

**BRAINSTORMING/PLANNING KENYA LAND ALLIANCE WORKSHOP
ON LAND POLICY AND LAND LAW REFORMS IN KENYA**

**22-23 February 2001
Machakos**

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SUMMARY REPORT

The Kenya Land Alliance (KLA) organised a two-day workshop in Machakos to brainstorm on important issues that should constitute the Land Reform Process and come up with a plan of action/activities to be undertaken by various stakeholders. Stakeholder representatives included civil society organisations and NGOs, relevant government departments, local authorities, academicians and lawyers. This Report is a summary of issues deliberated. It is intended to inform other interested programmes within Oxfam on the issues that will take priority in the on-going land reform process from a civil society point of view.

Overview

The Land Reform process in Kenya is proving to be a complex process. Unlike in the past debates, whereby issues centered on the implications of the land question for agricultural production, the debate today centres around its effects on the organisation of society. It is therefore linked to political and economic reforms that are unfolding at national and regional levels. As a consequence the debate is strongly biased towards land and property rights. It is believed that further land reform should be the basis of poverty reduction programmes since land is the major resource for poor people in Sub-Saharan Africa. This brainstorming workshop aimed at reaching a consensus on the issues to be taken forward.

Four presentations formed the basis of the discussions:-

1. The key elements and general guideline principles in formulating a national land policy.
2. Implications of gearing the formulation of land policy and land laws as a stimulus for agricultural productivity.
3. The influence of political, economic, social and cultural issues on the land policy and land law reform process.
4. Gaps, conflicts, contradictions, overlaps and inconsistencies in the existing land laws and what need to be done in land legal reform.

Key elements and guideline Principles in formulating Land Policy

Amongst the different elements that form land, it is the past and present human activities that represent different interests, i.e. access and ownership. Hence, a national land policy must aim to facilitate fairness. The current policies do not integrate, i.e. those of 'land ownership' and those of 'land use'. The problem of land degradation continues to aggravate due to over-usage of the

resource, as too many people are concentrated on small pieces of land. Problems cited in the current system include:-

- The land administration structure inherited from the colonial system.
- People have been robbed off their heritage.
- In land use administration, e.g. agriculture, housing, pastoral, etc., different institutions are distorted in their approach therefore creating conflict.
- Administration of the different sectors involved in land use is not co-ordinated.

Problems hence arise because there is competition between the different interest groups who view the problems from different dimensions. Land owners and local communities are not participating in the reform process. The following guidelines were considered pertinent to the process:-

- A clear mission must be defined.
- Develop clear concepts and principles.
- Clearly define how we would want 'access' of land so as to avoid abuse, with a long-term focus.
- Define objectives which should not be politically motivated.
- Work towards access to information through research to inform policy.
- In order for such policy to work, there must be land laws and an institution to facilitate the administration.

Further deliberations pointed out that there is actually no policy on land use in Kenya. Consultations on standards is lacking and probably there is need to identify the different land use systems. Land laws (even though not adequate), exist but the implementation structure is lacking.

Political, Economic, Social and Cultural Issues on the Land Policy and Land Law Reform Process.

Due to socio-economic and political changes, there have been popular demands to correct historical wrongs and to ensure equity in the distribution of resources. The need for rapid agricultural development has also occasioned this. However, politics and socio-cultural aspects relative to the economic issues have dominated the debates. Besides the physical qualities, land has many dimensions: social, cultural, ethnic, class, family, and also people identify with land differently. This has implications for the organisation of the state and the society, whereby the demands for a new form of state (as in the on-going Constitutional Review Process) and the equitable distribution of natural resources will certainly involve the land question.

Historical trends prove that the problem of landlessness and squatters deepened during the colonial period owing to expropriation and alienation. The post-colonial state adopted the colonial based legal framework of land administration and therefore failed to resolve the problems that formed during the colonial period. In fact regulating access to land became and still is a tool for administration of the society.

The current Constitutional debate and the Reform process itself, to be meaningful, must come to terms with the need for correcting historical wrongs and finding how best to incorporate non-constructed interests over the years. The pastoralist communities and the small holder peasants continue to lose land rights to the local and national economic and political elite

because of the distortions in the structure of regulating access to land. The same structure has tended to diminish rights of the small holder peasantry by fragmenting holdings to levels of economic inviability. This is because besides demographic pressures, small holders subdivide the land for subsistence farming with the intention to acquire credit for farming activities. Therefore, what should new land policies and laws reflect on?:

- They must be drafted within the reforms of the state institutions and the contemporary mode of rule.
- Democratisation of the state and land reforms must be simultaneous.
- New land laws and policies must begin by mapping out the nature of the land issue in order to place it in a broad context.
- Landlessness, loss of land rights of the peasantry and the pastoralists, ethnicisation of the land issue itself, historical claims and new forms of identities evolving from how land is articulated should inform the framework on which such laws are formulated.

Implications of Gearing the Formulation of Land Policy and Land Laws as a Stimulus for Agricultural Productivity

How will the land reform process affect agricultural productivity? This presentation reflected on the issues that KLA could take up regarding the land problem in the context of agricultural productivity. These include:-

- Small-scale farmers suffer diseconomies of scale. Hence they are disadvantaged in setting market prices.
- Big farms must depend on subsidies in order to be competitive and therefore developing countries are disadvantaged.
- Small farms can therefore be more effective in the context of developing countries.
- Existing systems of managing communal land should be structured in the legal framework.

Current policy and practice needs to change due to factors cited as contributing to failure of the economy. These include, corruption, high population growth, there is plenty of idle land, people's perception and attitude towards acquisition of land, and land rights are inadequate such that Kenyan's have let injustice prevail.

This presentation contends that land law reforms are inadequate without incorporating other socio-cultural dimensions. Economically, it is presumed that with industrial growth the agricultural sector will consequently develop. Improved governance will improve the rural economy as it implies an improvement in the re-allocation of resources and therefore improving small farm productivity.

Gaps, Conflicts, Contradictions, Overlaps and Inconsistencies in the Existing Land Laws and what needs to be done in Land Legal Reform

This presentation highlights the main problematic aspects in Kenya's Land Law System. First, the shortfalls in the Constitution, the current applicable property laws, and the various land use laws.

The Constitution lacks directive principles about the land question. Thus the issues of tenure (i.e. access and control), land management, the place of agriculture and the environment have been

regulated by ordinary law without a guiding Constitutional policy/philosophy. Secondly, the imposition of alien property laws by the Colonial administration led to clashes of tenure resulting in conflicts which the judicial system has never been able to resolve. Thirdly, Kenya is in a 'tripartite property regime', i.e. the Indian Transfer of Property Act (1982), The Registered Land Act (Cap 300) and the various African Customary Laws, are used concurrently. This has led to certain overlaps and institutional conflicts with regard to land use issues.

The Government Lands Act (Cap 280) empowers the President to make grants of freehold to individuals. This law lacks provisions stipulating the conditions under which such grants may be made. The multiplicity of laws regulating the management of land related resources in Kenya has over the years led to the establishment of various agencies charged with the duty of overseeing the implementation of these laws. These agencies and institutions have diverse and often conflicting mandates, thus lacking any form of co-ordination to administer natural resources. Hence the recent effort to enact the Environment Management and Co-ordination Act. However, its implementation is likely to be affected by the parallel legal regimes/laws still in existence.

Reforms should therefore aim to achieve the following:-

- Establishing directive principles on land tenure and use the constitution.
- Rationalising tenure throughout the country.
- Uniformising land property laws.
- Establishing an institution specifically to administer land laws.
- Enacting a land use law.

OVERVIEW OF THE ISSUES EMANATING

Clearly, the issues that dominate the situation are:-

- Women have not been included in any of the laws/policies.
- Conflicts are obvious between land tenure system and land use.
- Land degradation.
- Disjointed sectoral laws.
- In-action and mis-action amongst civil society.
- Popular mechanism for regulating land is undermined.
- Bad governance.
- Liberalisation is lacking.
- Individualisation of land through titles and other power structures.
- Declining agricultural production.
- It is not clear who owns land in Kenya.
- Multiplicity of agencies without co-ordination.
- Absence of operating principles.

ISSUES THAT WILL BE ADDRESSED / KEY RESULT AREAS

This is drawn from the plan of actions constructed by 3 discussion groups:

Land Policy

Areas of concern are landlessness, rights of ownership, re-distribution of resources, lack of clear tenure system, gender disparity, arbitrary change of land users, inappropriate technology, disregard to the environment, conflict in methods of land use. The administration and management is undermined by too many authorities implementing land related issues, lack of participation by people affected, lack of documentation, corruption, mechanism of control and guidelines are absent. Aims and objectives of a land policy should therefore consider:

- improved livelihood
- Fairness and equity
- Wise and efficient use
- Harmonising with other sectoral conflicts
- Redressing the past wrongs
- Establish broad consultative fora on Urban, Pastoral, and Rural sectors; and that lead NGOs should form interim committees.

Land Laws

Areas of concern are gender disparity, harmonising of statutes, harmonising of Kenyan laws with international conventions, adjudication, addressing historical wrongs, land ownership, the right to information, technical aspects, corruption and governance. Key result areas must include reform of the existing laws, address the question of public land, advocate for amendment of existing laws, address gender imbalance, address the proposed land bill to incorporate the complexity of the issues, take into account international conventions, democratise institutions that adjudicate land issues, historical wrongs must be addressed in the new Constitution, and transform the major land legislation in force. This implies the following activities:-

- Research.
- Identification of legislation to be dealt with
- Propose two fora: one to gather information and the other to disseminate findings.
- Research into customary law.
- Research into the historical wrongs.
- Drafting of a Bill.

Property Regime, Constitutional Land Policies

Areas of concern are who owns land in Kenya?, conflict of tenure, equity, security of tenure, inter-generational equity which is usually determined by customary practices. It is proposed that various activities could lead to clear constitutional laws and guidelines. These are:

- Historical survey/analysis of the Constitution.
- Identification of key Constitutional land issues.
- Identification of stakeholders.
- Facilitation of stakeholders.
- Development of Constitutional land positions.
- Advocacy for adoption of the positions.