rural Development, Food and Nutritional Security (CNDRSAN) and the Fund for Rural Development, Food and Nutritional Security (FDRSAN), described in articles 61 to 66 of the draft law. In addition there may be conflicts of interest at the ministerial level.

As far as article 23 is concerned it should be noted that in addition to the unconstitutionality referred to, it also violates the free market principle with respect to pricing.

In addition to its unconstitutionality referred to, article 34 also violates number 2 of article 3 of the Commercial Code. Private companies are profit oriented, which is an essential requirement for a commercial company.

## **ARTICLE 42**

Once again the State transfers obligations to third parties, herein referred to as “other actors”, a vague and undefined concept that, not concretely indicating who these actors are, may create legal uncertainty and a diversity of interpretations. Note that were such actors to be individuals, we would have the delegation of State powers to private persons, something which clearly violates the CRM.

## **ARTICLE 46**

Number 4 of article 46 contradicts the law itself where it lays down that it is an obligation of the State to promote employment in agriculture, by diverting human resources from agriculture to the energy sector, violating the principles and purpose of the law itself.

On the other hand, it limits the responsibility of the State to provide or promote jobs, constitutionally guaranteed under article 84 and by analogy under article 83 of the CRM.

These impositions are often already safeguarded in mega-projects, public-private partnerships and utility companies - where the transfer of knowledge is part of the obligations – by means of capacity building of the national work force allocated to these projects.

## **ARTICLE 53 AND 56**

These articles once again violate paragraphs b) and c) of article 97 of the CRM, first and foremost by State inference in matters related to the initiative of economic agents within the context of the free functioning of the market, and not refraining from expanding its role as a mere regulator and promoter of economic and social growth (paragraph g) of article 97 of the CRM.

## **ARTICLES 67, 68, 69, 75 AND 76**

Taking into account that the land is owned by the State, without there being any form of alienation, it cannot serve as collateral (be used as security and/or mortgaged) under article 110 of the CRM and the Land Law.

With regard to the access to rural credit mentioned in articles 67, 68, 69, 75 and 76, it should be noted that, apart from the practical difficulties caused by demanding that an agrarian population that is mostly illiterate and unable to offer any guarantees has the burden of proof of collateral for access to credit, there is the fundamental question of the impact of forcing the private sector to finance these operations.

As far as number 2 of article 75 is concerned, which refers to the possibility of the insurance policy providing collateral in rural credit operations, we have two situations: one concerning the additional costs for the operation; and secondly, even if the insurance can guarantee a loss of harvest, it will never offer a guarantee in case of non-compliance with the contract, be it mutually or for instance due to non-delivery of the harvest.

This does not yet take into account the costs involved in the State intervening and delegating powers, and the costs and difficulties related to implementation.

Article 67 violates paragraph g) of article 97 of the CRM because we see, once again, State interventions in the functioning of the private sector that go beyond its function as mere regulator and promoter of growth and economic and social development. This obligation of the State may not, however, override the rights of private parties or diminish such rights.

Moreover, the banking industry has its own rules set by its regulating entity the Bank of Mozambique (BM) and it must abide by them.

With regard to article 69, which states the criteria for access to credit, we have yet to mention the risk, considering the insufficiency of the requirements for awarding credit, posed by the exponential increase in bad loans.

The possibility of agricultural insurance functioning as security would only make sense if the CRM and the Land Law would simultaneously be altered so as to allow for the privatization of land in Mozambique.

Therefore, the text appears to contradict the spirit of the constitution. Land as a productive asset is guaranteed to and safeguarded for family agriculture and use by other citizens in general under articles 103, 105, 106, 111 *ex vis* 109 of the CRM, in conjunction with article 3 of the Land Law (LT).

## **ARTICLE 74**

Article 74 establishes the legal priority of the allocation of financial resources from the State Budget to agricultural development, rural areas and food security. Nevertheless, article 130 of the CRM establishes the possibility of multi-year projects, with their expenditure obeying the principle of annual publication of the OE. To our way of thinking, a law imposing mandatory spending for the OE seems to be a violation of the CRM and the article referred to.



## **ARTICLE 83**

This article gives rise to another study, i.e. the Impact Study on Food and Nutritional Security for the implementation of Investment Projects in Mozambique in the area of natural resources exploration. It will increase the costs of their implementation for the private sector, in an area where to date it is not required to undertake such a study.

Moreover it will further complicate proceedings, in violation of number 2 of article 250 of the CRM, to the extent that the public procurement process is rendered more complex.

In addition it will increase the potential for conflict with the evaluations already provided for in the Environmental Law and its regulations on population resettlement.

# CHAPTER TWO: CONCLUSIONS AND RECOMMENDATIONS

## CONCLUSIONS

Based on the foregoing we concluded that the existence of a law on agriculture, with a focus on food security and nutrition seems to be not particularly relevant for Mozambique at this stage.

With a few exceptions, all the matters dealt with here are already planned and/or regulated in a number of other laws, particularly in the CRM, in International Conventions to which Mozambique is a party, in national sector legislation (laws, decrees, regulations, etc), in master plans, strategic programs and guidelines and national policies in a host of different areas (ranging from land, water, environment, health and mineral resources to energy).

Thus, despite the lack of a codified law for agriculture and food security and nutrition, a framework does currently exist in a number of different laws and could be used to address the problems this draft intends to address.

We believe that the adoption of this law may be even harmful, because it gives rise to legal uncertainty, something which contradicts that which should be the role of a law.

Besides being costly in terms of institutional feasibility, its implementation is likely to be rather difficult, which leads us to the conclusion that the present law on agriculture, with its focus on food security and nutrition, does not seem to be very relevant for Mozambique at this moment:

- i. There are a number of serious conflicts with the CRM and other relevant legislation concerning this matter, leading to unconstitutionality and inefficiency due to the impracticality of the future law;
- ii. Although in some cases the law establishes articles with good content, these will remain a dead letter until their future regulation. Unfortunately, the historical record of our legislator shows that the process of regulation, in particular the preparation of legal instruments, the holding of public debates or consultations prior to its approval, implementation and monitoring and evaluation is time consuming.

- iii. Moreover, besides being a lengthy process that will result not only in increased costs to the OE itself, but also costs resulting from establishing additional infrastructure and financial and human resources for the creation of new public entities needed to implement, operate and supervise this normative instrument. These are substantive costs not provided for in the OE.
- iv. Besides being costly in terms of institutional feasibility its implementation is quite difficult, which leads us to conclude that the present law on agriculture, with a focus on food security and nutrition does not seem to be very relevant for Mozambique at this stage.
- v. There will be conflicts among various articles within the same legal instrument.
- vi. There will also be conflicts between this law and laws having equal value, due to this Law not establishing any rules concerning repeal or transition. Thus, any conflict between laws is to be regulated by taking recourse to subsidiary rules from the Civil Code, which state that in case there is a conflict between laws of the same value, the most recent law prevails. Here there will be conflicts between special laws and laws targeting different areas of activity, which are overseen by different ministries, so that in case of conflict the rules of the law that is now being analyzed will apply.
- vii. However, since one cannot assume that the entities covered by other laws that contradict this one need to have knowledge of the standards applied in this specific law, these entities may not be aware of the tacit repeal of the rules that apply to them, thereby creating a situation of legal uncertainty.

## RECOMMENDATIONS

Taking into account the conclusions, we recommend the following:

- i. Hold a public discussion on the draft law, rallying the most diverse sectors of society on a national platform with international visibility;
- ii. Conduct a study parallel to the legal analysis of the draft law in order to scientifically measure the real socio-economic impacts and not limit oneself to the legal perspective only;
- iii. We do not agree with the idea that the problems related to the agricultural development of the country can be solved through more legislation - in our opinion the implementation of existing legislation in a more appropriate way and the reform of the business environment would be sufficient to promote development not only in the agricultural sector but in other sectors of activity as well.
- iv. In our view Mozambique may perfectly well continue to use guidelines or food security and nutrition programs for some time, as is currently the case with the National Strategy for Food and Nutritional Security (ENSAN);
- v. We suggest a national debate on the theme “Food Security and Nutrition” which also focuses on the policy or strategy to achieve the desired objective.
- vi. Inclusion of the health sector, financing and planning and rural development in the responsible committee, in order to achieve a balance of positions with respect to the interests at stake.



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