

Project Completion Report & DFID Support to the Kenya Land Reform Process

11 August 2003

Final Report

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Introduction to Final Report

This final report has been prepared following the comments on the draft report by the Hon Kimunya, Minister of Lands and Settlement, and senior managers in the Ministry, the responsible DFID-Kenya officials and KLA's Co-ordinator. The author also benefited from participating in a one-day round-table with the Minister and his team from the Ministry hosted by DFID in London on 23 July 2003. For the benefit of those who have already gone through this report, henceforth the amendments and additions to the draft report are in square brackets [thus]. Finally Appendix address further questions raised by DFID.

1 Executive summary

The consultancy required a Project Completion Report of DFID's support to the Kenya Land Alliance (KLA) and advice to DFID on possible future activities that would support pro poor land reform in Kenya.

PCR of DFID support to KLA

The PCR attached as Annex 1, is encapsulated in the PRISM format. The performance of the project was assessed in terms of the goal, purpose and outputs of the project log frame (Appendix 3).

The purpose of the project is:

To establish and operate an effective land advocacy network in Kenya to defend and uphold the land rights of the poor and other disadvantaged groups and to campaign for policy and legal reforms that meet their needs and interests.

The objectively verifiable indicator (OVI) for this part of the log frame is that:

The advocacy network had been established and had a significant impact on the emerging land policy.

The PCR concludes that the project has resulted in the establishment of an effective land advocacy network and, in terms of its prescribed outputs, has usefully contributed to both the Njonjo Commission and the CKRC.

However, participation of KLA's members in the national land policy process under the leadership of the new government has not yet blossomed. Despite the land ministry's expressed willingness to work with civil society, it is not clear how it intends to do so. Appropriate mechanisms have yet to be put in place.

Further DFID assistance to KLA

The land policy development process has entered a critical phase and DFID-Kenya should consider further assistance to KLA's work, the scope and content of which will need to be agreed by KLA's membership and receive at least the tacit support of GoK. In mapping out future assistance to KLA it is possible to make programme proposals for the year ahead, but not much beyond. So much will depend on the Government's response to the recommendations of the Njonjo Commission and the outcome of the CKRC process.

DFID should consider funding a KLA programme which will be complementary to that of the Ministry of Lands and Settlement, one which involves assisting with the development of the national land policy, harmonising the land laws and preparing for the institutional changes envisaged in the report of the Njonjo Commission and the final draft Constitution Bill and the promulgated Act.

It is recommended that DFID facilitate a joint planning process between KLA and the Ministry, if a request for this comes jointly from the two parties. KLA and the Ministry should be encouraged to enter into negotiations as soon as possible and reach agreement in principle on a joint programme of work - not wait until the CKRC reports at the end of November. The mechanism could follow that adopted in the development of the South African land policy, with task teams, comprising government and civil society specialists being appointed by the Minister to prepare working papers on specific aspects of the policy, within an agreed time frame. Work on this aspect could start immediately. Whatever the outcome of the CKRC process, Kenya will need a national land policy.

As part of this preparatory phase, KLA and the ML&S could be encouraged to reach agreement on a 'protocol' to cover future interaction between the Ministry and KLA for the implementation of the joint work programme and related matters.

DFID funding for the ML&S (or its successor) and KLA should be dependent on their being willing and able to reach an agreement on a programme of co-operation for the preparation of the national land policy.

Pending such an agreement and the commencement of preparation of a joint programme, DFID should cover KLA's operating costs until the end of March 2004, the formal end of the current project.

Proposed DFID assistance to ML&S for a land policy review

Proposals are made in the context of two meetings with ML&S senior managers in the course of a review, which had as its principal aim a PCR of the KLA project. If the ML&S agrees, the proposal could be fleshed out on the basis of further meetings.

This paper makes the case for an interactive land policy development process on the lines recommended by the Njonjo Commission. As part of that process, it is proposed that DFID assist with the funding of a thoroughgoing 'Land Policy Review' as an input into that process. The work would be subdivided into two phases. The first phase would be completed within nine months and would lead up to the publication of a Land Policy Issues Report. The second phase would be completed within another three months and would set out the recommended policy options in a Draft Land Policy Review, on which a Sessional Paper on Kenya National Land Policy could be based.

It is suggested that DFID would fund the costs of contracting a team of internationally acknowledged specialists on aspects of land policy from NGOs, research institutes and professional bodies to work with government officials on a series of task teams covering key policy areas. National consultative workshops, funded by the project, would be scheduled at two critical stages, namely to consider a Land Policy Issues Report and a Draft Land Policy Review. DFID would also be asked to fund the costs of

a Secretariat managed by a private consultancy firm, but located in the ML&S to coordinate the process and finalise the documentation. KLA would be contracted separately to manage inputs by its members to the Issues Report and the Land Policy Review and to organise the national consultative workshops.

2 Introduction

The Terms of Reference for this review are attached as Appendix 1. Seven days were allocated to the assignment - five days to meetings in Nairobi, from 16th – 20th of June 2003 and two days to report writing. The reviewer wishes to acknowledge the efficiency with which the programme of meetings was arranged by DFID Kenya and by KLA prior to his arrival in Kenya.

The urgency of the assignment arose from the impending expiration of DFID's funding of the Kenya Land Alliance at the end of June 2003. Further, it was necessary to consider options for assistance to KLA in the light of the Government of Kenya's land policy development process under the direction of the Hon. Amos Kimunya, Minister of Lands and Settlement, prior to his official visit to the UK in the week beginning 21st July.

This report follows the scheme set out in the TOR. After a brief account of the background to the land reform movement in Kenya over the last four years and the land policy process in the region, the review describes the main findings [of the] KLA Project Completion Report (Annex 1) and goes on to consider options for future support.

3 Background to DFID support to the land reform process

3.1 Problems and constraints in Kenya's land sector

When DFID was considering options for support to pro-poor land reform in Kenya in 1999, key issues were identified as follows:

- The multiplicity of tenure regimes (both received and indigenous) and 'turf wars' between government agencies, which had contributed both to uncertainty and unsustainable land use, especially in rural areas;
- Tenure insecurity, which had become a major cause of poverty, especially in urban and peri-urban areas;
- The major policy gaps which had arisen in important aspects of land relations (e.g. the role of the state as owner or guardian of land resources; lack of clarity about the meaning of 'public interest' in relation to expropriation);
- The inability of government to resolve inter-community disputes and the progressive encroachment by various communities into areas not perceived as theirs, which had become a major source of political instability in many parts of the country;
- The 'wanton dissipation' of government land, which had led to a serious shortage of land for public services and social infrastructure as a result of the high incidence of land theft by officials and politicians with influence over land administration and allocation;
- The absence of a coherent land policy (or an institutional framework for the review, monitoring and evaluation of land issues) a major impediment to land

administration and management, which was both inefficient and exceedingly corrupt.

Professor Okoth-Ogendo, in a review for DFID-Kenya, made the case for DFID support for a 'radical transformation of land relations through comprehensive reforms'¹. His conclusions are paraphrased below.

- The longer the land claims and territorial disputes in the Rift Valley, the Coast Province and between pastoral and mixed farming areas remain unresolved, the more volatile these regions would become.
- Insecure land rights had become a serious cause of poverty in both the rural and urban areas. Communities whose livelihoods depended almost exclusively on land were increasingly marginalized. Not only were per capita incomes in the agricultural sector falling, but also the average family was now producing 20% less food crops than in 1963. In the urban areas, rapid population growth and underemployment had led to the emergence of huge slums. As much as 65% of Nairobi's population, for example, was said to be living in slums or slum-like structures without any security in respect of the land they occupy.
- Chaotic tenure arrangements were creating a great deal of tension and insecurity. This in turn had made it difficult to regulate land use. These and other drivers pointed to the need for comprehensive reform not only at the level of policy but also in the terms of laws and institutions governing the use and management of land. The need for reform, therefore, was both evident and urgent.

In his 1999 review for DFID, Professor Okoth-Ogendo set out what he considered were the elements of the package needed for the radical transformation of land relations in Kenya, namely:

- A land policy setting out a national consensus on all critical issues relating to land and giving clear directions on how the state intended to respond to each one of them,
- A basic land law synthesising, rationalising and integrating all the statutes on tenure, administration, management and dispute settlement,
- Appropriate institutional arrangements for land administration and the periodic review, monitoring and evaluation of issues pertaining to land, whether as part of the basic land law or under separate legislation, and
- A revised set of laws complimentary to the basic land law and concerned with the micro-management of sectoral resource issues including the environment.

¹ Professor H. W. O. Okoth-Ogendo, *Land Issues in Kenya; Agenda Items from the 20th Century*, September 30, 1999. (A confidential brief for the Department for International Development, Eastern Africa) Nairobi, Kenya.

He argued that land reform in Kenya could not be addressed through the enactment of *ad hoc* 'panel-beating'.² Consequently a great deal of time would be required to complete such an exercise. Judging from the experience of Uganda, Tanzania and South Africa it could take between five to ten years to move from policy formulation to legislation to implementation.

3.2 Promising developments

Four years have passed since Professor Okoth Ogendo's review of land issues for DFID, during which time the land problem has grown in seriousness and complexity. At the same time, however, there have been some encouraging developments. In the last ten years, most countries in the region have engaged in participatory evaluations of their land policies, laws and agrarian structures - processes in which Kenyan land policy specialists have been prominent. This has resulted in pressure for Kenya to undergo a similar procedure. The country has been slow to 'bite the bullet', but now has the opportunity to do the job well and at the same time learn from experience gained elsewhere in the region.

3.2.1 Appointment of the Njonjo Commission and the CKRC

In 1999, President Moi appointed a Commission of Inquiry into the Land Law System of Kenya, (informally called the "Njonjo Commission", after its Chairman Charles M. Njonjo). Although the original terms of reference did not include an examination of land policy, after some discussion by the Commission itself, the TOR were revised to include a review of 'the main principles of a land policy framework which would foster an economically efficient, socially equitable and environmentally sustainable land tenure and land use system'.

Another promising development in 1999 was the inclusion of land issues on the agenda of the Constitution of Kenya Review Commission (CKRC) chaired by Professor Yash Pal Ghai and on which Professor Okoth Ogendo [is a Commissioner].

3.2.2 The Njonjo Report

After five or six months' delay, [to the acclamation of civil society organisations including KLA] the Njonjo Commission's report (finalised in November 2002) was released in May 2003.³

The Report of the Commission of Inquiry proposes radical changes to land administration and management in Kenya. It calls for the establishment of a Kenya National Land Authority (NLA) and District Land Authorities. The former would operate at the national level and be responsible for originating policies and legislation on the administration of land in the country. The NLA would supervise, monitor and control the administration of all land matters currently handled by the technical departments of the Ministry of Lands and Settlement (i.e. the Department of Lands including all Land

² The expression 'panel beating' was used to describe Kenya's approach to land policy development in an address to the International Conference on Land Tenure in the Developing World at the University of Cape Town in January 27-29, 1998, by Professor H. W. O. Okoth Ogendo, '*Land Policy Development in Sub Saharan Africa: Mechanisms, Processes and Outcomes*'.

³ Report of the Commission of Inquiry into the Land Law System of Kenya on Principles of a National Land Policy Framework, Constitutional Position of Land and New Institutional framework for Land Administration, Republic of Kenya, November 2002 (the 'Njonjo Report')

Registries; the Department of Surveys; the Department of Physical Planning and the Department of Land Adjudication and Settlement) and by County Councils and other local authorities.

The report found that failure by the authorities to enforce and comply with the law was the principal cause of the land problems experienced by the country. The intensity of complaints to the Commission on the various issues differed from one region to another, but the overarching complaint related to the corrupt and irregular way land was administered (See Appendix 2 of this review – ‘Summary of issues raised with the Njonjo Commission’). The Njonjo Commission noted that there had been no serious attempt by the Ministry of Lands and Settlement to resolve these issues. Political interference, corruption, incompetence and lack of resources had prevented any satisfactory and lasting solution from being put into effect. The Commission’s detailed proposals for the resolution of these and other issues were to have been contained in its Final Report, but President Moi dissolved the Commission within two days of it submitting its interim report in November 2002.⁴

The Njonjo report recommended that the power of compulsory acquisition of land should be vested in the State alone and not in local authorities, county councils, provincial commissioners, etc. The law should clearly define the conditions necessary for such acquisition and provide for consultation with the local community or landowners, including cities and municipalities.

The report recommended that the current land tenure classification had outlived its purpose and the Constitution should classify all land in Kenya simply as public, commons and private. Public land should comprise all land currently held as unalienated government land, except land within the Coast Province that became government land through the application of the Land Titles Act (Cap. 282). Similarly, public land should include all land used or occupied by any ministry, department or agency of the government or a statutory corporation and all public roads. Commons should, with a number of specified exceptions, comprise all land currently defined as Trust Land under the Constitution and the Trust Land Act, and all land held and managed as community forests, water sources, grazing areas, etc. Private land should comprise all land currently registered under existing land registration statutes.

Members of the National Land Authority board, should be appointed by the President, while a chief executive officer assisted by heads of various technical departments would be responsible for the daily running of the authority. The authority would collect revenue from the sale and lease of land. The revenue and expenditure would be accounted for to Parliament and surplus funds would be remitted to the Government. Local people, subject to guidelines from the national body, would elect board members of District Land Authorities. The report proposes that District Land Authorities should be independent but should obtain technical or financial assistance from the national organisation. However, to ensure integrity and accountability, independent auditors

⁴ In the letter to the President accompanying the report, the Commission state that the document ‘only forms part of the Final Report which is still under preparation’. In view of the resources allocated to the work over a period of three years, the scope and content of the document is a disappointment. It is not clear what has happened to the record of written and oral submissions and proceedings.

appointed by the National Land Authority should audit the finances of District Land Authorities.

3.2.3 *The Report of the Constitution of Kenya Review Commission*

In September 2002, Kenya's land administration and management were the subject of proposals in Chapter 11 of the Draft Constitution.⁵ They are compatible with the more detailed land policy proposals in the Njonjo Report.

The Draft Constitution proposes far reaching changes to the current constitutional provisions on land and property. First and foremost, Chapter 11 of the draft constitution contains a section dealing with land policy thus:

- 'S.232 (1) Land being Kenya's primary resource and the basis of livelihood for the people shall be held, used and managed in a manner which is equitable, productive and sustainable.
- (2) The State shall define and keep constantly under review a national land policy directed at ensuring among others, the following:
- (a) equitable access to land and associated resources;
 - (b) security of land rights for all land holders, users and occupiers in good faith;
 - (c) sustainable and productive management of land resources;
 - (d) transparent and cost effective administration of land;
 - (e) sound conservation and protection of ecologically sensitive areas; and
 - (f) socially acceptable management and resolution of land disputes.'

Section 233 on the ownership of land, states that all land in Kenya belongs to the people of Kenya collectively as communities and as individuals; subject to this Constitution no person other than a citizen of Kenya shall have the right to acquire any interest or right in Land in Kenya. Non-citizens may, however, hold land on a leasehold tenure basis not exceeding ninety-nine years.

The draft constitution also classifies all land in Kenya as public, community or private land (section 234).

Tenure of land is dealt with under Section 235 and it is expressly stated that all public land is the collective property of present and future generations and shall vest in and be held by the National Land Commission in trust for the people. It also recognises customary tenure by devoting a clause to community land.

Section 236 of the draft constitution also guarantees the protection of lawfully acquired property rights in land, which [have] been alienated without discrimination on the basis of gender or any other cause.

The draft constitution, Section 237(1) provides for the establishment of a National Land Commission.

⁵ www.kenyaconstitution.org

The functions of the National Land Commission, S.237(2), are to:-

- (a) hold title to public land in trust for use by the people of Kenya
- (b) administer public land on behalf of the government and local authorities;
- (c) define and keep constantly under review the national land policy;
- (d) consolidate and from time to time review all laws relating to land;
- (e) exercise residual land administration functions on behalf of local authorities;
and
- (f) perform such other functions as may be entrusted to it by law.

The draft constitution, 237 (3), empowers parliament to enact a law to define the organization and powers of the Commission.

Stakeholders in the Bomas of Kenya Conference on the Draft Constitution debated the proposals in the land chapter in May/June 2003. There were no proposals for major changes and it is expected that the essential elements of the earlier draft land chapter will remain intact. The CKRC is due to be wound up by the end of November 2003. After that, the Constitution Bill will go to Parliament, which may decide to accept, reject or amend it, including the Land Chapter.

For the purpose of the planning of DFID's support to the land reform process in Kenya, the greatest uncertainty relates to the future of the Ministry of Lands and Settlement. At this stage, it is uncertain whether the Ministry of Lands will rise from the ashes of its predecessor with new strength and vigour or take on a radically new form under the National Land Commission.

3.3 The land policy process

First it must be noted that land policy development and implementation, like many change management processes, is full of pitfalls. Many policy reform failures result from a lack of attention to the implementation procedures needed if policy reforms are to be successful. In planning the implementation of a radical policy change of the nature envisaged by the CKRC and the Njonjo Commission, it will be essential to explore some of the relevant literature on change management.⁶

As pointed out by Julian Quan, when commenting on the TOR for this assignment, the World Bank's recent land policy report should be required reading for those planning the land policy development process in Kenya. In this report, examples are quoted which show that 'the process of consensus building, which includes the private sector, NGOs, and academics in addition to government representatives, is extremely important, both for the ability to implement and to identify priority activities in the light of budget constraints and links to a poverty reduction strategy'.⁷

Boiled down to its essentials, the land policy development process involves a series of overlapping tasks or steps:

- Consultation and formulation of a national land policy and white paper;

⁶ See Rebecca Sutton, 'Annotated Bibliography, The Policy Process: An Overview', Overseas Development Institute, London, 2001.

⁷ Chapter 5, 'Putting Land Policy in Context', *Land Policy for Growth and Poverty Reduction*, World Bank Policy Research Report by Klaus Deininger, April 2003

- Rationalisation of land-related legislation;
- Rationalisation of the institutional responsibilities for implementation of the laws and regulations;
- Dissemination of information to the public, training and capacity building;
- Development of a land information system.

The work of the Njonjo Commission and the drafting of a Sessional Paper would represent the first step in a process that could extend over the next three years.

Paragraph 102 of the report of the Njonjo Commission, referring to a paper by Professor Ogoth Ogendo⁸ states (para. 102):

'Policy development is a deliberate act that involves a number of steps not necessarily in sequential order. The first of these usually is a public inquiry guided by terms of reference set up by the State. The second is public debate on the conclusions arrived at through that inquiry. The third is the formulation of principles reflecting public consensus arising from that debate, and the fourth is authoritative determination of policy, which can then be used as a basis for legislation or administrative decision-making. Only in Tanzania have all these steps been taken in that order. Most countries in East, Central and Southern Africa have not been that systematic. Nonetheless, it is clear that in those countries where land policy instruments have been developed, the process of policy development has been information based, interactive, participatory and issue-orientated. Land policy development in Kenya must pay attention to these factors.'

Because of its sensitivity and complexity, land tenure reform is a long drawn out process. Progress is dependent on appropriate constitutional and legal frameworks and thorough public consultation. In Botswana, renown for the care with which it approaches land administration, the process has taken decades. For the last quarter of a century in Botswana, iterative policymaking has followed a process extending up to two years: (i) a commission of inquiry (or an expert review); calls for written submissions; public meetings involving a wide range of stakeholders; (ii) the preparation of a draft report, oral presentations and discussions at a national workshop covered by the media; (iii) a draft paper which is debated in Parliament; (iv) the publication of a government white paper setting out the policy change adopted; the recommendations which have been accepted, amended and deferred (or rejected) with a justification for government having done so; (v) finally, where relevant, the drafting of laws or amending of existing laws.⁹

In practice the process should be interactive, otherwise there will be difficulties translating new policy and laws into an affordable plan of implementation. Policy formulation and implementation cannot be easily separated. In Uganda, following the drafting of the Land Act of 1998, it was discovered that there were neither the human

⁸ Address to the International Conference on Land Tenure in the Developing World at the University of Cape Town in January 27-29, 1998, by Professor H. W. O. Okoth Ogendo, '*Land Policy Development in Sub Saharan Africa: Mechanisms, Processes and Outcomes*'.

⁹ Martin Adams, Faustin Kalabamu and Richard White, 'Land Tenure Policy and Practice in Botswana: Governance Lessons for Africa', *Austrian Journal of Development Studies*, XIX, 1-2003 also on Oxfam Land Rights Website www.oxfam.org.uk/landrights

nor the financial resources to put the newly drafted law into effect. The relationship between policy development, legal drafting, and institutional and financial planning is crucial.¹⁰

Currently the Lesotho Government is learning from the Uganda experience by ensuring that the final drafting of the land policy, the harmonisation of land laws and the institutional and financial planning are carried out as in interactive process by an integrated team of specialists working under the direction of the relevant Ministry.¹¹ The Uganda and the Lesotho experience are relevant to Kenya because in both cases a radical institutional transformation and decentralisation of land administration is involved, including capacity building, retraining and redeployment of staff.

4 Kenya Land Alliance

4.1 The establishment of KLA

Within Kenya, over the last decade, civil society organisations have been demanding that government protect the land rights of the poor in rural and urban areas and natural resources, especially gazetted forests, and take its trusteeship responsibilities more seriously. Concerned NGOs have created an organisational framework to move the land reform agenda forward. The Kenya Land Alliance is the only civil society network focusing exclusively on land matters.¹²

The Kenya Land Alliance was formally launched in May 1999 at a seminar in Nairobi with funding and support from Oxfam Kenya. Michael Ochieng Odhiambo (1999 and 1999a) the Executive Director of the Resources Conflict Institute (RECONCILE) describes the rationale for the establishment of KLA, now officially registered as a trust. It is a non-partisan, not-for-profit NGO. The Co-ordinator reports to the trustees and the Annual General Meeting of members. KLA describes itself as a network of civil society organisations and individuals for effective advocacy for land law and policy reforms (KLA, Annual Report: 2002). Member organisations comprise other service organisations (e.g. The Legal Assistance Centre) and networks (e.g. the Shelter Forum) as well as a few community-based organisations (e.g. the Ogiek Welfare Council).

¹⁰ Martin Adams, *Breaking Ground: Development Aid for Land Reform*, Overseas Development Institute, London, 2002.

¹¹ Lala Steyn and Michael Aliber: June 2003 'The Existing System of Land Administration and Institutional Options for Implementation of a New Land Act in Lesotho' and 'Resources and Finances Required for the Implementation of a New Land Act in Lesotho'

¹² Another important network is the Law Society of Kenya (LSK), which is also prominent in the field of land reform advocacy. It is not a member of KLA, but LSK members make helpful contributions on legal aspects to KLA's meetings. Its website (www.lsk.or.ke) is an important resource. See, for example, its overview of the Njonjo Commission's report. Two 'network' members of KLA are Shelter Forum, which deals with urban land and housing for the poor, concentrates on networking, documentation, promotion of infrastructure and related issues, and RECONCILE which focuses on four sectors, which hinge on land: forestry, agriculture, fisheries and pastoralism. Its key concern is to come up with policies which reconcile competing natural resource needs. The Kenya Pastoral Forum lobbies and participates in national committees, supports direct community protests, provides information tailored to different groups of policy makers and aims to strengthen cooperation among members.

At an inaugural planning workshop held at Utafiti Hall, Egerton University, in September 1999, Dr Robin Palmer of Oxfam GB cautioned that the work that the Kenya Land Alliance was setting itself up to do was difficult and sensitive. In particular, he drew attention to the fact that elsewhere, particularly in Uganda and Tanzania, the initiative to mobilize civil society on the land question arose in response to action by the governments in drafting statutes on land tenure. On the other hand, in Kenya, the initiative was to push the government to take this action.¹³

Likewise, Professor Okoth-Ogendo rightly noted that:

‘The proposed Kenya Land Alliance will, however, need a specific policy target to focus their activism on. The Uganda Land Alliance was successful mainly because a Land Bill was already on the table’.¹⁴

Box 1: Objectives of the Kenya Land Alliance

Main objectives:

To mobilize individuals and institutions for effective advocacy to achieve the reform of land policy and law in Kenya

Sub-Objectives:

- to facilitate networking and information sharing among the members and between them and others locally, regionally and at the international level;
- to sensitize and inform stakeholders and the public on the reform of land policy and law in Kenya;
- to contribute to the current debate on the reform of land policy and law in Kenya;
- to generate policy and legal options for land reform in Kenya;
- to organize civil society groups to formulate a draft land policy for presentation to government.

Source: Source: Odhiambo¹⁵

In 1999, DFID Kenya provided assistance (KShs17 million) for a three-year programme to secure the formation and establishment of the Kenya Land Alliance, then a one-person secretariat accommodated in the Nakuru office of RECONCILE, one of the members.

On the recommendation of the OPR,¹⁶ DFID assistance was increased to allow KLA to establish itself in a separate office and take on a nucleus of staff to enable it to engage with the Njonjo Commission and the Constitution of Kenya Review Commission. The

¹³ Odhiambo, Michael Ochieng and D. Adhoch ‘Towards effective land policy advocacy: Consultation on the way forward in land policy’. A report of the proceedings of a consultation held at Lenana Mount Hotel, Nairobi on 18th May, 1999 with funding and support from Oxfam. RECONCILE, Nakuru, Kenya.

¹⁴ Professor H.W.O. Okoth Ogendo, 1999, op. cit.

¹⁵ M. O. Odhiambo, ‘Towards an institutional framework for land policy advocacy in Kenya’. A report of the proceedings of the KLA Planning Workshop held at Utafiti Hall, Egerton University, Njoro, 15-17 August, 1999 with funding and support from DFID. RECONCILE, Nakuru, Kenya.

¹⁶ Martin Adams, ‘Output to Purpose Review of DFID Support to the Kenya Land Reform Process’, December 2001.

OPR recommended the tightening of the focus of the KLA work programme, in particular the holding of a National Civil Society Conference on Land Reform and the Land Question in 2002 to provide a formal input both to the Njonjo Commission and the CKRC.

4.2 Project Completion Report

The PCR, annexed to this report in DFID's PRISM format, provides an account of the progress achieved under the first phase of DFID assistance. The performance of the project was assessed in terms of the goal, purpose and outputs of the revised Logframe (Appendix 3).

The purpose of the project is:

To establish and operate an effective land advocacy network in Kenya to defend and uphold the land rights of the poor and other disadvantaged groups and to campaign for policy and legal reforms that meet their needs and interests.

The objectively verifiable indicator (OVI) for this part of the log frame is that

The advocacy network had been established and had a significant impact on the emerging land policy.

The PCR concludes that the project has resulted in the establishment of an effective land advocacy network and, in terms of its prescribed outputs, and has usefully contributed to both the Njonjo Commission and the CKRC.¹⁷

However, participation of KLA's members in the national land policy process under the leadership of the new government has not yet blossomed. Despite the land ministry's expressed willingness to work with civil society, it is not clear how it intends to do so. [The Minister has assured DFID that appropriate mechanisms for engaging civil society in the national land policy process are being worked out by government, in consultation with stakeholders.]

4.3 Possible future KLA activities for DFID support

In developing proposals for further DFID assistance to KLA, it is necessary to identify ways of helping civil society and Government to work together to improve the policy, legislation and implementation arrangements for land reform. Under the previous dispensation, there was little prospect of achieving this. For reasons that the Njonjo Commission has made clear (see Appendix 2), people had long since lost confidence in the Ministry of Lands and Settlement.

Under the NARC Government, it is hoped that the situation will change. However, there is concern among KLA members that it may not support the transformation in land administration and tenure relations that the Njonjo Commission and the CKRC recommend. There is a worry that the Government may continue with the 'panel beating' approach to land policy [of] previous governments, that it will rely exclusively

¹⁷ *Eradication of Poverty through Assured Security of Access to Land and Natural Resources*, Report of the National Civil Society Conference on Land Reform and the Land Question, KCCT, Mbagathi, Nairobi, 20-23 May 2002.

on 'quick-fix' measures and not seize the opportunity offered to adopt a longer term consultative and participatory approach.¹⁸

There is an understandable fear that the long established cadres in the ML&S may try to block land tenure reform and the establishment of a National Land Commission (or Authority). It is to be expected that resistance within the Ministry will be very strong. Land administration in Kenya is not just inefficient. The difficulties in rooting out corruption and abuse in the current system should not be underestimated.

4.3.1 The role of civil society in the land policy development process in the region

Policy formulation is the prerogative of the Minister. The role of civil society in government's policy development process is advocacy and lobbying based on information gathering (e.g. monitoring and research) and sharing (publications and dissemination via the mass media). The contribution made by NGOs to policy development in most of the countries in the region has not been great, but there are some notable exceptions – Mozambique and South Africa and to a lesser extent Uganda and Tanzania. In the first two mentioned cases, civil society was the most dynamic and instrumental.

The processes that produced the Mozambique Land Law of 1998 involved a wide range of actors, including the NGOs, church based groups, a Land Studies Unit at the University of Maputo, various politicians and international organisations such as FAO.¹⁹ In a recent study of the role of NGOs in promoting land rights in Kenya and Mozambique, Nazneen Kanji *et al* has suggested that the critical factors involved in the case of Mozambique were:

- 'Political liberalisation, increasing freedom of speech and of the press allowed NGOs to influence land policy. It was possible to criticise draft versions of the land law in public without fear of reprisals. Freedom of the press allowed opposing voices to be heard and citizens to be informed of different arguments.
- In the process of formulation, discussion and approval of the new land law and its regulations, the broad alliance between sections of government, parliament, religious institutions, NGOs, academics and donors was a critical factor in its success.
- The churches were important and active in this process, promoting dialogue between Frelimo and Renamo, establishing the Diocesan Lands Committees, and supporting the creation of the NGO ORAM to defend the rights and interests of communities.
- The Latin American experience of agrarian reform positively influenced the Mozambican land reform process. Some individuals - religious persons, academics, and representatives of development agencies and consultants of

¹⁸ There is good cause for concern, not only in Kenya. In many countries (e.g. in Zimbabwe, Zambia, Namibia and Swaziland) land policymaking is seen as a Cabinet task. Even then, the consistency associated with collective decision-making is absent, perhaps because policy is the prerogative of the President and/ or the Prime Minister and reflects political short-term expediency.

¹⁹ Chris Tanner, Report on an FAO Workshop on Common Property Tenure Regimes: Methodological Approaches and Experience from Lusophone Countries, 2000 www.oxfam.org.uk/landrights/ ; Law-Making in an African Context: The 1997 Mozambiquan Land Law. Rome: FAO Legal Papers Online No 26. www.fao.org/legal/

the United Nations system - were from Latin America and had particular knowledge of and sensitivity to land issues.

- The fact that individual academics and leaders of non-governmental organisations were respected and recognised for being honest was vital to the success of their advocacy. These leaders were able to engage with different interest groups while maintaining their commitment to promoting land rights for the majority. They were not members of either of the main political parties.²⁰

After the passing of the law, a Land Campaign (Campanha Terra) coordinated by the respected academic José Negrão, and supported by a range of international NGOs, then sought to disseminate information about the new law.²¹

In South Africa, NGO land reform activists made a significant contribution to land policy development, first from outside and then from inside government. In 1994, land reform policy emerged in the context of a newly elected government attempting to deliver within the framework of an existing centralised, uncoordinated and untransformed bureaucracy. Land-based NGOs and individuals within them, with a history of opposing forced removals, significantly influenced the emerging land policy. Much of the emphasis was on the restitution and redistribution of land, and on the provision of land rights as part-and-parcel of redressing the wrongs of apartheid and of addressing human rights in respect of land. First as consultants, then as senior managers, the Department of Land Affairs recruited a dozen or more of the younger generation, those who had been active in the land rights NGOs²² in opposition to the forced removals of the apartheid regime. Thus, from the beginning, the challenge for the new ministry and department was to build a shared organisational culture between the old and the new. The long drawn out process of establishing and re-engineering the DLA diverted officials from attending to the Department's core business.

For the drafting of the Green Paper on South African Land Policy in 1995, and the White Paper the following year, a series of task forces were appointed by the Minister to come up with policy papers on a number of key issues (e.g. land tenure and administration, land restitution, land redistribution, land development planning, land information, human resources development, communications, etc). Membership of each task force was made up of government officials, individuals from NGOs, professional organisations, university departments and research centres.

The contribution of civil society to policy development was acknowledged in the chapter of the Green Paper and the White Paper on 'Institutional Arrangements'; viz:

'Those who stress good government, transparency and argue for participation see a larger role for NGOs, not just as deliverers of services. They seek to involve NGOs and CBOs in the policy dialogue and in decision-making. In this

²⁰ Nazneen Kanji, Carla Braga, Winnie Mitullah 'Promoting Land Rights In Africa: How do NGOs make a Difference? IIED, London, 2002

²¹ José Negrão, 'The Mozambican Land Campaign, 1997-99', translation of a paper presented at a Workshop, Maputo, Mozambique, 14 December 1999. www.oxfam.org.uk/landrights

²² For example the Association for Rural Advancement (KwaZulu Natal), Surplus People Project (Western and Northern Cape), Transvaal Rural Action Committee, Border Rural Committee (Eastern Cape), all affiliates of the National Land Committee based in Johannesburg.

connection, the strengthening of NGOs and CBOs as separate institutions is important.²³

As a recent study of the NGO sector points out, 'Kenya has one of the oldest, largest and strongest NGO communities in Africa'.²⁴ According to Nazneen Kanji *et al*, NGOs have already made an important contribution to policy for improving access to land and housing in urban areas and to the protection of access to land in semi-arid pastoral areas.²⁵ KLA has proved itself capable of mobilizing the support of its membership in making submissions to the Njonjo Commission and the CKRC. KLA's members are in close touch with land and housing policy developments in the region and probably better informed than their colleagues in government. There is good reason to believe that Kenyan NGOs, KLA members in particular, can make a significant contribution to the process of land policy development in Kenya, if given the opportunity.

In terms of the work being done in response to the Njonjo report, released less than a couple of months ago, KLA and its members are in the process of assessing their next move. At the time of writing, plans were being finalised for a workshop of KLA members to organise a response to the Njonjo report.

4.3.2 Recommendations for DFID assistance for the immediate term

The land policy development process has entered a critical phase and DFID-Kenya should consider further assistance to KLA's work, the scope and content of which will need to be agreed by KLA's membership and receive at least the tacit support of GoK. In mapping out future assistance to KLA it is necessary to be cautious. It is possible to make programme proposals for the year ahead, but not much beyond. So much will depend on the Government's response to the recommendations of the Njonjo Commission and the outcome of the CKRC process.

DFID should consider funding a KLA programme which will be complementary to that of the Ministry of Lands and Settlement, one which involves assisting with the development of the national land policy, harmonising the land laws and preparing for the institutional changes envisaged in the report of the Njonjo Commission and the final draft Constitution Bill and the promulgated Act.

The detailed planning of a joint work programme with the ML&S should be speedily executed once the outcome of the CKRC process becomes clearer, that is in November 2003 when CKRC is due to be wound up. It is recommended that DFID facilitate a joint planning process between KLA and the Ministry, if a request for this comes jointly from the two parties. KLA and the Ministry should be encouraged to enter into negotiations as soon as possible and reach agreement in principle on a joint programme of work - not wait until the CKRC reports at the end of November. The mechanism could follow that adopted in the development of the South African land policy, with task teams, comprising government and civil society specialists being

²³ Green Paper on South African Land Policy, Department of Land Affairs, February 1996; White Paper, April 1997.

²⁴ *Government-NGO Relations in the Greater Horn of Africa: Kenya Country Study*. Institute for Development Research, Boston, USA. 2000.

²⁵ Nazneen Kanji, Carla Braga and Winnie Mutullah, *Promoting Land Rights in Africa: How do NGOs make a difference?* IIED, London, 2002.

appointed by the Minister to prepare working papers on specific aspects of the policy. Work on this aspect could start immediately. Whatever the outcome of the CKRC process, Kenya will need a national land policy.

As part of this preparatory phase, KLA and the ML&S could be encouraged to reach agreement on a 'protocol' to cover future interaction between the Ministry and KLA for the implementation of the joint work programme and related matters (see Appendix 4).

DFID funding for the ML&S (or its successor) and KLA should be dependent on their being willing and able to reach an agreement on a programme of co-operation for the preparation of the national land policy.

Pending such an agreement and the commencement of preparation of a joint programme, DFID should be prepared to cover KLA's operating costs until the end of March 2004.

If an agreement could be reached between KLA and ML&S along the lines proposed, the outputs in the project log frame (Appendix 3) would be revised to make reference to the protocol to be agreed and the task groups and working papers to be prepared as part of the land policy development process. The log frame would also have to recognise the joint government: NGO nature of the undertaking.

5 Possible future DFID support to the GoK land reform process

5.1 Overview of land reform work being undertaken

The TOR (Appendix 1) require the consultant to provide 'an overview of work being undertaken by the Government, Business and NGOs to affect changes in the land laws and administration of land in Kenya'.

5.1.1 Government²⁶

It is still early days in the life of the new government and the tenure of the Minister of Lands and Settlement. The report of the Njonjo Commission leaves no doubt about the difficulties to be resolved. The charges made by Kenyans against the ML&S (Appendix 3) suggest a bureaucracy in an advanced state of decay. The problem is deciding where to start with reform.

'Quick fixes' are needed as well as long-term strategies. But the former can run into unexpected complications, which can tie up scarce resources and divert attention from long-term strategies. An example is the wholly legitimate and urgent undertaking 'to stop the grabbing of public land for speculative and political purposes' and to repossess

²⁶ Sources: (i) Two meetings with senior management of the ML&S, initially at the beginning of the week's mission and again at the end. On both occasions the meetings were of a formal nature in the boardroom, on the second occasion in front of the TV cameras. (ii) On the occasion of the KLA Stakeholders workshop, there was an opportunity to hear from the Deputy Secretary Mr E. M. O. Opar on the programme of the new government. (iii) The proceedings of the Stakeholders Conference, which was held at the Kenya School of Monetary Studies, 16 April 2003, (i.e. prior to the release of the Njonjo Report) including the keynote address by the Hon. Minister, also provide information on government's intentions.

land that has been corruptly allocated and acquired.²⁷ This is a most daunting task for the Ministry and its legal advisers since much of the public land ‘wantonly dissipated’ has been mortgaged, sold and built upon.

Another undertaking which may come back to haunt the ML&S is the proposal ‘to phase out old generation title deeds’, which until now have been regarded as the most secure. The idea of the Ministry ‘meddling’ with old generation deeds horrifies the banking sector and landowners.²⁸ ‘New generation titles’ will presumably be the product of the promised IT-based Land Information Management System ‘which will re-instate the sanctity of the information contained in our registry’.²⁹ Computer records are not immune to tampering and more easily altered than deeds drawn on special paper with signatories of the Commissioner of Lands and Registrar appended. Great caution is needed before deciding to switch from a registry of deeds to a registry of titles – a well-known pitch for IT salesmen.

Important tasks being undertaken by the ML&S are: the scrutiny of Land Control Boards, Land Disputes Tribunals and land adjudication committees to make them more sensitive to the holders of land rights, especially women; a crash programme to bring the land adjudication process in Meru District to a successful close; and, on the survey and mapping side, the very important task of digitalisation of topo map production and updating.

With regard to long-term strategy, i.e. the formulation of a national land policy, the ML&S has formed an ‘in house’ technical committee to work on the preparation of a Sessional Paper. The task of land law harmonisation in line with the new policy has been passed to the Ministry of Justice and Constitutional Affairs. However, the ML&S recognises that the finalisation of the land policy and legislation must await the outcome of the constitutional review process.

The Minister assured DFID of his serious intention to engage with civil society and professional bodies³⁰ in this process. At the Stakeholders Conference on 16 April 2003, the Minister gave the same undertaking, but KLA members are concerned to know how and when this engagement is to take place.

Part II of the Njonjo Commission report clearly sets out the requirements for such a process. Yet the ML&S give the impression that the nature of the process required has yet to be absorbed. Perhaps this is understandable. The Ministry is taken up with resolving everyday crises. This underlines the need for the Minister to set up a separate Task Force, under an experienced land policy specialist, supported by dedicated task teams, comprising individuals drawn from government and civil society (including members of the professional bodies), to commence preparatory work on a comprehensive land policy review.

²⁷ Keynote address by Hon. Amos M. Kimunya, M.P., Stakeholders Conference at the Kenya School of Monetary Studies, 16 April 2003.

²⁸ Interview with KBA.

²⁹ Keynote address 16 April 2003.

³⁰ The Law Society of Kenya, the Institution of Surveyors lo Kenya, the Kenyan Institute of Planners, etc.

A starting point would be a detailed survey of the status of land administration in the country, including the allocation of human and financial resources to the function. According to the recently announced budget, the Ministry of Lands and Settlement is to receive 0.42 per cent of the government allocation in the current financial year. This is a modest amount, but in line with expenditure on the land sector of other countries in the region. It presumably does not take into account the costs of land administration by County Councils and local authorities, which must also be factored into the equation. Details of the current status of revenue (appropriations-in-aid) should also be gathered.

The first objective would be the compilation of a comprehensive issues paper, which sets out the options for moving forward. Time is of the essence. The new land laws have to be in place before the elections in 2007. Land will not be the only sector to require the drafting and enactment of legislation when the new Constitution is approved.³¹

There has been talk of reconstituting the Njonjo Commission to complete its work. This would not seem to be the way to proceed. Bearing in mind the number of people on the Commission and the time taken, it hardly represents value for money. However, the work that was out-sourced by the Commission was done well. It is hoped that expertise of this quality would also be available to the Minister's task force.

5.1.2 Business

In the time available, interviews with the business sector were limited to three brief sessions with different groups of stakeholders. However, this was sufficient to learn that business people are clearly alarmed by the uncertainty generated by the daily reports of land disputes, 'pronouncements by the Minister' and equally disturbing calls by KLA and its members for far-reaching redistributive land reform. 'What we need is a period of stability' and 'if change is necessary, orderly change', and for 'business people to be consulted about any proposed change'.

It is clear from the very high price of properties and rentals³² in Nairobi, compared with other capitals in the region, that serious dysfunctions are present in the land market which seriously constrain supply. An efficient land market encourages transactions between individuals that are underwritten by the law and by registered private service providers. An efficient land market should require only minimal day-to-day government intervention. In Kenya, formal market transactions still demand a relatively high level of official sanction (and gate-keeping by avaricious officials), but the rapid increase in urbanisation makes state intervention increasingly impracticable. The Government could no doubt achieve its economic and social objectives with less direct involvement in land transactions. These issues must be addressed by the land policy review. The views of professional service providers must be taken into account. Efficiency in the land market depends upon government providing an enabling framework and performing the necessary regulatory and administrative functions effectively and efficiently.

³¹ See Document IV: An outline of legislation which will require enactment, revision or repeal, Working Document for the National Constitutional Conference, 17th April 2003. CKRC.

³² This is particularly the case at the lower end of the market.

The needs of the urban poor must not be neglected. On the contrary, this is where the land policy must focus and where the comparative advantage and expertise of NGOs can be useful.³³ Tenure issues must be addressed in order to provide for tenure security, to allow investors to realise their capital and at the same time protect the urban poor from 'down raiding' by avaricious landlords and structure owners.

5.1.3 Donors

Development aid in the land sector has been confined in recent years to assistance to NGOs. Since the transition, Sida³⁴ reports that it has been in discussion with the Ministry of Public Works, MS&L and UN Habitat in connection with possible assistance with Nairobi Slum Upgrading. This could extend into tenure related work and the development of a Land Information System for the City.³⁵

USAID has provided assistance to the Law Society of Kenya for some important research relating to the Njonjo report.³⁶

The Netherlands Directorate for International Assistance³⁷ and Germany's GTZ are reported to be interested in the land sector.

5.2 Proposed DFID assistance to ML&S for a land policy review

These proposals are made in the context of two brief meetings with ML&S senior managers in the course of a review, which had as its principal aim a PCR of the KLA project. The proposal remains to be fleshed out on the basis of further meetings.

This paper makes the case for an interactive land policy development process on the lines recommended by the Njonjo Commission. It is proposed that DFID assist with the funding of a thoroughgoing 'Land Policy Review' as an input into that process. The work would be subdivided into two phases. The first phase would be completed within nine months and would lead up to the publication of a Kenya Land Policy Issues Report. The second phase would be completed within another three months and would set out the recommended policy options on which a Sessional Paper on Kenya National Land Policy could be based.

It is suggested that DFID would fund the costs of contracting internationally acknowledged specialists on aspects of land policy from Kenyan NGOs, research institutes and professional bodies to work with government officials on a series of task teams covering key policy areas. National consultative workshops, funded by the project, would be scheduled at two critical stages, namely to consider the Land Policy Issues Report and the Draft Land Policy Review. DFID would also be asked to fund the costs of a Secretariat managed by a private consultancy firm, but located in the ML&S to coordinate the process.

³³ For example, Pamoja Trust, ITDG, Maji na Ufanisi, GROOTS Kenya, Slum Dwellers Association as well as private firms such as Matrix Development Consultants.

³⁴ Information kindly provided to DFID by John Ndiritu, Programme Officer (Public Administration) Sida, Nairobi.

³⁵ Preparatory Mission for an Urban Land Study in Nairobi within the framework of the Collaborative Nairobi Slum Upgrading Programme, Ulf Kihlblom and Mike Cheremshynsky, U-Consult Sweden AB, Sockholm, January 2003.

³⁶ See www.lsk.or.ke.

³⁷ Information supplied by Dr Akinyi Nzioki, Netherlands Embassy.

5.3 The GOK and DFID policy context

5.3.1 GOK

In the 'Kenya Economic Recovery Strategy for Wealth and Employment Creation – 2003-2007', land issues crop up in Chapter 9, 'Cross-Cutting Issues', and in Chapter 8 in the context of Arid and Semi Arid Lands. The strategy document makes a commitment, within the first half of the FY 2003/04 to develop a 'clear time bound action plan for implementing the recommendations of the Njonjo Commission. It states that 'Some of the areas that will require immediate attention by the government include computerisation of land records'.³⁸ This particular item would probably not have been selected as a priority if the groundwork on land policy had already been done. If the legal basis is inadequate, modernizing land administration institutions and land records may be of doubtful value. Issuing titles in the absence of a clear legal framework or in an environment where institutional responsibilities are not clearly delineated can easily increase rather than reduce conflict and even become a source of higher tenure insecurity.³⁹

As Gueye *et al* point out, the rules governing access to, and the distribution of the benefits from, land are important for poverty reduction, governance, economic growth, and environmental sustainability.⁴⁰ This importance is often not reflected in countries' development strategies, where reference to land is either tangential or lacks specificity. This is currently the situation in Kenya. Despite the attention given to the land issue by the media and the CKRC, the elite has still to grasp its significance. Predictably, the authors in the otherwise excellent strategy paper for the Ministry of Planning do not touch upon the land issue.⁴¹

5.3.2 DFID

Finally, the reviewer was asked to comment on the consistency of these proposals for DFID assistance to the land reform policy process with the broad objectives of the DFID-Kenya pro-poor growth theme group (theme 4). At this stage, in the absence of documentation setting out these objectives, it is difficult to comment, but I would aim to cover this in the final report.

³⁸ Page 52

³⁹ Klaus Deininger, *Land Policy for Growth and Poverty Reduction*, World Bank Policy Research Report, April 2003

⁴⁰ Gueye, B., H. Ouedraogo, and C. Toulmin. 2002. "Country Case Study West Africa." Paper presented at the World Bank Regional Workshop on Land Issues in Africa and the Middle East and North Africa Region, April 29-May 2, Kampala, Uganda.

⁴¹ Harris M. Mule and David Ndii, 'Strategy for Economic Recovery; A Discussion Paper prepared for the Ministry of Planning, March 1, 2003.

Appendix 1 TOR for a review of DFID support to Kenya Land Reform Process

1. Background

1.1 Recent government actions and policy pronouncements since the new government took charge have inspired confidence and renewed enthusiasm on land reform and the strengthening of ministry of lands and settlement as the basis for improving livelihoods for the majority of people and for sustainable development in Kenya. Enthusiasm for land reform and decentralisation of land administration is based on the government's stated intention to involve stakeholders in order to increase effectiveness and efficiency of land matters by reflecting local conditions, needs and priorities. The ministry of lands & settlement has already initiated stakeholders meetings to help the ministry capture views for their strategic plan and reform agenda.

1.2 Secure access to land and natural resources is fundamental for maintaining the livelihoods of the vast majority of rural Kenyans. However, conflict over land rights arising from increasing population pressure, corrupt administration systems, and over-exploitation and degradation of the natural resource base is a cause of political rivalry and violent confrontations.

1.3 DFID Kenya has since 2000 been providing support to contribute to developing dialogue and debate in Kenya on land tenure and administration with the objective of building pressure for changes in land policy, legislation and institutional arrangements.

1.4 This support has largely been through Kenya land Alliance (KLA). The purpose of KLA is to catalyse and facilitate reform of land policy, legislation and institutional arrangements.

1.5 The KLA programme has three outputs to achieve this end:

- a) support to dialogue and advocacy on land tenure issues,
- b) undertake research and case studies,
- c) provide technical advice to propose or review legal or administrative changes.

1.6 The DFID support to KLA finishes in June 2003.

2. Terms of Reference/scope of work

2.1 In relation to the KLA, the consultant will:

- conduct Project Completion Report (PCR) to determine to what extent the purpose has been achieved and assess the likely sustainability for the project outputs beyond DFID support;
- provide advice to KLA on possible future activities that will support pro poor land reform in Kenya, including development of a log frame for land policy reform;
- assess how the proposed future activities fits into the wider GoK and DFID policy environment;

- provide an input to the institutional capacity assessment of KLA in terms of the capacity to deliver on their core mission and for future work;

2.2 In relation to DFID K, the consultant will:

- provide DFIDK with recommendations for the future direction of support to the Land Reform Process in Kenya based and building on PCR and taking into consideration the new political environment dispensation. In making recommendations the consultant should:
 - a) provide an overview of work that is being undertaken by the Government, Business and NGOs to affect changes in the land laws and administration of land in Kenya. It may be necessary to discuss these issues with people and organisations in addition to those consulted in the PCR – these may included the Ministry of Lands, other donors and DFID Advisers;
 - b) look specifically at the recommendations of the Commission of Inquiry into the Land Law System of Kenya (Njonjo Commission) report and assess prospects for taking them forward;
 - c) consider the proposals of consensus building on land policy in Kenya review of the World Bank's Policy Research Report on *Land Policy for Growth and Poverty Reduction*.
 - d) assess how proposed future direction of work are consistent with the broad objectives of the DFID K programme, particularly pro-poor growth theme group (theme 4).

3 Methodology

3.1 The consultant will review key project documents including the project memorandum, project reports, KLA strategic plan, GoK Economic Recovery Strategy.

3.2 The consultant will interview / consult the key project stakeholders at different stages of the review. These are likely to include:

- KLA personnel;
- Ministry of Lands staff and other relevant GoK departments
- Reconcile (Michael Ochieng Odhiambo)
- Ford Foundation
- Oxfam
- Other member organisations of the KLA
- Private sector (Dennis Awori and Lee Karuri of Private Sector Alliance, CEO of Kenya Bankers Association)
- Donors (FAO, International Land Coalition/IFAD, WB) (by phone/email as all outside of Kenya)
- DFID Kenya staff

3.3 The review is expected to result in the following key outputs:

- a meeting / workshop of KLA stakeholders to discuss the initial findings of the review for key project stakeholders based on PCR; and to formulate a draft log frame of activities to address Land Policy Reform;
- a PCR report in an agreed format and to an agreed standard for DFID and KLA within two weeks of completion of the field work. A final report should be submitted 2 weeks after the receipt of comments from KLA and DFID, and no later than 1 August;
- report to DFID on future engagement in the sector.

3.4 The consultant should make a presentation of the main findings and recommendations to DFID Advisers and other donors involved in land and resources tenure work on 20 June prior to departure.

4. Timing

4.1 The consultancy will take place as from 16 June 2003

4.2 It will be necessary for the consultant to spend some time in Nakuru where the KLA is based.

4.3 The consultant will provide the report to the Rural Livelihoods Adviser, DFID Kenya.

DFID Kenya
June 2003

Appendix 2 Summary of issues raised with Njonjo Commission

In Annex 2 of the Njonjo Commission's Report, there is a summary of land and land related issues raised by Kenyans that the Commission recorded. These issues covered almost every aspect of land ranging from land administration, land allocation, adjudication, survey, settlement, land registration, land control boards, land disputes tribunals to constitutional issues on land.

i) Land Administration

- Lack of competent staff and equipment;
- Too much centralisation in the Ministry and the Lands Department at Nairobi;
- Too much power concentrated in the hands of the President and the Commissioner of Lands when land is being allocated;
- Too little communication between the people at the grassroots level and their local and central government representatives;
- Failure by the Lands office to observe current legislation;
- Failure by the Ministry to amend or repeal current legislation or to introduce new consolidated legislation;
- Too much interference by the Provincial Administration in land matters;
- Lack of services in some areas;
- Breach of trust by County Councils and Commissioner of Lands;
- General inefficiency in land offices; and
- As the current administrative and institutional arrangements are inappropriate, a permanent commission should be established.

ii) Land Registration Systems

- There are too many Registration Acts and very little attempt has been made to convert titles to the Registered Lands Act (R.L.A. Cap 300);
- Section 143(1) of the R.L.A. has been abused to deprive people of their property;
- The Sectional Properties Act 1987 should be brought into use;
- The Land Registries staff and Registrars are inefficient and there is too much corruption and lack of supervision;
- Poor services;
- The concept of "Absolute proprietorships" is not understood by both the public and the registrars and other officials;
- That pre-existing customary land rights being extinguished on registration of title to land is a misnomer; and
- Government Lands Act (Cap 280) (GLA), Registration of Titles Act (Cap 281) (RTA), Land Titles Act (Cap 282) (LTA) and Region of Documents Act (Cap 285) (RDA) Registries should be decentralized through converting titles to RLA.

iii) Land Survey

- Poor quality staff results in inaccurate and outdated maps;
- Survey costs are too high;
- The general boundary system as used at present is inadequate, inaccurate and should be modernized;
- Titles issued before amendment of Registry Index Maps causing confusion; and

- Some surveyors are corrupt, dishonest and greedy causing people to lose their land
- iv) **Land Registration and the Preparation of Official Documents**
- The methods used in the Land Registries are outdated and often not understood by the public and the Registrars themselves;
 - Too much documentation and too expensive;
 - Total lack of security of deed titles leads to forgery and other malpractices;
 - The Registries are seriously out of date and do not accord with the facts on the ground;
 - Too many government departments involved and no co-ordination; and
 - Land delivery procedures are too long and cumbersome.
- v) **The storage and retrieval of documents**
- Files are deliberately hidden and only “found” on payment of a bribe; and
 - There is a need for computerization.
- vi) **Land valuation**
- Some valuation e.g. for change of user and extension of lease done in Nairobi only even where the land is elsewhere;
 - There is lack of understanding about valuation that needs to be eradicated;
 - Valuation for compulsory acquisition is improperly carried out;
 - The effect on property values caused by the arbitrary extension of Municipal boundaries should be investigated and corrected; and
 - Rates charged by Municipalities are too high.
- vii) **Land Control**
- The membership of the land control boards, the corruption, the failure to impose restrictions on sub-economic subdivision, the manipulation of the Boards by Politicians, the dishonesty and interference of the Provincial Administration, the miserable allowances, the lack of agendas and failure to announce sitting dates where all matters affecting proper functioning of Land Control Boards; and;
 - Consent to charge/mortgage should extend to the remedy by realization of the asset without further consent and therefore should involve family members as if the transaction were an actual sale.
- viii) **Expenses Relating to Land**
- There are too many charges incurred when dealing with land some of which are unauthorised;
 - The Registries do not publicise the official charges and tend to charge far too much for their services;
 - Clearance Certificates are difficult to obtain and the public is penalized for the incompetence of Central and Local Government Departments; and
 - Survey fees do not relate to the value of the property being sub-divided.
- ix) **Settlement of Disputes**
- The membership, their appointment and the jurisdiction of the Disputes Tribunals need to be simplified;

- The Provincial Administration should not interfere in this process;
- There should be a special Division of the High Court to deal with land cases;
- Conflict between Land Disputes Tribunals Act No. 18 of 1990 (L.D.T.A.) and the R.L.A. on boundary disputes;
- Customary Law applied in dispute settlement but not included in statute;
- Jurisdiction of the Land Dispute Tribunals (L.D.T.) is limited and could be extended;
- Magistrate Courts lack jurisdiction to correct erroneous awards by L.D.T.
- L.D.T. has become dumping ground for cases courts consider waste of time;
- Land dispute settlement mechanisms, structures, processes and institutions are characterized by delays, incompetence, corruption, illiteracy, nepotism, political interference, inadequate remuneration and poor understanding of the law; and
- Lack of harmony and overlap of roles between the organs, agencies and institutions that handle institutions that handle land disputes.

x) **Lack of integrity and professionalism**

- The ignorance of the Land Registrars and even the Provincial Administration shows up in many forgeries in the Land Registries and Survey offices. Maps are altered, boundaries are moved on the ground, beacons are stolen and no one does anything about it;
- Lack of professional ethics and integrity by persons dealing with land matters; and
- However, the public too are dishonest and indulge in questionable practices i.e. there is a general lack of patriotism and morality

xi) **Land Allocation**

- The procedures for the allocation of both Government and Trust Land have been disregarded and abused for decades;
- There has been a breach of trust by both central and local government;
- The allocating authority whether Central or Local Government should take the views of local residents into account or else the local residents should carry act the allocation functions themselves;
- Development plans should be publicized, amended to conform to local requirements and adhered to by all authorities;
- The allocation of sensitive ecosystems, water catchments, forests, the foreshore, riparian land should cease;
- The sale of undeveloped plots should be prevented and abusers of the system should be punished;
- The allocation of settlement scheme plots has been seriously abused by the Provincial Administration and by Local Government Officers. They should be disciplined and improper allocation set aside;
- Plot allocation committees are not provided for in the existing laws;
- Minutes of plot allocation committees tampered with in Ardhi House; and
- The President and the Commissioner of Lands should have their powers of allocation devolved to the District level.

xii) **Land Acquisition**

- The failure to pay prompt or adequate compensation caused anger;
- The failure to take over the land once acquired led to corrupt practices;

- There was a need to insist on an Environmental Impact Assessment before completing the acquisition process; and
- When land acquired for public purpose was no longer needed for that purpose, it should be offered to the original owners (or their descendants) in priority to anyone else.

xiii) Land ownership

- The sanctity of title should be respected;
- Beach plots should not interfere with the right of the public to have access to the beach;
- Where possible communal titles to land held under Customary laws should be encouraged;
- Coast land ownership problems should be investigated and resolved in accordance with traditional land practices;
- Foreigners should only have leasehold titles and these only within urban areas;
- There should be a ceiling on land holdings to discourage hoarding and speculation in land; and
- Forests and other natural resources should be owned and managed by the local residents and exploited by and for the benefit of local residents in priority of others.

xiv) Extension of Leasehold Titles

- The delay in granting a renewal of a lease should be minimized;
- The procedures should be publicized when considering a new lease;
- The differences between urban and rural leaseholds was not fully appreciated;
- The term of a leasehold title was not fully understood and the reasons for a lease and its length of term should be explained to the public;
- The necessity of planning urban areas when leases are shortly due to expire has not been appreciated by the public or the officials;
- The technical details of sub-leases and their renewal has not been understood by land office officials; and
- Need to do evaluation and involve local communities before leases are executed.

xv) Land Consolidation and Adjudication

- The delay in deciding appeals by the Minister was causing distress and must be reconsidered and properly manned;
- The failure of taking gender issues into account during adjudication needed to be addressed;
- Due to corruption and political interference, adjudication has at times created landlessness;
- The environment should be protected during adjudication;
- The rights of “acceptees” should be taken into account;
- Objections to an Adjudication Register should not delay title issuance;
- Land given for a public utility purpose should not be interfered with and grabbed by other people;
- Land Titles Act (Cap. 282) claims should be processed immediately;
- Local communities should be fully involved in the process of adjudication and no one else allowed to interfere; and
- Land consolidation has outlived its usefulness and as the majority prefers adjudication to consolidation, repeal the Act.

xvi) **Land Tenure**

- Communal Land tenure should be recognized and where individual land tenure is approved by local communities only those local communities should benefit;
- The Coast land tenure problems should be treated as a separate problem and should be thoroughly investigated by the local people themselves before the problems are resolved;
- County Councils should no longer hold land in trust for the local communities as they have breached this trust; and
- The principal guideline should be the sustainable use of land.

xvii) **Water Bodies**

- Water should be owned by a National Authority and not by any individual or section of a community;
- Riparian land should not be allocated;
- Pollution of water bodies should be actively prevented and those responsible punished;
- Use of water should be carefully planned;
- Investigate the possibility of using Lake Victoria water for irrigation; and
- Access to water must be respected and properly administered.

xviii) **Protection of the Environment**

- The protection of all sensitive ecosystems should become a priority;
- Forest must no longer be destroyed but must be restored;
- And a semi arid lands must be treated differently from better quality land and the residents helped to exploit these special areas which have their own peculiar problems and a customary communal tenure system should be recognized;
- Waste disposal must be planned and controlled;
- Dams and Hydroelectric Schemes should be carefully monitored before they damage down-stream ecosystem; and
- Local residents should be consulted before setting up refugee settlements and compensation be paid by the UNHCR for degradation and destruction caused by refugees.

xix) **Inheritance rights to land**

- The rights of women and of children on inheritance must be respected by all irrespective of customary traditions;
- The duration and costs of succession proceedings should be minimized;
- The Kadhi in accordance with Islamic Legal Procedures should handle Islamic Succession cases; and
- Writing of wills should be encouraged.

xx) **Tenants – at – will**

- The current system of tenants – at – will in the Ten-mile coastal strip has no legal basis or foundation and legislation should be enacted to regulate the system; and
- The law should be amended to recognize the ownership of fixtures/crops separate from the soil.

xxi) **The Constitutional position of land**

- Land should be accorded a special place in the Constitution;
- The protection offered by Section 75 of the constitution should not apply to illegally acquired land;
- There is disagreement whether land in any particular area should be restricted to the people of that area or whether people should be allowed (or even encouraged) to buy land anywhere;
- The deliberate promotion of ethnic violence over land issues by politicians should not be tolerated in future;
- The Constitution should be amended to clearly define what is “government land” and provide for its trusteeship; and
- Chapter ix of the Constitution recognizes only County Councils as owners of land within their jurisdiction but not other local authorities and this should change.

xxii) Abuse of laws

- The widespread practice of land grabbing is a direct result of abuse of land laws, it must not be allowed to happen and grabbed land must be repossessed;
- Public utility land must be repossessed and put to the purpose for which it is intended;
- Since the Commissioner of Lands has abused his powers in land allocation, local persons should take charge of their land;
- There should be strictly enforced codes of professional ethics

xxiii) Land Distribution

- There should be a fully implemented policy on maximum land holdings where land is not being developed and or where it is being hoarded and used for speculation;
- Equally there should be a policy to prevent re-fragmentation of land and the subdivision into uneconomic units; and
- There is failure to address population growth vis-à-vis land distribution

xxiv) Land use planning

- There should be only a single planning authority whose decisions should be strictly implemented;
- The use of marginal lands by traditional groups was appreciated and should be strictly implemented;
- The use of marginal land by traditional groups was appreciated and should be properly administered with the best interests of the group members as the guiding principle and crop farmers should be kept away from these lands to avoid conflict;
- In urban areas, strict control of land development should follow proper planning to discourage haphazard informal developments;
- The spread of townships into agricultural areas should be properly planned and enforced;
- Infrastructure should be planned and implemented;
- Communities should become more involved with planning for the use and control of resources and their decisions needed by officials.
- The physical planning Act 1996 conflicts with the Government Lands Act (Cap 280) and the Land Control Act (Cap. 302);
- Role of Minister in approving physical development plans and gazettelement is cumbersome and expensive;

- Land sub-divided into uneconomic units;
- Expansion of urban areas to rural areas without proper infrastructure;
- No land use plans;
- No policy on land use to guide development;
- Nairobi has become too large and unmanageable; and
- The physical Planning Act 1996 should not apply to agricultural land as defined under Section 2 of the Land Control Act (Cap.302)

xxv) Land Tax on Idle Land

- Tax idle land;
- Use idle land to settle the poor and landless; and
- Criteria for determining what land is idle should be set out.

xxvi) Administration and management of protected areas

- Fish landing sites should be managed by Kenya Ports Authority;
- National Reserves should be owned and managed by local communities;
- Conflict between Kenya wildlife service and local communities over sharing of resources e.g. salt licks in parks.
- Communities bordering parks should share benefits of tourism and reciprocal rights of access for pasture;
- The legal ownership of wildlife both in protected areas and private land by the state to the exclusion of land owners and local communities has alienated wildlife from the people and cause resentment;
- Water catchment areas should be gazetted and titled and that local communities educated in their conservation;
- Forest laws and policies be reviewed to allow communities to manage and conserve the forests and have access to revenue and to utilize forest resources for cultural, religious and medicinal purposes;
- There should be a buffer between settled areas and game parks to reduce conflict; and
- Historical sites and monuments should be managed by National Museums of Kenya.

xxvii) Provision of Infrastructure

- Rural access roads should be maintained;
- Access roads are encroached upon;
- Land allocated without provision of infrastructure;
- Eastleigh Airbase should be relocated as its present site is dangerous to the public, the lands should be planned for housing;
- Infrastructure should be provided for fish landing sites; and
- Since the collapse of the Kenya Meat Commission, there has never been a proper livestock marketing system and this has bred poverty in pastoral areas;

xxviii) Problems of Nomads and pastoralists

- Ownership of land in marginal lands should be communal and the land should not be subdivided;
- The land should be held by a land board conversant with land laws and special problems of such areas;
- Pastoralism should be accepted as a way of life and proper use made of such land;

- Migration from high potential areas to such areas should be controlled to limit damage on the environment;
- Abattoirs and a proper marketing system should be provided in pastoral areas so as to improve the pastoral way of life and integrate it in the national economy; and
- There is pressure on pastoral grazing land from wildlife and humans and livestock are normally injured by wildlife.

xxix) **Landlessness**

The commission listed causes of landlessness as:-

- Displacement of communities from their ancestral areas by the slave trade and the colonial government;
- Population increase;
- Breakdown in traditional land-use systems;
- Land clashes and banditry;
- Some people owning too much land; and
- Lack of a clear policy on landlessness.

xxx) **Squatters**

- Squatters on public land should be settled freely;
- Squatters on private land should have prescriptive rights applied more easily and quickly;
- Encourage private owners to sell land to squatters;
- Squatters are spawned by unfair land allocation procedures;
- The application of the Land Titles Ordinance to the coast made indigenous coastal "squatters" by default; and
- Squatters have no legal rights and they are always harassed.

xxxii) **Absentee landlords**

- Land of absentee landlords should be repossessed and given to local residents;
- The practice of being an absentee landlord should be outlawed; and
- The existence of absentee landlords is an a normally that has deprived the indigenous coastal of their birthrights.

xxxiii) **Land Policy**

In light of the above findings, the Commission then observed that Kenya lacks a comprehensive land policy thus:-

National parks and game reserves occupy far too much land while many Kenyans remain landless;

- Some minorities have been deprived of their land;
- Boundaries of urban authorities are arbitrarily extended;
- Government has failed to confront population pressure on land one result of which landlessness persists;
- The current mining laws and policies are exclusionist since mining activities do not benefit local communities and have led to environmental degradation; and
- Land Acts and policies do not recognize or incorporate concepts of African Customary land laws and traditional land use/resources management techniques

Appendix 3 KLA project Log frame

Project Name: DFID Support to KLA FIRST DRAFT

Country: Kenya

Date of Preparation: November 2001

Latest Date of Revision:

Narrative Summary	OVis	MoV	Assumptions
<p><i>Super-goal:</i> <i>Poverty eradication</i> Goal: <i>Assured security of access to land and natural resources for livelihood enhancement</i></p>	<p>Land reform policy is implemented with self-evident impact on tenure insecurity and poverty reduction</p>		<p><i>(goal to super-goal)</i></p>
<p><i>Purpose:</i> <i>To establish and operate an effective advocacy network in Kenya to defend and uphold the land rights of the poor and other disadvantaged groups and to campaign for policy and legal reforms that meet their needs and interests</i></p>	<p><i>EoPS:</i> The advocacy network has a significant impact on the emerging land policy which receives widespread public approval and support</p>		<p><i>(purpose to goal)</i> Government responds constructively by reviewing policy, introducing legislative reforms and institutional changes.</p>
<p><i>Outputs:</i> 1. Effective land reform advocacy network established.</p>	<p>A critical mass of CSOs is actively assisted by KLA in their land reform advocacy work which is in support of affected communities Inaugural meetings and workshops. KLA Co-ordinator recruited. KLA registered as a trust. E-mail system in place and Secretariat on-line. At least 20 paid up member organisations by end of</p>		<p><i>(outputs to purpose)</i> KLA succeeds in securing the confidence and support of the media and the authorities and is recognised as a responsible, non-partisan advocacy organisation.</p>

Narrative Summary	OVIs	MoV	Assumptions
<p>2. Greater understanding by civil society, government and donors of what is needed to secure the land rights of the rural and urban poor and disadvantaged groups.</p> <p>3. A National Conference in July/August 2002 on Land Reform and the Land Question organised by KLA for civil society and government participants.</p> <p>4. A document setting out land policy principles receives the support of the Conference is submitted to both the Constitutional Review and the Land Commission.</p>	<p>2001.</p> <p>A series of published briefing papers are informed by the research and case studies prepared by KLA and members.</p> <p>Workshops, lobby forums, dialogue sessions with member organisations, other stakeholders and government departments.</p> <p>Research papers and case studies completed.</p> <p>The Conference attracts strong support from CSOs in Kenya and favourable coverage from the media. Conference logistics in place</p> <p>Ten thematic reports and eight representative case studies prepared.</p> <p>Conference document published by end of June 2002.</p> <p>The recommendations of the Conference are reflected in the reports of both the Constitutional Review Commission and the Land Commission.</p> <p>Submission to Commissions finalised by September 2002.</p> <p>Publication completed by October 2002.</p>		<p>KLA management is successful in focusing its attention on the critical policy issues and is not driven off course by problems of an organisational nature.</p> <p>KLA is able to obtain the necessary resources from donors and members needed to stage the conference and operate effectively.</p> <p>The Commissions seriously consider the KLA submissions.</p>
<p>Activities: Establishing KLA. 1.2 Introducing KLA to prospective members through a series of workshops.</p>	<p>Inputs:</p>	<p>Possible funding sources</p>	

Narrative Summary	OVIs	MoV	Assumptions
<p>Recruiting members</p> <p>2.1 Operating the advocacy network</p> <p>2.2 Commissioning, sponsoring and co-ordinating research activities on land reform issues.</p> <p>2.3 Sponsoring and co-ordinating the preparation of case studies relating to the abuse of land rights of the poor.</p> <p>3.1 Providing the Secretariat for the Conference.</p> <p>3.2 Preparing briefing papers and case studies for the Conference.</p> <p>3.3 Preparing the Conference Document setting out policy principles.</p> <p>4.1 Preparing the final submission to the Commissions</p> <p>4.2 Publishing and distributing the submission</p>			
		£000s/ yr	

Appendix 4 Government/NGO Land Reform Protocol

It is often said that the success of land reform in Kenya will depend on a tripartite partnership between government, NGOs and CBOs. The idea is not a new one. It emerges from a similar initiative in the Philippines between NGOs involved in land reform and the Department of Agrarian Reform - the Tripartite Partnership for Agrarian & Rural Development (TriPARRD) in the early 1990s.

This note asks whether there is need formally to establish and agree the rules and procedures to regulate the relationship between the ML&S and NGOs in promoting land reform. These rules and procedures could be set out in a formal protocol that all parties would endeavour to honour. It would form the basis of a cooperative undertaking in which governmental, non-governmental and community organizations would play complementary roles, coordinate at all levels, plan, implement, monitor and evaluate the national land reform programme, and recognise and reconcile differences.

In the Philippines, TriPARRD had four main goals:

- (a) to improve the agrarian reform law and its implementing policies and guidelines through lessons extracted from field experience.
- (b) to build and strengthen the social infrastructure of the agrarian reform programme;
- (c) to transfer lands to and ensure land security of the agrarian reform farmers through their active participation;
- (d) to develop and optimize the use of land in order to increase the farmers' income;

Such a partnership but with modified goals could be formally instituted in Kenya with the adoption of a protocol setting out on (one page) clear objectives, principles and strategy for working together.

An examination of state-NGO relations in other countries frequently reveals an uneasy relationship, sometimes hostility, especially where concern for the poor causes NGOs to lobby government to obtain access for the poor to land for urban housing, forest or water rights. Some NGOs' enjoy more harmonious relations with the state when they act as mere sub-contractors for the purposes of providing community facilitation, drought relief, health and education services, etc. However, others are reluctant to accept that role alone. Yet other NGOs wish to distance themselves from government. The accompanying Table, which is based on work in the Philippines⁴², indicates the underlying sources of tension.

⁴² Agrarian Reform Support Programme in the Philippines, Project Preparation Report, Annex 4. Tripartite Partnership for Agrarian Reform, European Union, Brussels, 1994. (by Martin Adams and Raul Socrates Banzuela)

The Benefits and Disadvantages of Government-Donor-NGO Collaboration

FROM THE GOVERNMENT PERSPECTIVE

Benefits	Disadvantages
Better delivery of supporting services to rural communities	Government's services shown to be inefficient by comparison with NGOs'
More information available from the grass roots	NGOs mobilization work promotes political instability
More interaction with rural communities	Demand for government services arising from participatory approaches increase beyond the capacity to meet it; too much focus on politics and not enough on poverty alleviation; NGOs lack competence in socio-economic/livelihood projects;
Enhanced cost effectiveness	NGOs compete with government for donors' funds
More monitoring and control of NGOs	NGOs reluctant to submit to routine monitoring; unaccountability of NGOs

FROM THE DONOR'S PERSPECTIVE

Benefits	Disadvantages
Better delivery of supporting services to target group, in contrast to poor performance by high-cost public agencies	NGOs are as reluctant as government to adhere to routine monitoring; unaccountability of NGOs regarding use of funds; NGO involvement complicates disbursement and creates administrative burdens for donor office; difficulty in arbitrating between national NGOs
NGOs seen as a better means of creating general awareness of the need for sustainable development and agro-ecology	Innovativeness of NGOs constrained by service contracts
Stress of NGOs on good governance, democracy and participatory methods.	Donor accused of interfering in domestic politics

FROM THE NGO PERSPECTIVE

Benefits	Disadvantages
Improved access to government policy formulation	Co-option by government and greater bureaucratic controls
Access to more funds to pay for NGO personnel, training and operational costs	Unreliability of funds routed through government channels; bureaucratic delays; tension between different NGOs seeking funding; loss of autonomy and independence; domination by foreign technical assistance staff; loss of credibility among clients and a tendency to maintain existing social and political conditions
NGOs obtain access to more funds for poverty alleviation and rural development	NGOs become implicated in government's scandals, especially from government-initiated NGOs (GRINGOs); cost and profligacy of consultants (local as well as foreign) funded by the donor
Opportunity to improve government services by providing training	Government acquires the NGOs' methods, dilutes and discredits them
Opportunity for scaling up operations	Relegation of NGOs to mere delivery activities to the detriment of their wider Programmes

The underlying tensions arise from the different ideological standpoints of government officials and NGOs and from the different assumptions of what development means, of the reasons for underdevelopment and poverty, and of ways to solve, alleviate or manage the situation. These differences partly account for the reluctance of NGOs to be co-opted by government and for their apparent readiness to withdraw from agreements over matters of principle.

For a partnership to be successful, a commitment on the part of government officials to NGO involvement is essential. Commitment, however, must be for the right reasons.

In the Philippines, collaboration with NGOs is sought for divergent reasons. Some perceive NGO involvement in public-sector programmes as a means of reducing the role of inefficient public bureaucracies and enhancing that of the private sector. Others see it as a means of ensuring wider participation and openness in the development process.

In the Philippines, as in Kenya, NGOs have become much more prominent in the last decade or more. The collaboration that has developed between the NGOs and the government agencies reflects the government's genuine wish for increased accountability and for wider public participation in development.

An understanding of these conflicting interests and the reasons for the sometimes tense partnership between NGOs and the state is crucial in planning, especially in the land reform sector in which NGOs are strongly politicised.

A protocol would provide for a regular schedule of meetings encompassing NGOs involved in the land reform sector and DLA's senior management. The agenda for these meetings would provide for an airing of issues relating to the funding, commissioning and implementation of agreements relating to joint work programmes and projects.

Appendix 5 Questions raised by DFID-Kenya on the Draft Report

In commenting on the draft report, DFID-Kenya asks a number of questions about KLA, viz: What are the strengths and weaknesses of KLA? Why has it succeeded and how could it be strengthened? More information is needed on the attitude change required if KLA is to move from an antagonistic to a co-operative relationship? A more explicit justification is requested for KLA's continuing role in the process and specifically what it should bring to the table.

To answer these questions, it is necessary to make some general points about the land reform policy cycle and the role of advocacy. By its nature, land reform is essentially a political act and is sure to be contested all the way from policy formulation through to implementation. The opportunity for land reform usually arises at specific political moments, and implementers often have to balance a desire to strike while the iron is hot with the need for real reform that includes broad consultations and legal propriety. As a result, land reform is often implemented at a scale that remains marginal, and is dropped after a very brief first stage that merely lets the steam out of the kettle.⁴³

A switch of emphasis to so-called economic goals, rather than the eradication of landlessness and poverty, often follows an initially strong political commitment on the part of governments to land redistribution or to the confirmation of the land rights of the poor. This cyclical trend is evident in most countries of the region – in southern Africa with regard to land redistribution, and in East Africa with regard to land tenure reform. Debates about land reform everywhere have seen a confrontation between land reform advocates and those who believe that it is about strengthening the land rights mainly of the rural poor, and those who want to give land to 'capable farmers'. The landed elite tends to obtain ascendancy over the medium to longer term after a political transition. They too usually adopt the rhetoric of poverty alleviation, but lobby government with arguments about the importance of improving food production, of export-revenue earning, of sustaining farm employment and environmental management. This may again be followed by a reaffirmation of the needs of the poor before the elections, only to be shelved when the votes of the majority are secured and the realities of implementation once again dawn on office holders.

Similarly, land reform movements are characteristically cyclical in nature. Land advocacy alliances such as the KLA grow in strength in periods of inaction by government. When governments 'steal their thunder', they fall quiet, perhaps disperse altogether as they are absorbed into government ranks to get on with putting policies into practice.

KLA owes its strength to the fact that its membership grew in a period of opposition to a government that was cynically exploiting its powers over land allocation for its own selfish political ends. Under the Moi regime, the membership of KLA was united in its opposition to the government's policies. Under the NARC, this unity could fall away and so could the need for a strong land alliance. KLA's future, and the answers to many of DFID's questions are closely bound up with the question of how seriously the new

⁴³ A comment attributed to Jomo Kenyatta by Lionel Cliffe.

government grapples with land issues. If its policies reflect the advocacy of KLA's members in support of strengthening land and shelter for the poor, then the need for an opposing alliance of land NGOs (and donors who support for them) could well diminish, especially if many of the former NGO land activists decide to join the government service. If there is a genuine transition, donor funding for NGOs could be expected to fall. This happened in South Africa and Mozambique in the nineties and in the Philippines a decade earlier following the bloodless coup that swept away Ferdinand Marcos and brought Corazon Aquino into power. In the next couple of transitional years, however, organisations such as KLA could be very important; just as they were in South Africa and Mozambique.⁴⁴

At this stage it is too soon to be sure on the direction of the new government. In the meantime, KLA would be wise to keep its options open. So would donors, but nonetheless adopt a positive stance based on the assumption that Government will press ahead with the reforms recommended by the Njonjo report and the CKRC.

Suggestions about a possible strategy for KLA are made in this draft report. Section 4.3.2 refers to the need for KLA to reach agreement with Government on a protocol that will guide a joint programme of work, which would involve KLA members working with government on specific aspects of policy. This is matched on the government side by proposals in section 5.2, where it is proposed that a Land Policy Review should involve Kenyan NGOs, research institutes etc. The report makes clear that it falls upon Government and KLA to work something out between them. DFID's asks for a more explicit justification of KLA's continuing role in the process, but this is up to KLA's membership to decide. The report contains some heavy hints. Judging by the e-mails coming in from KLA, these have been picked up.

Other questions raised by DFID relate to the existence of other civil society players who are not involved with KLA. The answer to this question depends on the breadth of the definition of 'civil society'. Probably the most prominent is the Law Society of Kenya (see footnote 11). There are also the other professional organisations such as bankers, surveyors, valuers and physical planners who remain outside and can be expected to do so.

Finally DFID asks about the role of others donors, but in so doing provides the answers. Yes, a coalition of donors in support of the land reform process could be immensely important, just as it was in the case of South Africa in the Mandela years.⁴⁵

⁴⁴ See reference to the Mozambique experience in Section 4.3.1 and the findings of the IIED study by Najeen Kanji and her fellow researchers,

⁴⁵ See Martin Adams, *Breaking Ground; Development Aid for Land Reform*, ODI 2000 and 'Official Development Assistance for Land Reform in South Africa', *Development Co-operation Review, 1994-99*, Department of Finance, Pretoria, and IOD, June 2000.

