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KENYA LAND POLICY: ANALYSIS AND RECOMMENDATIONS



APRIL 2008, UPDATED MAY 2009

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ACRONYMS AND ABBREVIATIONS

ADR	Alternative Dispute Resolution
CLB	Community Land Board
CSO	Civil Society Organization
DFID	UK Department of International Development
DG	Development and Governance
DLB	District Land Board
DLO	District Land Office
GIS	Geographical Information System
GPS	Geographic Positioning System
GoK	Government of Kenya
TIED	International Institute for the Environment and Development
US	Land Information System
LRTU	Land Reform Transition Unit
KNLP	Kenya National Land Policy
MoL	Ministry of Lands
NGO	Non-Governmental Organization
NLC	National Land Commission
NRI	Natural Resources Institute
NRM	Natural Resources Management
REPLA	Regional Enhanced Livelihoods in Pastoral Areas
SIDA	Swedish International Development Agency
USAID	United States Agency for International Development

PREFACE

Globalization of the world's economies, the increasing and sometimes violent competitive demands for scarce and valuable natural resources, and the (re)emergence and expansion of important nations in the world economy create new economic and political opportunities and challenges for the United States. The way in which nations define property rights—such as private, public, state-held—and permit citizen to hold property (e.g., private, leaseholds, etc.) and defend those rights through the rule of law or administrative procedures, greatly influences the processes of globalization, national economic growth, and the development of democratic society. Indeed, property rights are seen as a critical factor in economic growth, nation-building, governance, and political stability in the U.S. Foreign Assistance Framework.

While there is a need in every society for state-held and public land, “private rights,” whether individual, corporate, or community, have been shown to be the most robust, facilitating investment, economic growth, and more sustainable use of natural resources. These private rights can be administered and secured through formalized systems, including land registration and titling, or through less formal systems, such as customary, “traditional,” or other non-statutory systems as seen in many parts of Africa and Asia. The degree of formalization needed depends on the development of national markets; the needs of the country; its administrative capacity; and other social, political, economic, and cultural challenges and opportunities. It is not uncommon or necessarily problematic to have both formal and informal or less formal systems operating in one country at the same time.

When these dual systems exist, the challenge is not to eradicate one in favor of the other—the informal in favor of the formal—but to create linkages between these systems that will provide security of property rights and allow individuals, communities, and corporate structures opportunities to make transactions between these systems, and opportunities to upgrade or transform property rights (from less formal to more formal) when economic conditions are right, and institutions exist to administer, record, and adjudicate more formalized rights.

From the inception of the organization, the United States Agency for International Development (USAID) has focused on fostering the development and promotion of property rights in countries where it works. Over the years, critical thinking from within USAID, U.S. universities, and the Agency's domestic and international partners has led to new programmatic approaches to foster property rights around the world. These programs have contributed to economic growth and increased private investment; fostered political stability, improved governance, and mitigated violence; and improved sustainable and profitable management of natural resources. The lessons learned from these programs have, in turn, led to new strategies and sequencing in reforms to promote property rights in diverse economic, political, and cultural settings.

In 2003 and 2004, USAID embarked on a small-scale program to develop (a) a more uniform methodology to understand and address property rights issues, and (b) measure the demand from USAID missions for technical assistance to address property rights reforms and institutional development in our partner countries. This led to a much more ambitious program beginning in 2004 to develop a comprehensive framework and tools to conceptualize, programmatically address, and promote property rights around the world. This program was implemented as a Task Order (Lessons Learned: Property

Rights and Natural Resource Management) through the RAISE¹ IQC. The results of both sets of work have defined the conceptual framework for land tenure and property rights (LTPR) as part of USAID foreign assistance and tools for USAID’s engagement in LTPR programming internationally.

Under the **Property Rights and Resource Governance (PRRG) task order, implemented through the PLACE² IQC**, USAID seeks to expand upon the LTPR Framework, and refine existing and develop new companion tools to augment the Framework. This task order focuses on the promotion of the Economic Growth objective, within the new U.S. Foreign Assistance Framework, by promoting property rights and natural resource governance. The task order has the following goals:

1. **Improve Knowledge Management and Best Lessons:** develop and transfer lessons learned/best practices regarding land tenure, property rights and resource governance to development practitioners including partner institutions, USAID, and other USG partners.
2. **Improve Economic Growth:** through the development of methodologies promoting property rights (including private individual and “group,” corporate, shareholder, and community rights) through such tools as land titling and registration, community demarcation, and the development of new models for enterprise property rights. An emphasis will include tools to promote land and natural resource markets.
3. **Promote Governance and Mitigate Conflict:** through development of methodologies and tools to improve transparency in land and natural resource access, to broaden civil participation in decision making, and in the development of tools to resolve disputes and conflicts over natural resources (including land, forests, wildlife, and coastal and mineral resources such as diamonds and oil).
4. **Improve Natural Resource Management and Biodiversity Protection:** by promoting methodologies to link property rights for land, forest, water, wildlife, and other resources with natural resource management practices (particularly in protected, buffer, and corridor areas, and in areas adversely impacted by conflict).
5. **Address Gender and Vulnerable Populations Needs:** by developing best practices/lessons for access and rights to land and natural resources by women and vulnerable populations’ (e.g., indigenous groups, minorities, displaced and disadvantaged groups). This will promote economic growth and equity for frequently disenfranchised populations. It could also create options, through access to productive resources, which would mitigate the transmission and/or economic impacts of HIV/AIDS for women and vulnerable populations.
6. **Provide Technical Support to USAID Missions and operating units:** by providing evaluation, design, and technical support for activities related to property rights and natural resource governance. These activities may include (but are not limited to) property rights in privatization, economic growth, finance, governance, conflict resolution, post-conflict reconstruction, conflict resources, natural resource management, biodiversity, gender, and resettlement of displaced and vulnerable populations.³

The PRRG Program is managed for USAID by ARD, Inc., of Burlington, Vermont, USA. Key partners on this task order include the Rural Development Institute, the World Resources Institute, and Links Media.

The Program’s CTO is Dr. Gregory Myers, Senior Land Tenure and Property Rights Specialist, EGAT\NRM\LRMT, United States Agency for International Development; gmyers@usaid.gov.

¹ Rural and Agricultural Income with a Sustainable Environment (RAISE).

² Prosperity, Livelihoods, and Critical Ecosystems (PLACE).

³ Gregory Myers, EGAT\NRM\LRMT, excerpt from Property Rights and Resource Governance Global Task Order.

INTRODUCTION

This analysis and recommendations stem from USAID/Kenya's request for an assessment of Kenya's draft National Land Policy (dNLP).⁴ It was conducted under the global task order: Property Rights and Resource Governance Program, a mechanism designed and supervised by USAID-EGAT's Land Resources Management Team under the Office of Natural Resources Management.

It is intended to contribute to USAID's input to the Donor Partners Group on Lands (DPGL) review of the emerging dNLP, and was also done to inform field assessment work carried out by ARD teams during March 2008.

USAID/Kenya asked for the assessment from two perspectives:

1. What adjustments may need to be made to the land policy to ensure its successful implementation given the current operating context of the Kenya Government pre- and post-elections; and
2. Given the goal of this Policy is to facilitate secure access to land, and not necessarily to grant individual freehold rights to land, will the current policy support USAID's portfolio of existing and intended investments in Kenya?

USAID also asked for an analysis of issues and opportunities under dNLP in specified program areas, in particular economic growth, conflict management and mitigation planning, governance and institutional development, HIV/AIDS, and NRM/biodiversity conservation.

The purpose of the study is to raise questions concerning the dNLP and to propose areas for further consideration, to assist Kenya in its attempts to address this difficult issue. The study thus first reviews and assesses systematically the ideas put forward in the current draft of the policy. It goes on to look at the implications of some elements of the policy for ongoing USAID programs, and at opportunities for new programming. It then provides key findings and recommendations. In a review such as this, more is said about those provisions that seem to raise issues or might cause problems. Those that are unobjectionable and even laudable are noted but passed over lightly. That is the nature of the exercise, but it may give an unduly negative cast to this review of what the consultant appreciates is a remarkable step toward land policy reform.

This final draft of the study has benefited from both the results of the field assessments carried out by ARD and USAID in March 2008⁵, comments received in connection with its presentation at a Forum in Nairobi on March 27-28, 2008, and discussion throughout the visit to Kenya.

The author is grateful for the helpful comments from a great many Kenyans who have been involved in the development of the policy or are otherwise engaged in land issues in Kenya. Thanks are due also to

⁴ The analysis here is based on the May 2007 version of the draft NLP published by the National Land Policy Secretariat.

⁵ Associated reports are as follows: Aggarwal, Safia and Chris Thouless. August 2008. Land Tenure and Property Rights Assessment: The Northern Rangeland and Coastal Conservation Programs of USAID/Kenya; and Ekin, Tim, Odenda Lumumba, and Beatrice Wamalwa. August 2008. Land Tenure and Property Rights Assessment: Agricultural Enterprise Initiatives of USAID/Kenya.

Mike Roth, ARD team leader in Nairobi; Robert F. Buzzard, Jr., General Development Officer, USAID/Kenya; and Greg Myers, Senior Land Tenure and Property Rights Specialist, EGAT\NRM\LRMT, USAID/Washington, for reviewing the paper and providing detailed comments; and to the author's colleagues on the ARD team, from whom he learned a great deal.

EXECUTIVE SUMMARY

The dNLP is an impressive and informative document. It seems likely to provide the template for discussions of land policy in Kenya in the coming decade, whether or not it is ultimately approved by the government.

The draft policy identifies the critical problem facing Kenya's land tenure system as the inequitable distribution of land, rooted in land injustices of the past, in acts that it sometimes characterizes as illegal, at others as illegitimate or unfair. It mandates land restitution or resettlement on new land to remedy those dispossessed in injustices going deep into colonial times, and calls for reconsideration of constitutional protection for the property rights of those who obtained their land illegitimately. It repudiates the long-standing priority of land administration in Kenya, the conversion of customary land tenure into individual ownership. It calls for the program's systematic land registration (the prime conversion mechanism) to be suspended pending revision and for the reassertion of customary land tenure rights. It does not spend as much time as might be wished on restoration of the integrity of the registration system, which is certainly an urgent need, beyond the suggestion that computerization of land records will assist in this regard.

The concerns expressed in the policy regarding inequitable distribution of land in Kenya are legitimate and the historical injustices real. Their reality is reflected in the current ethnic violence over land. There are layers of injustices, however, beginning in the colonial period and extending into the present. Disentangling them to achieve "justice" will be difficult and complicated by the fact that a part of the land has moved through market channels to good faith purchasers, often small and medium Kenyan farmers. The remedies proposed in the policy, such as "restitution," are painted with a very broad brush—so broad that it is hard to tell whether the government will be able to develop realistic and politically viable programs to accomplish them. Some injustices have created serious resentments among ethnic groups, and those groups are major political players today. Reforms that cut these ethnic lines can be perceived as new injustices and, if badly managed, can increase rather than resolve conflict. They can become fodder for unscrupulous politicians who are more interested in using issues to drive political wedges to their own advantage than in resolving those issues.

There may be a virtue in focusing on immediate implementation of the recommendations of the Ndung'u Report to reclaim public and trust lands that have been illegally or irregularly allocated. This is a measure on which a broad popular consensus should be possible, and should not await the sorting out of the much more fraught issues of "injustice" and "illegitimacy."

The proposals in the draft policy are ambitious and call for new institutional structures to administer them. They should be reviewed carefully in terms of their cost implications. The ability of Kenya to bear those costs must be assessed. Prospects for donor funding for some elements among the proposed programs appear better than for others.

There are a number of constitutional reforms proposed in the draft policy that have already been taken into the draft of the Constitution that was rejected in the 2005 referendum. These provisions in particular need reconsideration. They undermine badly the right to compensation for forced takings of land by the state, and create a potential for abuse that could ultimately threaten the rights of many smallholders, whom the drafters of the policy seems to be seeking to advantage with the provision. Special provisions on compensations recognizing that fairness requires different compensation in different circumstances

may be appropriate, but a provision that relieves the state from all liability for takings under the rubric of “land reform” is not.

While the draft policy points in many commendable directions, it does have its weaknesses. It is heavily agrarian, and focused more on the need to rectify mistakes made in that sector, to the neglect of the huge shelter needs that will be caused by the pending rapid urbanization that is sweeping the world and has only begun in Kenya. The emphasis on equity is understandable given the failures of Kenya in this regard, but proposals for restitution and resettlement are not accompanied by thoughtful recognition of the difficulty of maintaining production and growth during land reform. The repeated references to resettlement as part of the solution is unsettling, as badly planned or executed settlement schemes have been a large part of the problem. The policy does not adequately indicate how this can be avoided in the future.

Given the challenges involved in the proposed land reforms, it may be that they can best be tackled piecemeal, on a local or regional basis. It may be easier to reach acceptable if imperfect rectifications of old injustices if these are handled in a fashion that at least partially insulates them from national politics.

The prospects of ultimate approval of the policy are uncertain in the confused post-election political environment. In some areas of the country, that conflict has focused on land and exhibited strong ethnic dimensions, making clear the urgency of addressing the problems raised by the policy. At the same time, however, the sensitivity created by the violence is likely to induce caution in tackling the issues. This poses an opportunity for further refinement of the policy, and the ironing out of some contentious issues on which there appear to be strong dissent from the policy’s positions by some important stakeholder groups. This review has recommended rethinking of some policy positions.

There are a number of areas in which the directions indicated in the policy potentially impact USAID programming. In some cases, the recommendations comport well with priorities and activities reflected in current USAID programming. The policy, if approved, could serve as a platform for USAID initiatives in those areas.

In other areas, however, policies put forward would risk achievement of project and strategic objectives. Where there is dissonance between positions taken in the draft policy and USAID understandings of needs, USAID may be able to draw on its considerable fund of international experience with land issues to inform discussions around finalization of the policy. USAID’s experience in Kenya itself will have elements that can contribute to the refinement and implementation of the policy.

USAID needs to take account of this land policy experience and its implications in its programming. It may wish to seek a role in keeping alive and informing the dialogue around certain policy issues and the land policy implementation planning process, either through assistance to the Land Reform Transition Unit (LRTU) established by the Ministry of Lands (MoL) to carry forward the finalization and implementation of the policy, and to the civil society organizations (CSOs) participating in the process. This is particularly important given that, in the post-election context, a number of fora have developed in which important land issues will be resolved on a political basis: the Truth, Justice and Reconciliation Commission and the Agenda 4 Land Reform discussion under the Annan process, the discussions to finalize the Constitution within the one-year time span to which the parties have committed, and the decision making by the parties and within Ministry structures of where to resettle the IDPs generated by the post-election violence, decisions which will have implications for policy. USAID may also wish to ask whether there are institutional and legal reforms proposed in the policy that are relevant to USAID’s programmatic objectives in Kenya, and worth supporting. It is important to remember that there are concrete measures mentioned in the policy that do not require institutional or legal reforms, which fall within the competences of the MoL, and with regard to which the Ministry may ask USAID to assist the LRTU.

USAID should take the initiative to address some of these issues in connection with its current program of work.

Examining USAID's current work program, some areas of important potential interaction with policy directions of the policy can be seen:

- USAID is currently supporting market-led commercial agricultural development in medium and high production areas. Implementation of the recommendations of the policy on restitution and redistribution reforms could endanger achievement of program objectives. USAID needs to engage actively on these agrarian reform issues, seeking the elaboration of quite general proposals in the policy in ways that would achieve their legitimate social objectives while minimizing disruption of agricultural production.
- USAID is supporting community-based conflict resolution in its work with pastoralist communities, work that utilizes the same ADR approaches that are mandated in the policy. There would appear to be an opportunity for lessons learned under these projects to be incorporated into ADR initiatives recommended in the policy.
- USAID seeks to support democratization of local government structures, and the policy recommends that many land administration functions be turned over to elected district and community land boards. This appears to be an important opportunity for USAID to realize a strategic objective, and USAID should consider supporting this initiative.
- The policy mandates preparation of participatory community action programs by communities near environmentally sensitive areas, and involvement of local communities in the co-management of wildlife sanctuaries and conservancies. It calls for a review of reserved lands (forests and game reserves) in pastoral areas with an eye to restitution or improving pastoralist access to such land. There appears to be a potential platform here for USAID's pursuit of creative approaches to management of sanctuaries and conservancies for the benefit of local people, as well as an opportunity for using lessons from its community-level work to benefit policy refinement.
- The policy mandates reforms in the property position of women and other vulnerable groups, and proposes measures that could be incorporated into the programs of public information and training which USAID is supporting under its efforts to mitigate impacts of the HIV/AIDS epidemic.

USAID, in positioning itself on the issues raised in the draft land policy, should not work primarily on the margins of the equity issues. If these issues are now coming to a head, it is not possible to overstate the importance of their resolution, or at least their amelioration, to political stability.

I.0 A PERSPECTIVE ON NATIONAL LAND POLICIES

Kenya's National Land Policy is an example of a recent trend in developing countries to articulate national land policy in an integrated and coherent fashion. That trend reflects a realization that governments have often legislated on land matters piecemeal and without due reflection, and that the result is often a patchwork of laws that lack coherence and are not undergirded by a comprehensive land policy vision. The development of a national land policy is an opportunity to step back and reassess fundamentals, and the policy should provide the platform for the next, more coherent generation of laws and programs.

The need for such a policy statement is greatest where a watershed political event has taken place and there is considerable uncertainty about even fundamentals of land policy. Post-conflict states often have urgent need of such an exercise. Liberia and Sudan are both working toward National Land Commissions that are to prepare National Land Policies. In other countries, and this is the case in Kenya, the demand for a National Land Policy stems from a growing conviction that policy directions need to be reconsidered. Even countries with strong competences in land administration, however, have used land policy reviews to assess progress and fine-tune policy directions. Botswana, a leader in innovative land administration in eastern and southern Africa, has had a succession of national land policies going back to the late 1960s. Still, other countries, including some that have pursued major land tenure reforms since independence (Uganda and Kenya are examples), have had no comparable comprehensive policy declarations. It should be noted that not all land policy exercises are successful. In Lesotho, a donor-driven land policy development effort went off the rails several years ago when the government scrapped the idea and moved on to draft legislation.

What useful functions can the development of a national land policy serve? It is certainly most useful if there is real uncertainty as to what policy is or there is widespread discontent over existing policy. The process by which the policy is constructed is critical, as the exercise is far more useful if it provides an opportunity for broad public discussion and frank exchanges on fundamentals of land policy. This may allow a consensus beyond party lines to develop concerning the way forward.

Most national land policies do well as needs assessments, and place many demands for change on the table. Because land is a limited resource, it will often not be possible to accommodate all those demands. The policy must set general directions for change, and establish priorities, but inevitably many hard decisions are left to legislators and implementers. Finding the right balance between general directions and detail is a key challenge for those developing land policies.

How long are land policies valid? Unlike a law, a land policy does not bind successor governments. How durable are these policies in practice? In Ghana, a fairly general statement of national land policy was approved by the Cabinet a decade ago. It was the product of a particular government, but has survived a number of governments without being replaced. It is regularly cited, and has never been specifically

disowned by any government. On the other hand, no one is entirely sure of its continued authority on all points. The process may make a difference to durability. In Cambodia, the National Land Policy of 2001 received parliamentary endorsement. The government thereby sought to make it more than a simple declaration by the government of the day. At the same time, it bore the label “interim” and a process of revision has begun this year, aiming for a new land policy by 2010. The durability and authority of a national land policy will be affected by both the breadth of participation in the development of the policy and by the formalities with which it has been promulgated.

In the end, however, it is important to remember that all land policies are to some degree “interim.” Economies and societies change, political events transpire, and policies must be adjusted to take these into account. At best, a land policy reflects a social and political consensus on needs of the land sector that, for a time, helps legislators and administrators make better decisions. The KNLP, whatever its specific flaws and limitations, does represent a coherent vision and so, with some adjustments suggested later in this report, is capable of performing this function. To the extent it is finally approved by the government, and its ideas embodied in law and concrete programs, it will gain life and force. To the extent that realistic plans for implementation are made and those programs are adequately funded, they may change the position on the ground.

2.0 ASSESSING THE DNLP

Here the key substantive provisions of the dNLP, primarily in Sections 3 and 4 are reviewed. Policy directions are assessed, and references made to relevant experiences of other countries, especially other African countries.

2.1 DEVELOPING KENYA'S DRAFT NATIONAL LAND POLICY

In the case of Kenya, the demand for a National Land Policy came from a broad-based coalition of nongovernmental organizations (NGOs), CSOs, and donors, and it reflected dissatisfaction with the current land policies and the legal framework for land. The basics of that policy, while not articulated in a comprehensive national policy document, have been clear and consistent since independence. Land policy has been driven by a conviction that economic growth, accorded the highest priority, requires the transformation of customary land tenure to private ownership of land on the Western model, either as individual property or as group property (in the form of group ranches). This was to both increase security of land tenure and to allow the development of a large, impersonal market in land, which it was hoped would be characterized by distributive efficiency, and to provide landowners with the opportunity to raise capital for investment by mortgaging their land.

It is a policy that has been pursued with remarkable consistency by successive governments over the years, and the extent of implementation has been impressive: the vast majority of commercial, residential, and arable land in Kenya (and much arid land as well) has been brought under private individual ownership by a process of systematic first registration.

There is a large literature assessing that land tenure reform effort.⁶ While the provision of ownership rights has been credited with contributing to the growing vibrancy of smallholder agriculture in the post-independence years, and to Kenya's generally enviable growth rate in recent years, there has also been a strong critique of the program. Some have questioned the credit impact, or at least whether credit was ever made more available to Kenyan smallholders. Individualization has been found to have eliminated not only community rights but also secondary rights of other, often vulnerable individuals, such as women and the poor. Questions have been raised about the distributive impacts of the developing land market and, in particular, the ethnic dimension of that distribution. Finally, it is clear that the transition to new property forms has been incomplete and that values of customary systems have persisted. This is difficult to generalize because different conditions (land scarcity, markets) have led to different reactions to introduction of private ownership. In many areas, private ownership and a de facto return to custom have been rejected. In others, a layered, mixed system has been created, in which heads of households registered as owners have in effect become heads of new lineages. In this case, within the parcel for which the owner was registered, a limited version of the customary system has been gradually created by succession among the descendents of the owner. The incomplete transitions to the new system and the persistence of values from custom give rise to conflicting claims under custom and statutory law and have resulted in continuing uncertainty and tenure insecurity in some areas of the country where the reform, in theory, has been accomplished.

⁶ See for example, Coldham 1978, Shipton 1988, and Hunt 2005.

These concerns led some to demand a fundamental rethinking of the core policy of individualization. To other commentators, the program had contributed to the impressive post-independence intensification and commercialization of agriculture in the densely populated highlands, but had been pushed too far, too fast, without adequate attention to mitigation strategies and the development of complementary policies and laws to address the issues of some specialized sectors or vulnerable populations. The matter has been complicated by the descent of the system of land registry records in chaos beginning in the 1970s and the growing corruption in the system. Para. 85(a) of the Policy calls on the government to “bring to completion on-going processes of adjudication and consolidation” and “ensure that future adjudication and consolidation processes adhere to this Policy.”

While finding the right balance between custom and statutory land tenure is certainly the most conceptually complex issue demanding attention, and the one that will most broadly affect Kenyan agriculture, there are other deeply problematic aspects of the Kenyan land tenure scene. By a variety of mechanisms, sometimes merely questionable, sometimes fraudulent and irregular, much public and trust land has been shifted into the hands of elites and members of politically influential ethnic groups. There have been irregular allocations of public lands, diversions of trust lands from their purpose of supporting traditional users, purchases of land from traditional authorities by land-buying companies, and ill-considered resettlement of smallholders from the crowded highlands into the Rift Valley. These have left deep resentments.

A 2004 concept paper called for a National Land Policy and identified several broad needs of the land sector, identifying the following core issues:

- Insecure land tenure, in particular, for the urban and rural poor, for women, for HIV/AIDS-affected households, for pastoralists, and other vulnerable groups in both urban and rural areas.
- Poor land administration characterized by limited access to land information due to poor quality records, extended technical processes, lack of transparency, and user friendliness.
- Weak and/or ineffective mechanisms for fair, timely, affordable, transparent, and accessible resolution of land disputes.
- Continued land fragmentation (80 percent of small farms have less than 2 ha).
- Poor governance in land administration, management, and dispute resolution.
- Different land tenure regimes with limited harmonization.

A National Land Policy Secretariat located in the MoL undertook the task of developing the national policy, working through six thematic groups and numerous subgroups. This was a well-structured process in which there was broad participation by government agencies, CSOs, and NGOs, though perhaps less by the private sector. Fourteen regional consultations were carried out around the country. The results have received extensive commentary from stakeholder groups and have been the subject of considerable publicity and broad public consultation. A “final” draft was approved by a 600-stakeholder symposium in April 2007 and then approved by the MoL in May 2007. While the Kenya Land Alliance (of NGOs) and other key stakeholder groups are positive with regard to the policy, some stakeholder groups, including the Law Society of Kenya and the Kenya Land Owners Association, have significant reservations.⁷

The “final” draft of May 2007 was the basis of a Cabinet Paper asking for Cabinet approval. Once the policy was approved by the Cabinet, a sessional paper was to have been drafted for parliamentary approval of the draft policy. (A policy with legal implications is sent to Parliament for approval; a

⁷ Ibrahim Mwachane and others, Review of DFID & SIDA Land Sector Support. Draft: 22 November 2007 (Nairobi), p.17.

sessional paper is an explanation of the policy document.) However, since the policy had budgetary implications, the Cabinet Office pointed out that it needed to be forwarded to the Cabinet by the Ministry of Finances as well as the MoL. It was then resubmitted with the signatures of both ministers. This is where matters stood when Parliament was dissolved in October 2007 in preparation for the December 2007 elections. The Minister of Lands was not returned to Parliament by his constituency, and so a new submission to Cabinet by the new Minister and the Minister of Finance will be necessary.⁸ It is not clear whether, in the end, the policy will receive the endorsement of the Cabinet and Parliament. The land-related violence in recent months could cut both ways, creating a sense of urgency or inducing caution, depending on the willingness of a new government to tackle these issues. It is not encouraging that, in the early negotiations on Cabinet composition, each party wanted to give the MoL to the other party.

Notwithstanding this, the dNLP is a very substantial, comprehensive, and instructive document. It is an extended policy note, frankly addressing many key land sector problems. The extent to which it proposes concrete solutions varies from one cluster of issues to the next. It often simply points direction. In other cases, a more developed strategy is offered. Often further studies or development of legislation are recommended. Because the document is so comprehensive, it covers a great many clusters of land issues, and real depth in proposed solutions is not to be expected.

In the short term, it seems quite possible that approval of the draft policy will be delayed. The question is then whether certain proposals contained in the policy that enjoy a high level of consensus and confidence should not still be pursued. The MoL has the competence to make and implement land policy, and to the extent that it already has the legal authority it needs for some actions, is in a position to move forward with them now.

An Implementation Strategic Plan, which embodies decisions about priorities and provides a roadmap for progress over the coming year, must be developed. The focal point for implementation planning is the Land Reform Transition Unit (LRTU), formed out of the earlier Land Reform Secretariat, both in the MoL. The Unit, reporting directly to the Minister, has been established with five sector team leaders (Institutions, Legal Framework, Land Management, Public Education and Awareness, Land Management, and Land Information Management), who have been appointed from among staff of the regular departments of the Ministry. Members of a Steering Committee have been tentatively identified and their organizations contacted concerning their service; most have responded positively. Chairpersons for the several task forces that would elaborate proposals in the policy into programs have been identified; none are officials, but come from NGOs, the private sector, or universities.

While this gearing up for implementation has moved forward, there are uncertainties concerning the funding for the LRTU and its program. A Memorandum of Understanding on funding between the Ministry and DFID, SIDA, and other donors has not been concluded as expected. Given that most donors are not pursuing business as usual in the wake of the election crisis, the MOU has been delayed. Key donors, including DFID, seem to be reassessing their role. Their support for land policy reform has not waned, and the urgency of the matter is more evident than ever. However, there is notably less confidence in some of the directions charted in the dNLP, and the donors may be more selective in the programs they will support. Like many issues around land in Kenya today, there is some question of how this will play

⁸ It is to be hoped that in reconsideration by Lands and Finance, serious attention will be given to potential costs, which the author would estimate to be very high. The Implementation of major land programs in Africa, especially those involving decentralization of land administration such as that proposed in the KNLP, have often proven far more expensive than anticipated, for instance in Uganda and Tanzania. See John W. Bruce and Anna Knox, "Structures and Stratagems: Decentralization of Authority over Land", forthcoming, *World Development*.

out.⁹ The prospects for approval and implementation of the dNLP are dealt with further in Section 4.1 of this paper.

2.2 CONCEPTUAL AND CONSTITUTIONAL FRAMEWORK (DNLP 3.1 AND 3.2)

The early sections of the policy set the stage by emphasizing the limited amount of good quality agricultural land in Kenya, the rapidly growing population, and the growing pressure on the land resource. They paint a picture of a highly dualistic system, with a large farm sector consisting of a small number of large European farms under Western tenures, and a small farm sector where African peasants farm tiny holdings under customary tenure. Land allocations and land transactions since independence have blurred these once sharp outlines and created a substantial class of African large and medium landowners. Distribution is still very unequal, however, and this sets the stage for the recommendations on land redistribution that run throughout the policy.

First principles, as stated in a discussion of the philosophy of the policy, reflect a reaction to the emphasis over the last 50 years on individual ownership of land. The policy stresses that land is not simply a commodity, and that too much emphasis has been placed on economic productivity at the expense of other values, including those of indigenous culture and conservation systems. It adopts the position that individual tenure and customary tenure should co-exist and benefit from equal guarantees of tenure security. It reflects, especially in its discussion of the need for constitutional change, a conviction of the need for land reform, stressing that the current distribution of land is inequitable and arguing that the constitution should not protect private property rights that have been acquired in “an illegitimate manner.” Para. 44 asserts that “The radical title shall be vested in the people of Kenya collectively as a nation, as communities, and as individuals. Kenyans both as communities and individuals can draw tenure rights from that radical title under specific laws.” The provision does not say in what circumstances radical title vests in the entities mentioned. It is submitted that this is somewhat obscure, and that if this formula were to become part of the Constitution, it would confound the courts which must interpret it. Radical title is a well-established notion in English Common Law and refers to the underlying right of the Crown from which all private land rights (“tenures”) are historically derived. Civil Law and American Law, on the other hand, merge that radical title into the right of the private owner. Many lawyers trained in English Common Law tend to assume that public regulation of land use must be based in this residual title of the Crown, but, in other legal systems, alternative constitutional bases are found for the regulation of land use, such as the duty to ensure public safety, or the police power. The provision should be reconsidered.

These provisions and others later in the policy have raised in the mind of USAID staff and others a concern about whether, since “the goal of this Policy is to facilitate secure access to land, and not necessarily to grant individual freehold rights to land,” it provides a satisfactory platform for USAID programming in Kenya. This is a legitimate concern. There is much discussion of historical injustices and emphasis on their strong association made with private property rights and, in spite of language in the policy concerning protection of property rights, this can be seen as laying down a basis for an attack on property rights. As will be seen, some proposals, in particular those that were shifted into the proposed revised constitution defeated in the referendum in 2005, tend to substantiate this. Still, there is no suggestion in the policy of any intention to do away generally with private individual ownership. It seems

⁹ See National Land Reform Secretariat. 2007. Kenya Land Reform Support Program, Phase 2. Implementation Project Document (version 0.5 draft, 3 September 2007) (Nairobi, National Land Reform Secretariat). This is a DFID project document which sets out the anticipated actions toward finalization of and planning for implementation of the land policy over the next two years. This document envisages that, during this period, issue task forces organized by the LRTU and the Ministry of Lands will develop detailed plans for implementation, initiating the studies and the drafting of legislation called for in the policy. The state of progress was assessed by Ibrahim Mwachane and others, Review of DFID & SIDA Land Sector Support, 23 November 2007. (Draft Report) (Nairobi).

that the other tenure options would supplement it. The other tenures on which reliance is to be placed (long-term leasehold is prominently mentioned) may provide secure tenure, but will not necessarily do so. It would be of great concern if there were any intention to convert existing ownerships generally to leaseholds, but this does not appear to be the case. There is, however, a clear intention to convert foreign-owned land to long-term leaseholds, the subject of a proposed constitutional change, and this is discussed later in this paper.

Returning to the final portions of this section on private land rights, dealing with issues such as compulsory acquisition of land and development control, these are unexceptional and consistent with international good practice.

2.3 LAND TENURE ISSUES (DNLP 3.3)

Individual ownership of land was introduced in Kenya during the colonial period as the tenure for white settlers. Almost alone in the region, the government of newly independent Kenya not only continued that tenure for those holdings but also embraced a policy initiated late in the colonial era of converting customary land tenure to individual private ownership. The wisdom of that decision and the appropriateness of its implementation through systematic survey and registration of individual land holdings have been controversial, but these policies have been followed by successive governments with remarkable consistency. The recommendations of the dNLP would halt this 50-year process and, it seems, would seek to roll it back in important ways.

Fundamental property categories would change. The existing categories of government, trust, and private land are to be replaced by state, community, and private land.

For public land (paras. 59-62), an inventory is to be established, and the allocation and administration of public land is to be entrusted to a National Land Commission. The proposals closely track those of the Ndung'u Report. There is a call for recovery of "public land acquired irregularly" and for a Land Act that will establish a Land Title Tribunal to determine the "*bonafide* ownership of land that was previously public or trust land." This would involve a re-examination of many grants to the influential and small alike, and has clear political and ethnic dimensions. It could also lead to re-examination of many resettlement schemes that have not complied with the terms under which they were created; for instance, with regard to the balance that was supposed to have been struck between settlers from outside the area and local people. The ultimate impact will depend on what is considered to not be "*bonafide*." If this refers to land acquired by fraud or other corrupt practice, and this must be proven in court, it is a perfectly legitimate provision. If, however, it refers to land acquired legally, but as a result of abuse of discretion, including ethnic favoritism, it raises serious questions. Here as elsewhere, the draft policy does not use the term illegal, preferring more subjective terms such as "illegitimate." As it stands, it is subjective and therefore capable of political manipulation in ways that could ultimately prove quite dangerous to national unity. Concerns about this and related provisions are discussed further below, in the section on implications for USAID activities in commercial agriculture. It would be better if the standard were that of the Ndung'u Report: "illegal or irregular," which are less subjective.

For community land, the policy reasserts the viability of customary land rights, and attempts to create a permanent niche for them within the legal landscape. Land under custom is in the future to be denominated community land. Customary rights are no longer to be viewed as an anachronism being replaced by individual tenure, destined for extinction. Community land vests in the community, but it is not clear whether this refers to both communities of common descent and communities of common residence, or to only the latter. Government is asked to document and map existing forms of communal tenure, whether customary or non-customary, and to provide for its recognition and protection as well as restitution of "illegally acquired parts of trust land to the affected communities."

A good deal of land has been converted to individual ownership by systematic land titling and registration but is still *in practice* managed according to a mix of formal and customary rules. Uneasy amalgams of old and new practices exist in many areas. In others, there is active conflict between those asserting claims under the old and new systems. In such areas, could implementation of the recommendations in this portion of the policy result in a significant rolling back of the conversion to individual ownership? What are the implications of this for existing title holders? The policy is not as clear on this as it should be. The field assessments by ARD done in March 2008 indicated that, whatever the failings of the registration system, rural land users with title still value their titles and see them as providing security of tenure. It is not at all clear that they would want them revoked and replaced by customary rules.

Recent years have seen growing acceptance by economists of customary land tenure. It has been mentioned that a critical literature based on empirical research suggests that Kenya may have pushed its conversion of customary land tenure to private individual ownership too far and too fast, with negative socioeconomic consequences. The problems arising in the Kenyan case have in fact provided much of the incentive for thinking about alternative approaches to development of customary land tenure. Bruce and Migot-Adholla (1994), based on empirical studies funded by USAID and the World Bank in Kenya and elsewhere, urge “adaptation” rather than abrupt replacement of customary land tenure. The idea of adaptation is not new; colonial regimes selectively developed customary land norms to suit their needs (Chanock 1991). Recent World Bank land policy documents (Deininger 2003) have accepted the workability of customary land tenure, and there has been a growing openness in the development community to working with customary land tenure. There is a tendency in many African polities to reassert traditional values and rules (Engelbert 2006), and this is clear in the draft policy.

How to manage such “adaptation” is an open question. It raises difficult issues of both the substance of customary law (for example, there are often provisions that discriminate against women), and the administration of customary law (traditional authorities are sometimes authoritarian and nontransparent). Few would suggest that customary tenure and institutions should be embraced uncritically or without needed reforms. It is also clear that, in some contexts, customary land tenure is in a process of disintegration with growing chiefly abuses, rather than a process of evolution. It must then be replaced by formal titles, be they individual or group titles. There are several basic approaches to adaptation. They are not mutually exclusive, and are found in different combinations (see Box 1).

The dNLP mentions codification of customary law as a strategy for recognizing or refurbishing customary land law. This is an ambitious project, given the number of ethnic groups and customary laws in Kenya, not to mention local variations of rules even within one ethnic group. The key issue, however, is coverage. Is a roll-back of registered individual ownership anticipated? This would be difficult in practice. It is essential that the policy make clear that any return to custom in areas already registered would only take place at the request of the community itself, and that those community members who wished to retain registered rights would be enabled to do so. For all the problems that exist with the titling system, the ARD field assessments came away with a sense that rural people still value the protection provided by their titles.

Regarding private land, the policy proposes far-reaching changes. In paras. 72-74, it stresses that it will not be possible for every person to own land; that the “goal of the policy is to facilitate secure access to land, and not necessarily to grant individual freehold rights to land to every person,” and that the government must facilitate access to land for many citizens through other means, such as leasehold mechanisms. That same para. then goes on to mandate “repealing the principle of absolute sanctity of first registration under the Registered Land Act.” It also recommends requiring that every primary right holder “obtain the written and informed consent of all secondary right holders before disposing of the land.” Finally, leasehold from the State is endorsed as a private tenure of land. Para. 79(d) calls for a maximum lease term of 99 years, but does not indicate a minimum term. These are critical provisions of the policy and need to be examined in turn.

BOX 1. INTEGRATING CUSTOMARY LAND TENURE INTO NATIONAL LAW

As mentioned in the text, there are a variety of approaches to integrating customary land law into national legal systems. A useful review is Fitzpatrick (2005). Some of the most common are:

1. The classic common law solution, which is the selective absorption of customary law rules into the nation's common law by judicial recognition of those rules. For a classic and lucid account of the incorporation of custom into the national common law of an Africa country, see Zaki Mustafa, *The Common Law of the Sudan* (1971). Woodman (1996) provides a thorough contemporary analysis of the process in Ghana.
2. Ascertaining customary land law and making its content more readily available to judges and others. This can be seen as an adjunct to the first approach. It requires studies that can identify current change-patterns in custom and help us understand contemporary custom. For a very useful example, dealing with rapid change in customary tenure in peri-urban Ghana, see Ubink (2008).
3. Codification of customary land law, an approach going back to work by the University of London's School of Oriental and African Studies in East Africa in the 1950s, but recently reasserted by Okoth-Ogendo (2005) in the Kenya context.
4. Registration of customary land rights as customary rights (rather than converting them to statutory forms of land tenure). See Lavigne Delville (2004) on current innovations in registering and administering land rights in Francophone West Africa.
5. Modification by legislation of negative aspects of customary land law, such as gender biases, and creating mechanisms for appeals of abuses to administrative or judicial authorities of the state. See the discussion around formalization of customary law in South Africa (Cousins 2007).
6. Creation of hybrid institutions that administer customary land rights, involving both officials and traditional authorities. See Julian Quan (2000) on land boards as a mechanism for management of land rights.
7. Modernization of traditional land administration institutions through mechanisms such as registration of land allocations and dealings, with increased public participation in and transparency of decision making. Ghana is currently experimenting with Customary Land Secretariats working under traditional authorities, in an attempt to achieve greater transparency and accountability supported by DFID under a multi-donor Land Administration Project.

Para. 77 proposes a merger of the legal categories of freehold tenure and absolute proprietorship. Freehold is a British common law tenure also termed “ownership” but whose feudal background involves an underlying radical title in the Crown from which this tenure is derived. As the name indicates, it has been stripped of feudal obligations to the Crown, and is held for free (beyond the obligation to pay taxes). Absolute proprietorship is an attempt by the drafters of the Registered Land Act to escape the feudal terminology and create a tenure with the radical title in the owner, not the Crown or the State. The drafters of the policy urge the conversion of all absolute ownerships to freehold. They provide no reasoning for this. It is not clear whether the motivation is common law legal conservatism or whether the drafters felt that having a radical title in the State somehow restricted the rights of private landowners and desired to increase state prerogatives. This is odd, as there are minimal practical differences between the rights of the owner under the two ownership tenures. The conversion poses no serious problem.

Para. 77 goes on to require that every primary right holder “obtain the written and informed consent of all secondary right holders before disposing of the land.” This is by contrast quite a dangerous provision, simply because the secondary right holders are not defined. The uncertainty concerning who is a

secondary right holder would cast a pall of uncertainty over the land market, introducing a major element of risk into transactions. A narrower requirement, requiring spousal consent, would be far more appropriate and workable.

A further recommendation of Para. 77 is to do away with the “absolute sanctity of first registration.” The “absolute sanctity” referred to is established by the Registered Land Act’s Section 143(1). It provides that a court can rectify (correct) the register in cases where the court is convinced a fraud or mistake has taken place, but specifically excludes first registrations from this provision. The Ndungu report discusses this provision (vol. 1, 15). It concludes that however attractive it may have seemed to the drafters of the Act to provide a rock-solid basis for registered ownership and the land market, there are serious constitutional problems involved in barring re-examination of such cases. They indicate that the provision has in fact often been used to protect the fruits of fraud and that the courts have read it too broadly, allowing that result. They recommend its amendment and provide a draft amendment in Appendix 10. The draft policy repeats that recommendation, and it appears justified by the experience with the provision in Kenya.

Para. 78 calls for expanded use of leasehold tenure. There is already a very considerable amount of public land held by private parties and companies under 999-year leases, a Kenyan anomaly; the English common law rule is that no lease can exist for more than 99 years.

How far can state leasehold tenure provide security of tenure? Leases form a normal part of private land tenure systems, allowing those who have more land than they need to lease it to others. These bargained-for leases are not problematic, but serious problems do arise with leases where the State is doing the leasing as a market-dominant supplier of land, as when leasehold from the state is made the primary private tenure (see Box 2).

Leasehold is a right to use land for a fixed period of time in return for a consideration, which usually takes the form of rent, though an upfront payment can also be involved. That is a relatively simple concept but, in practice, leases become very complex documents, with pages and pages of conditions. It is not unusual for leases from the State to impose as conditions compliance with many sorts of laws, such as those dealing with land use controls and land taxation, and to condition many actions on the approval of officials, for instance sub-leasing or changing the land use or transferring the lease. These conditions in effect make the leasehold right subject to the discretion of land administration and other officials. Such discretion is often abused. A “clean” lease, without such conditions, can provide security of tenure, but a “loaded” lease, full of such conditions, subjects the holder to the whim of bureaucrats and will provide little tenure security. Long duration means little if the lease is subject to termination for a failure to meet various conditions at any point. The policy as drafted unfortunately says little about what a long-term lease from the state would provide, and it does not indicate standard or minimum terms for leases for particular purposes, as do laws in some other countries in the region, for example, Botswana. (Typically, a “long-term” lease suggests something not less than 30 years, but there is no hard and fast rule and the policy is silent on this critical point.)

There is an appropriate place in Kenya’s land tenure system for state leaseholds, and almost every country with private ownership also uses state leaseholds to some extent (for instance, federal leasing of extensive public rangelands in the western U.S.). The question is how broadly Kenya would use state leasehold, for what purposes, for what duration, and subject to what conditions. Unfortunately this is not clear in the draft policy.

BOX 2. STATE LEASEHOLD

The experience with state leasehold tenure in Africa as the primary private tenure has not been very positive. In Uganda, Idi Amin's 1975 Land Reform Decree converted all privately owned land to long-term lease from the State. The corruption and other abuses in the leasehold system led the 1996 Uganda Constitution and the 1998 Land Act to restore private and customary ownership of land as the basis of the tenure system, though the State can still provide state-owned land on lease in specific cases.

Pervasive abuses of discretion in administration of leaseholds and concessions have occurred in other countries in the region, such as Zambia, Guinea Bissau, and Mozambique. The new black majority government in South Africa, faced with this choice between private ownership and state leasehold as a primary tenure, chose to maintain private ownership, though there are state leaseholds of some public lands.

There is no reason why a long-term leasehold should be an unsatisfactory form of land tenure. The reasons it often is unsatisfactory have to do with the way the leases are written. Often they are for nominal rents. This means that officials are allocating valuable land at well below its market value. This in turn invites abuse of administrative discretion and corruption. The difference between the actual administratively set cost of the lease and its real market value is the opportunity for rent-seeking. Often the rationale for not charging a realistic cost for the land is that this would exclude the poor, who the programs are intended to help; but it also explains why the land in these programs often ends up with the wrong people, or at least does not reach the poor as cheaply as intended.

There is also a tendency in such state leasehold systems to try to impose and enforce land use controls through the leases. Rather than restrictions that apply generally, conditions regarding use are written into the lease. The author remembers a desperate petrol station owner in Zambia whose lease required him to maintain a petrol station on the rented land, having discovered that the city had granted another lease on similar terms and put him out of business; the city council, however, refused to allow him to open a business of any other kind, valuing a petrol station at that end of town. Such a use of state leaseholds is both wrong-headed and quite common.

In Botswana, recognized as one of the most successful land policy experiences in Africa, state leases are used alongside customary land tenure in a fashion that appears to have worked well. Customary tenure is the basic tenure with leases granted for commercial, industrial, and residential purposes only where requested, limited only to those broad use categories, and adjustable so far as this was consistent with the community land use plan.

Para. 79 deals with the 999-year leases mentioned earlier. These leases originated in the colonial period, though many have today been transferred to Kenyans. The policy asks for the establishment of "an appropriate mechanism for the surrender of interests currently held beyond 99 years in exchange for the proposed standard leasehold term." However, the policy does not state a proposed standard leasehold term. A constitutional provision proposed recently is more specific, calling for conversion of 999-year leases to 99-year leases. These very long leases are an anomaly, and conversion to 99-year leases is not itself objectionable; the value of a "clean" 99-year lease (a lease not subject to onerous conditions) is virtually the same as a freehold. The term, however, is not the only issue. If the 999-year lease is replaced by a new lease involving a much higher rent (the rent on the 999-year leases is quite nominal and there have been demands for revision), or not renewable upon expiration, or subject to onerous conditions, then the change may well be considered a taking of property that requires compensation. The reason for the constitutional proposal is apparently to make the change proof against a constitutional challenge. This proposed constitutional change is one among several proposed, and they are discussed later in this paper.

In para. 85, the government is urged to "bring to completion on-going processes of adjudication and consolidation," and to "ensure that adjudication and consolidation processes adhere to this Policy." It seems that a suspension of new systematic adjudication is being called for, pending reforms to bring this program into line with the values and objectives expressed in the policy.

Para. 86 urges government to “facilitate the commercialization of land rights subject to principles of equity and sustainability.” This is consistent with other statements in the policy, in that it conditions marketability of land rights upon meeting equity concerns expressed in the policy.

Para. 92 would prohibit non-citizens from holding ownership interests in land, and allow non-citizens and foreign companies to acquire leasehold interests only, for not more than 99 years. This potentially has constitutional implications. Depending on the terms of the new leases, there may be a significant taking of property for which compensation would be payable. No mention is made in the policy of compensation, and like the proposal for reduction of 999-year leases to 99-year leases, this proposal in the policy is also a proposal for change in the Constitution. The breadth of impact of an ending of foreign ownership is hard to gauge, because the extent of foreign ownership of land is unclear. It is substantial, but much of it has become ownership by Kenyan companies in which non-citizens have an interest and management role. Prohibition of foreign ownership may discourage future foreign investment, though the seriousness of the impact is difficult to gauge. The field assessments carried out by the ARD team found that many investors seem to be comfortable working with relatively short time horizons, seeking to recoup costs in the relatively short term. Leaseholds from government, if the terms are attractive, may be acceptable to many foreign investors.

Para. 93 suggests other ways in which land can be made available for investment. One important provision urges the compulsory acquisition of all land on which mineral resources have been discovered before the resources are allocated to investors, “in order to prevent exploitation of local communities.” The intention is laudable, but the appropriateness of the provision will depend on the nature of the mineral resource involved; for example, whether the technology for mining the resource involves great surface disturbance (e.g., strip mining) or whether surface disturbance may be much less (oil extraction). A further provision of this paragraph on establishing “land banks” for investors needs further thinking. Land bank provisions have often been abused in developing countries, with government compulsorily acquiring land for land banks which, in the end, is not devoted to investment projects but is diverted to other uses, including the personal profit of officials. Ghana provides a striking example of this, as does China. Sometimes these banks are established in locations that do not suit the needs of many investors, and then the investors tend to use the land market to find land more suited to their needs. The model might be pursued if a law provides in some detail the criteria and process involved and for the return of land to original owners if the public purpose cannot be achieved, and if the approach is used sparingly and monitored closely.

Finally, paras. 94 and 95 provide for natural resource tenure policy. Para. 95 calls in (c) and (d) for the government to vest all renewable and non-renewable resources “in the State to hold in trust for the people of Kenya.” The wording is unfortunate, in that land is included in the definition of a natural resource under para. 94, and this could be read to require that all land vest in the State. That would be unfortunate because the state is generally a poor direct manager of land resources, and especially renewable resources. With an adequate legal framework in place, one that through clear property rights organizes private incentives effectively, such resources are better off in the hands of individuals and communities. (It may be that what is intended here is a vesting of the “radical title” discussed earlier, but that is not what the provision says.) Fortunately, para. 95 (f) suggests that the authors of the policy accept that there is a place for private individual and community ownership of land-based natural resources. This needs to be made even clearer in any subsequent draft of the policy.

2.4 LAND USE MANAGEMENT ISSUES (DNL P 3.4)

In this section, there is an important change in the nature of the task faced by the drafters of the policy. The previous section on land tenure focuses on the need to correct mistakes considered to have been made in establishing the nation’s property system, which was a major national project of the past 50 years. This section on land management instead mandates the filling of a gap: the weak and ineffective system of

regulation of land use to ensure environmental, health, and aesthetic benefits to the public. This area has been seriously neglected in the development of the legal and regulatory framework for land in Kenya. This is not unusual in developing countries, and donor agencies bear some responsibility for this, in that they have often given priority to property rights development in their assistance. Donor projects rarely address property rights and use regulation in an integrated way, and tend to focus on the former.

Most of the remedial proposals of the policy for control of land use are measures long overdue. On the other hand, there is always a constitutional tension between property rights and use regulation, as a regulation that is extremely intrusive can constitute a taking that requires compensation. One shortcoming in this section is that it does not discuss that tension, nor suggest the standards that are to govern its management.

Generally, the diagnosis of the failures to effectively control land use for the public benefit seem accurate enough. There is an emphasis on national and regional physical planning as a basis for investment and sustainable resources use, and that is appropriate. There is a call for implementation of “cluster settlements” in rural areas to avoid sprawling, inefficient land use. This can be a very unfortunate idea, if compulsion is involved, as was the case in Tanzania. It can be done much more effectively, however, by providing service center “magnets,” in the form of shops, clinics, schools, and other public services. The policy needs to say that it has the latter, not the former, in mind. In discussion of the urban sector, there is a recognition of the importance of urban agriculture, and the need to zone in ways that allow it.

The policy then goes into a discussion of sustainable production principles and productivity targets and principles. The usefulness of the concept of productivity targets will depend on how they are used. Nothing in the wording here suggests that the authors are thinking about some of the more unfortunate approaches, such as crop zoning, but again, more specificity would be helpful.

Para.12, dealing with “land sizes,” calls for the setting of economically viable minimum land sizes for various zones, and the control of subdivision to avoid parcels falling below those sizes. There is a conceptual problem in that there is no such thing as a rational minimum land size for all activities in a given zone. Fragmentation is certainly a problem in some parts of Kenya, but it seems likely that these provisions will meet the same fate as other, earlier attempts to legislate against subdivision. Such restrictions are unlikely to succeed because even very small landowners, faced with children who lack options other than farming, will often subdivide their land to the extent they feel they have no choice. The colonial era saw the setting of minimum sizes and even minimum shares in co-owned properties, and an attempt was made to enforce them by refusing registration to parcels that violated them. The result was simply to drive such parcels out of the registry system. The successions involved are not registered, contributing to the register going out of date. More creative approaches will be needed to have a significant impact on this problem; they should be built around incentives and utilize market mechanisms.

The provisions on restoration and conservation of land quality, land reclamation, and environmental management principles are solid but quite general. Regarding conservation and sustainable management of land-based natural resources, para. 131 mandates a number of positive and specific approaches. These include preparation of participatory community action programs by communities living near environmentally sensitive areas, and involvement of local communities in the co-management of wildlife sanctuaries and conservancies. There follow what are again sound but “in principle” sections on ecosystem protection and management principles, urban environmental management principles, and the use of environmental assessment and audit as land management tools. Para. 140 (d) strongly endorses the “polluter pays” principle, which is entirely appropriate.

A final section deals with sector and cross-sector land use, calling for effective coordination among sector institutions. This is critical, but extremely difficult to achieve. The provisions of the policy do not begin to adequately address this issue, and it is an important weakness. Even in the subsequent section dealing with the Institutional Framework, the problem is not addressed adequately.

2.5 LAND ADMINISTRATION ISSUES (DNLP 3.5)

This section deals with the delivery of property rights and their administration. It notes that “the current system of land rights delivery has not supplied adequate serviced land at an affordable price,” and that “the system has not achieved equitable and fair distribution of the limited land resources” (para. 146). It appears to attribute this primarily to the land registration system, in that it then calls for new land registration legislation, replacing several existing acts, and for repeal of the Land Adjudication Act and the Land Consolidation Act (para. 150). It urges a refocusing of land delivery on the poor and landless and a revision of criteria for settlers to address their needs. It mentions the need to provide for “acquisition of land for establishment of settlement schemes,” but is not more specific (para. 152).

Turning to the cadastre, there are a number of useful recommendations, including amendment of the Land Survey Act to allow use of modern technologies such as GPS and GIS, and improvement of the specificity of general boundaries to the point that they can be fitted into a digital system. It calls for a national Land Information System, a laudable objective, outlining the wealth of information and the many benefits that could flow from the establishment of such a system. It does not go beyond this to the practicalities of how that system is to be designed, how the information is to be obtained and input, or who will construct and manage the system. This will be a very major undertaking, and a number of African attempts to create such national systems have failed at the design stage, or been stymied by ministries and other agencies which have jealously guarded their information. The attempt is worthwhile, but the problems should not be underestimated. There are a number of donors (SIDA, JICA) that are assisting the MoL in this area, and can provide the technical expertise needed. It will be important that they coordinate effectively.

There is a section of Land Market Principles that calls for the decentralization of land registries and encourages the development of short-term land rental markets since “the more common land markets based on sale and long-term leases are not effective in ensuring equity and access to land.” It seems comfortable with allowing markets to determine the terms of these short-term leases. If the short-term land rental market referred to is a market among private actors, this is a sound recommendation; if it refers to a short-term leasehold market in state-owned land, it is questionable.

A section on land taxation calls in para. 168 for several very specific and potentially important measures: the application of unimproved site value and improvement value in urban areas, the introduction of a development levy on undeveloped land, and the application of the capital gains tax to income from sales of real estate. Existing taxes would be continued. Individually, these recommendations seem appropriate. Wealth in real property, exploding in recent decades, has been under-taxed. Taken together, however, the recommendations may be too much of a good thing, and unduly penalize landowners. For example, if a land tax is applied on an improvement value basis in urban areas, it is questionable whether the capital gains tax should also be applied. Implementation of a capital gains tax is likely to be more difficult and the adjusted land tax may be the better option. The introduction of a development levy on undeveloped land is a conceptually attractive measure to prevent land hoarding, but there are serious conceptual problems in defining “undeveloped”; the idea surfaces regularly but the author is not aware of a single country that has an effective program of this nature. It is probably far more manageable to raise land tax rates for both urban and rural areas and make them progressive according to parcel size in upper ranges, exempting small parcels entirely.

Finally, there is a section on dispute resolution principles. It calls in para. 170 for greater use of alternative dispute resolution but does not attempt a serious diagnosis of the failures of Kenya’s justice system and the many different approaches to land dispute resolution already attempted. It is surprisingly unspecific. The authors may have considered that a full assault on these very difficult issues fell beyond the scope of this policy, but if so, it is worth reconsidering. Any initiative that depends on law will be futile unless the dispute resolution system is made more workable or effective alternatives provided.

2.6 LAND ISSUES REQUIRING SPECIAL INTERVENTION (DNLP 3.6)

- **Redistribution:** The policy in para. 173 calls for land redistribution in light of what it describes as “gross disparities in ownership.” It mentions three options, a) redistribution, b) restitution, of which little is said specifically except to call on government to develop a legal and institutional framework for restitution, and c) resettlement. None of the options are described in sufficient detail to allow useful comment. The author’s concern is that there is a danger in a policy paper promising these measures without providing a clearer roadmap as to how they will be implemented. Otherwise, they may prove empty promises, causing popular disappointment, and providing fodder for politicians more interested in exploiting these issues than resolving them.

The reference here (and at other points in the policy) to resettlement as a remedial action is worrying, in that ill-considered resettlement has been a cause of some of the injustices mentioned. It is questionable whether it should be pursued; an option would be to consider “community-based land reform” which provides funds to allow the landless or those needing resettlement to acquire land on the market, not in concentrations which can become problematic at a later date, but in a scattered pattern. There are many examples in Africa of people needed to find land acquiring it through purchase in the territories of other ethnic groups without much difficulty, if they are not concentrated in one area. Purchases of land in Buganda by BaKiga migrants from densely populated southwestern Uganda is an example.

- **Land Banking:** Land for redistribution, restitution, and resettlement is to be acquired through purchases, donations, and land reclamation (para. 177). No mention is made of compulsory land acquisition, and this is appropriate. The author has mentioned his reservation about potential misuse of this mechanism in Kenyan circumstances earlier in this note.
- **Restitution and Resolution of Historical Injustices:** Lack of access to land by many is seen as a governance failure, to be remedied, both generally and in the case of specific historical injustices (para. 174). Para. 179 calls on government to “establish mechanisms to resolve historical land claims arising in 1895 or thereafter,” using the year when Kenya became a British colony as the cut-off date, and to establish a suitable legal and administrative framework with mechanisms for restitution, reparation, and compensation of historical injustices and claims. Again, the author is concerned about the wisdom of making such broad promises. Failure to deliver on them, or failed attempts to deliver on them, could contribute significantly to ethnic resentment and violence. What is the redress of old injustices to one group is a new injustice to another. These are matters to be handled with great care and specificity, not broad promises. The paragraph goes on to say that laws should be reviewed to identify obstacles, including “constitutional provisions on the right to private property and compensation on compulsory acquisition regardless of how the property was acquired” (para. 179 (c)). There is again a constitutional proposal to this effect already in the Constitution subjected to a referendum two years ago, and it will certainly come up in the forthcoming constitutional discussions. This note will return to those constitutional provisions later.
- **Pastoral Land Issues:** The paper emphasizes the appropriateness of traditional modes of pastoral land use in arid areas, and notes the impact of encroachment on these areas. It mentions expropriation of high potential areas for natural forests and game reserves by elites. Remedies proposed emphasize a new legal framework that would permit restoration of the flexibility of pastoral land use with the cross-boundary land use so important to nomads in the face of uncertain rainfall. There is a call for a new legal framework for land and dealings in land in pastoral areas and for reviewing the boundaries of reserved lands in pastoral areas to determine current need (para. 183). There may well be a need for more options for organization of landholding in these areas. Group ranches, if inappropriate in some areas, seem to have worked well in others, with development of water resources, and in others have helped a transition to cultivation by pastoralists. It may be useful to provide other options, but

the decisions should rest with the membership of the groups. They may or may not want other options. When the policy talks about restoring pastoralist land use, in terms of restored mobility, there is a critical question about what areas are to be considered pastoralist areas. It is a worthwhile project to revisit viable land use patterns for pastoralists, and to seek to improve their position, but there will be many areas that were once used by pastoralists that are today so intensively developed that restoration of pastoralist land will be inappropriate.

- **Land Issues Peculiar to Coast Region:** The coast area is identified as the area with the largest single concentration of landless indigenous people, an explosive situation, and a myriad of other problems caused largely by public land mismanagement are noted. Numerous very specific measures are proposed, the most important of which is an inventory of all public land in the 10-mile-wide coastal strip and converting that land to community land for the benefit of people residing in the areas (para. 194). The author is inclined to think that efforts to address historical injustices might best focus on this area, as the problems there do not involve the major population movements that have occurred into the Rift Valley, and violence has not already made the situation more volatile. In Kenya, it may be more politically viable to tackle land reform as a regional matter, piecemeal, and in an opportunistic fashion, rather than attempting to address all injustices at once.
- **Land Rights of Vulnerable Groups:** This is a broad category, including subsistence farmers, pastoralists, unemployed youth, those living with HIV and AIDS, and others. There is an in-principle statement of the need to identify these groups, protect their land rights, and provide them with land through redistribution and resettlement.
- **Land Rights of Minority Communities:** This category refers to communities which are culturally dependent on specific geographical habitats, such as forests, who have lost access to those resources through forest preservation efforts. They are to be inventoried and given access to land; the policy calls for a new legal framework for restitution of their land (para. 201). The implications for protected areas could be dire; the policy, to be responsible, must enunciate a more limited and specific objective.
- **Disaster Management:** There is a reference to resettlement as an appropriate remedial measure; as the author has suggested earlier, future resettlement should be undertaken only very cautiously, to avoid creating new ethnic tensions.
- **Refugees and Internally Displaced Persons:** The policy notes the extensive nature of the challenge and calls for a more systematic approach. With regard to internally displaced persons, it refers to “Kenyans who have been displaced from their land as a result of tribal and land clashes.” It mentions resettlement but suggests that there is no legal framework for dealing with such problems (para. 210). It does not mention restoration of property, the appropriate solution under international conventions regarding displaced persons. The approach may be unrealistic, given current events, but should be recognized that this is the remedy to which internally displaced persons (IDPs) are entitled under international law and the constitutional guarantee to protection of their property. That said, it is obviously unwise to attempt to require IDPs to return to context where they feel they are in danger. Compensation is then the appropriate remedy. Again, assisting these IDPs to utilize market mechanisms to find land rather than resettling them may be the more appropriate approach. There is also the question of the land they have left behind. If they cannot return, mechanisms need to be put in place to ensure that their land is purchased rather than simply taken; those who have seized land should not be allowed to profit from their crimes. One possibility would be an office for disposal of confiscated properties, which would dispose of that land and pass on the proceeds to the displaced owners.

- **Informal Settlements:** There is a call for an inventory of informal settlements, a determination of which land is suitable for human settlement, and where it is not, the resettlement of those populations. Where it is suitable, the policy talks of negotiation with private owners and registration and upgrading of squatter settlements on public and community lands (para. 213). While many of the measures mentioned are positive, the paper stops short of a firm endorsement of broad regularization and titling of informal landholdings, leaving it out of line with current thinking.¹⁰
- **HIV and AIDS:** The policy calls on government to adhere to and enforce non-discrimination against those with these diseases and to put in place mechanisms to protect their land rights and those of AIDS orphans and widows. It adds, more specifically, that government should facilitate public awareness campaigns on the need to write wills to protect land rights of dependents in the event of death (para. 218).
- **Children and Youth:** Reviews of a variety of laws are called for to protect land rights of children and youth, and a public education campaign is recommended (para. 221). This is appropriate.
- **Gender and Equity Principles:** Cultural practices that disadvantage women are identified as contrary to constitutional and other legal provisions. Legal reform is called for, and enforcement of current laws on inheritance. More specifically, it calls for provision for joint spousal registration of land, and joint spousal consent to land disposals, for all types of land tenure (para. 225). These are in line with reforms in other countries in the region, and appropriate. They will not be easy to implement, in particular the recommendation with respect to inheritance rules.
- **Matrimonial Property:** The paper calls for legal reforms to create a broader concept of matrimonial property, to allow women more equal access to resources during marriage, after marriage, and after the death of the spouse (para. 227). Again, the proposals are appropriate but will be difficult to implement. Legislating them will need to be followed through with extensive public education campaigns and attempts to organize women to campaign for fulfillment of the promises which such laws represent.

These issues concerning rights of vulnerable populations are very important, but they are also issues where in addition to calls for legislation, there is a need for concrete proposals to improve matters in the short term. A very concrete approach, with such potential, is a proposal that will be promoted as a means of protecting AIDS widows and their children. This is well worth pursuing aggressively.

2.7 INSTITUTIONAL FRAMEWORK (DNLP 4)

The critique of the current land administration and management framework as highly centralized, complex, and bureaucratic is correct, and it is surprising that the report is so delicate that it speaks of land administration as “perceived to be corrupt” (para. 228). It is in fact widely acknowledged to be corrupt. This is not surprising; land and customs are the two most commonly cited instances of corruption in developing countries.

An overhaul is appropriate, and the proposal for a National Land Commission (NLC) is credible. Reorganization of the MoL would be the alternative, but the drafters of the policy have clearly concluded that a more drastic approach is needed. This is not a temporary land commission such as those which have done major policy and law reform development in many African countries, but a permanent Land Commission with important land administration responsibilities. It is to be a constitutional body, to reinforce its independence of political pressures (para. 232). If the NLC is to be given constitutional

¹⁰ Hernando de Soto. 2002. *The Mystery of Capital* (New York: Basic Books).

status, this should be done very carefully. Constitutionally mandated commissions are hoped to be independent in setting directions and making decisions, but they can also be so isolated from changing political realities that they themselves become unaccountable bastions of older ideas and interests. This has happened, for instance, with Ghana's Land Commission, and reform proposals now being put forward have been difficult to carry out because of the threshold need to obtain a constitutional amendment. A very careful balance between independence and accountability must be struck.

It is suggested that the NLC be directly accountable to Parliament for its operations (para. 237), but it is not at all clear how this would work. Parliaments are not generally effective managers, and the provision should be reconsidered, at least to make it clearer how Parliament might exercise this function.

The Commission would have a very comprehensive set of competences (para. 233). These are administrative in nature, not policy-making or adjudicatory. On the list is one combination of roles that raises concerns over the integrity of NLC decision making. The Commission is responsible for both the land administration functions (whose central task is to provide the public infrastructure and support for property rights and markets in land) and, at the same time, it is to function as the manager of all public land. It is not clear what would happen to the roles of agencies entrusted with management of particular categories of public land, such as forest reserves, and it needs to be made clear that the specialized agencies would continue to control these resources.

When disputes arise that pit public land claims against private land claims, and the NLC is seen to control the information and records needed to prove claims, private disputants will likely consider that they are at a disadvantage, and this may well be the case. One solution, followed in a number of other countries, and adopted this year in Yemen, is to create within the NLC a relatively independent Department of Land Survey and Registration, headed by a Chief Registrar appointed by the President and with judicial status.

A second issue concerning proposed NLC competences is the role of the NLC with regard to the land tax. The policy provides (para. 23 3(e)) that the NLC shall "levy, collect and manage all land tax revenues except rates, which shall be collected by district-based authorities." Several issues seem to be posed:

- First, the term "levy" seems to imply that the NLC is going to be creating land taxes. Is that possible under Kenya's constitutional system and division of powers between branches of government?
- It can also be asked whether the NLC will be able to get the "district-based authorities" to collect its land taxes. What "district-based authorities"? Will they benefit from the revenue? It usually works best to place the tax collection task on an institution that will receive at least part of the revenue.
- Finally, the rationale for NLC managing and using land tax revenue is not clear. It is something that is commonly urged, and from the standpoint of the land sector, it would be very helpful. Government financial managers are reluctant, however, to see the government revenue partitioned in this way, rather than allocated by the budgetary process. Will this be treated as off-budget revenue? Are there precedents for this in Kenya? How would accountability be handled?
- And why should not local governments, as is the case with land taxes in most countries, get the main benefit from land tax revenue? Land tax collection is best handled in a decentralized fashion and, indeed, it may not be feasible to collect this tax unless local governments are involved and have an major interest in the revenue collected.

The NLC is to administer its programs through District Land Offices (DLOs), District Land Boards (DLBs), and Community Land Boards (CLBs). The elected Land Board model, which owes a good deal to the positive experience of Botswana with land boards, is an excellent choice. The question is how much land administration Kenya can afford. The alternative would be to attempt to reform the County

Councils, which appear to require serious reform, but the policy seems to reject that option without discussing it. The advantage of that approach of course would be to avoid creation of expensive, specialized local land administration institutions. The author does not wish to second guess this choice by the drafters, which may well be the right choice, but it needs to be justified more effectively in the draft policy. Decentralization of land administration, while clearly needed, has proven alarmingly expensive when implemented in recent years in Uganda and Tanzania. Some of the statements in the policy create an unnecessarily high risk of that in Kenya. First, in the district offices and boards, there is a suggestion that staff at the district level will be appointed “on the basis of established guidelines, standards and minimum qualifications” (paras. 240 and 243). Based on the experience elsewhere, notably Uganda, there will be a need to vary the staffing and even the standards of training for different district offices, which may have quite different needs. There is also a need to clarify the relationship between the DLOs and the DLBs. In Botswana, the DLO plays the dual roles of local representative of the MoL and, at the same time, the secretary and executive arm of the DLB.

As for the Community Land Boards, it is difficult to assess what is anticipated here because the “community” is not defined. One can imagine many thousands of such community boards. Uganda, after failing in recent years to implement a similar provision, has allowed for the gradual creation of such community boards on community option, rather than making them a required piece of the land administration machinery. Where they do not exist, reliance is placed on existing community institutions to carry out the needed land functions under the supervision of the District Land Board. This should be very seriously considered in any revision of the policy.

The provisions on the Ministry in Charge of Lands (paras. 250-251) would leave the MoL a much-reduced version of its present self. It would retain control of policy, and one of its key functions would be conveying policy directions to the NLC and facilitating implementation of land policy reforms. It would also be in charge of capacity building in the decentralized system and regulating private land service providers. It is not clear whether the Ministry would have local offices any longer or what the Ministry’s relationship would be with the DLOs. Consideration should be given to the DLOs having dual links, to both the Commission and the Ministry, as in Botswana. These linkages need to be spelled out in the policy. It is hard to imagine that Kenya could afford two parallel hierarchies of land offices, and a financially responsible approach to decentralization needs to be better articulated in the policy. Finally, it needs to be clearer how the decentralized machinery will be funded. These are very basic questions.

Finally, land dispute settlement is addressed (paras. 254-259). The Rent Restrictions Tribunal and the Business Premises Tribunal are to be reviewed for continued relevance. The Land Disputes Tribunal Act (No. 18/1990) is to be repealed and replaced with more appropriate machinery for dispute resolution at local and district levels. Again, costs need to be assessed carefully. The report calls for alternative dispute resolution (ADR) mechanisms to be deployed by CLBs and DLBs. As suggested earlier, what both the diagnosis of the problems and the content of the recommendations do not seem to reflect is really searching inquiry. Again, it must be emphasized that effective land dispute settlement and the rule of law are not issues at the margin; they are critical to the success of any program of reform of land tenure.

There are two important institutional issues that need more attention. The first concerns land redistribution. The policy calls for redistribution, restitution, and resettlement. These activities pose serious management challenges with institutional dimensions. To be effective, any agency taking the lead on land reform must get the close cooperation of other key ministries such as those responsible for planning, infrastructure, and agriculture. The two most common models utilized have been:

1. An inter-ministerial coordinating committee chaired by the MoL, on which key ministries are represented and which can mobilize their staff and resources in a coordinated manner for particular reform projects; and

2. A National Land Reform Agency, with all the needed capacities created in miniature within the Agency, to be exercised strictly within those areas of redistributed or allocated land where reform beneficiaries seek to establish themselves.

Further thought needs to be given to this institutional issue, and there is a need for a fuller elaboration of a workable approach in a revision of the policy.

The second institutional issue concerns natural resource management. The organizational framework described in the policy is relatively solid regarding functions associated with land administration and land use planning, but there is little that responds to the need for more integrated management of natural resources. While the policy calls for this, it does little to suggest how it might be accomplished. This is a major lacuna in the dNLP as it stands. Again, more attention should be given to the matter in any revision of the policy.

BOX 3: LAND REFORM MODELS

Efforts by states to redistribute land since World War II, at least those in market economies, have utilized five basic models: land to the tiller reforms, ceilings reforms, restitution reforms, privatization reforms, and, most recently, “community-based” (or “market-mechanism”) reform. Each model tends to be linked to particular historical and regional circumstances giving rise to the perceived inequitable or inefficient distribution of land that the reform seeks to address. They have in common that they seek to establish a reformed sector of privately owned, smaller, and more efficient land holdings. In very broad terms, the models are:

Land to the tiller: Many of the relatively successful land reforms from East Asia in the period immediately after World War II reflected this model (Japan, Korea, Taiwan, and China prior to collectivization). Land was owned by large landlords and farmed for them by many small tenant farmers. The reform consisted of simply giving tenants the land they tilled. Its success reflects its simplicity: no change in scale of production or resettlement of beneficiaries was involved. The Ethiopian land reform of the 1970s resembled this model in its early stages, at least de facto; but beneficiaries did not receive ownership rights and damaging periodic distributions of land were introduced.

Ceilings reforms: This is the model most commonly used in Latin American reforms in the 1960s. In the Latin American case, the large estates (*Jatifundia*) were often worked as at least partly integrated operations, by a paid labor force (who usually had their small food plots, or *minifundia*) rather than tenants. A legal maximum size of holding was legislated, and all or a part of each holding that exceeds that maximum (the “ceiling”) was taken by the state for redistribution. Compensation may or may not have been paid, or have been adequate, depending on the case. Beneficiaries included the farm’s labor force but also other poor. The land was sometimes given to individual households to farm, but was also sometimes given to collectives, in an attempt to preserve the integrated large farm operation. The recent Zimbabwe reform is on this model; Brazil provides an example of a much more effective ongoing reform on these lines.

Restitution reforms: This model is most closely associated with the recreation of private property in the countries of Eastern Europe upon the collapse of their socialist economies in the 1990s. Land was largely in the hands of state and collective enterprises, but was returned to the former private owners from whom it was confiscated in the 1940s; if this was not possible, compensation was provided. In Africa, South Africa’s restitution program has been returning land taken by apartheid governments for whites to the original black owners or, where this is not possible, providing them with compensation.

Privatization reforms: This is another model from the 1990s, associated with countries of the former Soviet Union. In Russia and the other countries, land from state and collective enterprises has typically not been returned (restituted) to former owners but has instead been redistributed in ownership or ownership shares to former enterprise workers. In some cases, the enterprise, reorganized as a company, receives the land.

3.0 USAID PROGRAMMING IN LIGHT OF THE DNLP

Will the implementation of the dNLP support USAID 's portfolio of existing and intended investments in Kenya, which include work in the areas of 1) economic growth, 2) conflict management and resolution, 3) governance and institutional development, 4) AIDS/HIV mitigation, and 5) natural resource management/biodiversity conservation.

3.1 ECONOMIC GROWTH: THE COMMERCIAL FARMING SECTOR

Under its SO 615-007, Increased Household Incomes, USAID is investing in commercial production in Kenya's agriculture. The approach is market-led, with an emphasis on value chain development targeting three of Kenya's most strategic agricultural commodities (maize, dairy, and horticulture) in medium and high production areas. The program has long recognized that ethnic strife poses a threat to program performance.

In the short and intermediate term, this program would be likely to be impacted by implementation of various programs set out in the dNLP. This is especially true of those on land redistribution. In the policy there are:

- Assertions throughout that the distribution of land is inequitable;
- Argumentation that the constitution should not protect private property rights that have been acquired in "an illegitimate manner";
- The call for recovery of "public land acquired irregularly," focusing in particular on private land that was once public or trust land;
- The proposed prohibition of non-citizens from holding freehold interests in land, and the conversion of those freeholds to long-term leases;
- The call for "acquisition of land for establishment of settlement schemes";
- The call for government to "establish mechanisms to resolve historical land claims arising in 1895 or thereafter," and to establish a suitable legal and administrative framework with mechanisms for restitution, reparation, and compensation of historical injustices and claims; and
- In that context, a call for review of laws to identify obstacles, including constitutional obstacles posed by protections of private property that require compensation for compulsory acquisition regardless of how the property was acquired.

The criterion here is not size of holding. There is no maximum holding size suggested, but instead the objective is the restitution of land acquired "in an illegitimate manner." This not only is a very subjective standard, it is also scale-neutral, so small holders could at least in theory be affected as much as large holders. Early colonial grants could come into question, as could grants to officials in more recent times

and purchases where local sellers claim they did not understand the nature of a transaction. It is difficult to tell where lines might be drawn. The question of the treatment of land acquired under questionable circumstances but later conveyed to and held today by good faith purchasers is not dealt with.

Proponents would argue that the measures implied here would have potentially beneficial impacts on commercial agriculture in the long run (more appropriate scales of production, greater intensity of land use, resolution of long-standing ethnic conflicts over land, and others). However, in the short and intermediate run of five to ten years, and perhaps longer, the process of land reform can only disrupt commercial production. This should be expected to occur during the difficult transitions on parcels of land caught up in the reform process, but there can also be an impact on production in other areas, if owners there feel threatened. Perceived risk on the part of owners will discourage investment, while reform beneficiaries who receive the land may take some years to develop linkages into supply and output chains. This is a cost that needs to be seriously considered; the case of Zimbabwe in the past decade suggests that the cost is extraordinarily high if land reform is badly managed.

Such transitions are almost never easy, though of course they will be less difficult if planned for adequately. There is a danger that reformers will focus too narrowly upon provision of land to beneficiaries, rather than all the other inputs and services they need to be successful. Hopefully Kenya, with considerable experience in resettlement, would not make some of the more common mistakes.

Other recommendations of the policy that may be problematic from the standpoint of commercial producers, large and small, are the provisions shifted from the draft policy into the draft Constitution.

Huge abuses have occurred in Kenya's land sector, and it is impossible to argue that the present distribution of land is equitable. The question is whether programs of the nature put forward here can be implemented in an equitable fashion and in a manner that avoids major negative impacts on production. In an atmosphere of deep ethnic resentment over land issues, these solutions are framed in terms of historical injustices that have in fact cut along lines of race and ethnicity. This is worrisome. The process of their implementation, though aimed to redress those ethnically charged injustices, may in the short run exacerbate the tensions those injustices have caused.

Government might consider a different land reform agenda, one which is framed in ethnically neutral terms, such as classic "ceilings." Ceilings lack the moral justification of injustices redressed, but they may be less socially risky. Ceilings also have another important advantage: they inform a very large portion of landholders (those with holdings below the ceilings) that they will not be affected directly by the reforms and can go about their business.

3.2 CONFLICT MANAGEMENT AND RESOLUTION: STRUGGLES OVER LAND

Conflict management and peace-building is one of the DG Program areas of focus. Implementation of the current program commenced in 2004 and is based on a strategy that targets pastoralists' areas in the northeast and parts of the coast. DG Program interventions are at the local level (working with existing structures including peace committees and traditional mechanisms) as well as national-level (advocacy for a national policy). USAID is supporting four CSOs and the government's National Steering Committee on peace-building and conflict management [NSC]). In addition, USAID/ East Africa is beginning a Regional Enhanced Livelihoods in Pastoral Areas (RELPA) Program, under which work is likely to include landscape-scale interventions addressing natural resource management, pastoralism, agriculture, and ecosystem services. It will utilize cross-cutting approaches in natural resource policy and governance, resource and property rights, capacity building, institutional strengthening, enterprise development, sustainable finance, conflict mitigation and management, gender, and strengthening disadvantaged groups. These are grassroots, community-based integrated programs of assistance that include conflict management and resolution components.

How would implementation of the dNLP affect these projects? First, it is important to distinguish the primary approach to conflict over land in the policy from that of the USAID-funded efforts noted. The USAID-funded efforts are conflict management efforts, typically very close to the ground. They seek to manage competition for land and the needs of pastoralists for flexibility in light of changing rainfall and other environmental variables. The dNLP instead puts forward programs intended to redress the inequalities caused by historical unfairness. It would attempt to move beyond conflict management to remove the basis for the dangerous political tensions around inequitable land distribution and historical displacements of peoples from their lands.

This redress extends to pastoralist lands, where USAID is already engaged. The dNLP bemoans the expropriation of high-potential areas for natural forests and game reserves from pastoralist lands. It calls for restoration of pastoralist patterns of land use, with flexible and negotiated cross-boundary access to protected areas, water pasture, and salt licks among different stakeholders. It calls for repeal of the Land (Group Representatives) Act, the key enactment governing land tenure in the “group ranching” model, and the institution of alternative means of registration that define individual rights within pastoral communities while allowing them to maintain their unique land use system. This call presents an important opportunity to provide a more adequate legal framework for regularization/formalization of community-based resource tenure, and USAID should seek to understand how best this could be accomplished in its project areas.

The dNLP also deals with conflict management, and there are some statements in the policy that connect well with USAID’s community-based conflict management efforts. The dNLP recommends in para. 170 the establishment of “appropriate institutions for dispute resolution and access to justice within communities with clear operational procedures, mechanisms for inclusion of community members in decision making, and development of guiding rules for making decisions on specific matters.” It goes on to recommend the encouragement and facilitation of the use of ADR mechanisms to reduce the number of cases that end up in the court system and delayed justice. Later in the policy (para. 257), there is a call for repeal of the Land Disputes Tribunal Act (No. 18 of 1990) and the replacement of those tribunals by a more appropriate institution for dispute resolution at the district and community levels. Para. 258 calls for ADR mechanisms to be used by Community and District Land Boards to facilitate fair and accessible justice on land matters. USAID’s programs are supporting ADR-style (mediation) dispute resolution at the community level. The dNLP provisions suggest opportunities for using what has been learned in those efforts for ADR on a broader scale. USAID’s experience might prove valuable to those developing the Land Board system.

Turning back to the more politicized mega-disputes with strong historical and ethnic dimensions, where the main thrust of dNLP is substantive redress of injustices, there may still be a role for community-based dispute resolution such as that supported by USAID. For example, if in some areas customary tenure rights are restored, negotiation may be needed to sort out whether outsiders who had previously acquired land in the area can retain it, and on what terms. Also, if in pastoralist areas there is to be a reopening of boundaries for pastoralist transits, the new patterns of use and rights of way will need to be carefully negotiated. There will be disputes to be settled. An ADR approach and the compromises it can facilitate will work better in such cases than a more formal winner-takes-all adjudication. There is a long history of use of such methods between pastoralist peoples in arranging for seasonal grazing routes, accommodating each other’s needs in one year in the expectation of own needs being accommodated in another year.

As in so many areas, the prospects for the changes proposed will depend heavily upon the process designed to implement the reform, and this is not indicated in the draft policy.

3.3 GOVERNANCE AND INSTITUTIONAL DEVELOPMENT

One of the objectives of SO 615-006, Improved Balance of Power through Transparent and Accountable Democratic Institutions, is to increase civil society's effectiveness in advancing reforms. The process leading up to the dNLP involved the mobilization and increasing effectiveness of a variety of civil society organizations, notably the Kenya Land Alliance and a number of survey professional organizations. Other civil society organizations, such as the Kenya Society of Landowners and the Law Society of Kenya, seem to have come to the process later but will likely be making important inputs if the process moves forward.

One of the striking things about the dNLP is how exclusively it focuses on government action as the needed remedy for the problems noted. This is understandable to some extent, since governments make policies and laws, and adjudicate disputes. On the other hand, there are major roles for private sector actors, such as lawyers, surveyors, professional associations, CSOs, NGOs, and others in implementation processes. Indeed when one surveys the huge reform agenda set out in the policy, it seems that only by engaging the private sector in some of the tasks will there be any hope of implementing the programs. This is a perspective that is not reflected in the dNLP, and USAID could make a major contribution by working with the private sector and CSOs to explore new roles for non-government actors in reform implementation.

A second objective is the strengthening of democratic institutions and the rule of law. One significant challenge posed by the recommendations of the dNLP is the creation of democratically elected local land administration institutions, the District and Community Land Boards. This could be an important opportunity for democratic processes to make a difference at the community level, handling important decisions about resources on which livelihoods depend. The Land Board model is one of the best choices in the dNLP, and USAID may find important opportunities to strengthen democracy in Kenya through assistance to the design and creation of these local institutions. USAID played an important role in building the land board system in Botswana, providing the training for the District Land Officer (DLO) cadre who implemented land board decisions.

3.4 NATURAL RESOURCE MANAGEMENT AND BIODIVERSITY CONSERVATION

SO 615-005, Improved Natural Resources Management in Targeted Biodiverse Resource Areas, seeks to enhance the sustainable and equitable management of Kenya's rich biodiversity resource areas. It seeks to facilitate, inter alia, the development of a legal and policy framework for natural resource management/biodiversity conservation (NRMJBDC) and constituencies for public/private sector involvement in NRM.

The dNLP's provisions on NRM and environmental management are quite limited compared with other land subsectors, sound but quite general. They connect most closely with USAID's program when the provision on conservation and sustainable management of land-based natural resources mandates preparation of participatory community action programs by communities living near environmentally sensitive areas, and involvement of local communities in the co-management of wildlife sanctuaries and conservancies (para. 131). There appears to be an opening here for the generalization of some of the tools USAID has been building in its community-level activities.

Dealing with forest resources, the policy criticizes the loss of important forest resources to elite land takings, but it is more sympathetic to community claims. The section on pastoralism mentions the expropriation of high-potential areas of pastoralist lands for natural forests and game reserves, and it calls for a new legal framework for land and dealings in land in pastoral areas. It mandates a review of the boundaries of reserved lands in pastoral areas to determine current need (para. 183), hinting at the

possibility of de-gazetting some land or at least further opening up these areas to pastoralist use. A similar tone is struck in the section on disadvantaged minorities, which notes the case of minority communities which are culturally dependent on specific geographical habitats, such as forests, but have lost access to those resources through forest preservation efforts. The communities are to be inventoried and given access to land; there is a call for a new legal framework for restitution of their land (para. 201).

There is a potential threat here to the integrity of existing forest reserves but also interesting opportunities. USAID could play a very positive role by bringing forward and promoting models that provide benefits from biodiversity for local populations, or, where biodiversity does not require a strict protection regime, models under which NRM involves the direct participation and even control of reserved land by local communities, with some traditional uses accommodated.

Finally, there may be a more general risk to sound NRM implicit in the land redistribution theme of the dNLP. There are repeated references to resettlement, to compensate those who have suffered historical injustices (para. 172, 175) or have been displaced by ethnic clashes (para. 210). Elsewhere, there is a tendency to try to find this land from stocks of lightly utilized public land in arid areas. Depending on how the land distribution programs play out and the level of demand for land for this purpose, there could easily be a temptation to direct some of that resettlement onto marginal land where cultivation may in the long or even medium term not be sustainable. The policy should recognize this danger.

3.5 AIDS/HIV MITIGATION

The impact of the AIDS epidemic is a cross-cutting issue for USAID/Kenya. Its microenterprise system works with communities especially affected by HIV/AIDS, and PL480 programs are tailored to support orphans and vulnerable children.

The draft policy calls on the government to adhere to and enforce non-discrimination against those with HIV/AIDS, to put in place mechanisms to protect their land rights and those of AIDS orphans and widows, and to support public awareness campaigns on the need to write wills to protect land rights of dependants in the event of death. (para. 218).

The position of AIDS widows is also potentially affected by the recommendations of the policy on joint spousal registration of land and for joint spousal consent to land disposals for all types of land tenure (para. 225), as well as for a broader concept of matrimonial property, to allow women more equal access to resources during marriage, after marriage, and after the death of the spouse (para. 227).

The policy correctly diagnoses the disabilities suffered by women affected by AIDS as a reflection of the more general weakness of property rights provided to them in patrilineal inheritance systems. If it is not already doing so, USAID should use these recommendations as a platform to build a component on land into its public awareness and education programs on HIV/AIDS. The policy calls for provision of forms for wills and this, as well as training to ensure a broader understanding of and acceptance of wills generally, deserves support from USAID. This is an area where habits are hard to change, but a will in which the testator explains the need to leave property to a wife or daughter can be compelling, and initiate changes in attitudes about what must “always” be done.

4.0 CONCLUSIONS AND RECOMMENDATIONS

4.1 THE DNLP: KEY ISSUES

The draft policy is a very substantial, comprehensive, and instructive document. It identifies problems frankly, and reflects a determination to confront and solve them. It usually points the general direction that needs to be taken to remedy those problems and, for the most part, the policy prescriptions are sound. Only occasionally does the policy provide a detailed action agenda for dealing with a problem, but given that the document is very comprehensive and covers a great many clusters of land issues, real depth in proposed solutions cannot be expected. It remains to be seen if it will be approved by government, but, in all likelihood, will provide the template for most discussion of land policy options in coming years. An attempt is made in the following section of this report to identify areas that need improvement. This is in response to the request of the LRTU presentation on the final day of the USAID-sponsored forum for concrete criticism and recommendations for change.

The policy as it stands is heavily agrarian. It focuses more on the mistakes of the past than the challenges of the future. This slights urban and peri-urban areas, and this is particularly true of the level of attention given to rapid urbanization and the needs for shelter it will pose. Looking at the experience worldwide, it is clear that the rapid urbanization touching most developing countries has only begun in Kenya, and that it will likely accelerate rapidly, reaching levels that Kenyans will find hard to imagine today. It is important to be clear on the relationship between population growth, land pressure, and rapid urbanization. On the best international evidence, urbanization will create rapidly rising demand for land and land prices in urban and peri-urban areas, and will create competition and conflict over land in those areas. Sorting out any confusion of land rights in such areas should receive real priority. At the same time, that inflow to urban areas, will not slow down much the growing pressure on rural land. This is possible because such a large part of the country's population is still rural at this point in time.

Another limitation of the draft policy is the lack of attention to the impact on growth of policies recommended in the interest of equity. There is no mention that restitution, for instance, will need to be sensitive to the level and nature of the existing development of the land concerned; that where productive, large operating units are broken up, it will usually take several years to return to prior levels of productivity; or that there may be major impacts on foreign exchange earnings as crops change with the change of farmers' owners. These are not reasons for dismissing land reforms out of hand, but they need to be taken very seriously. Taking them seriously will often mean that reforms are moderated or done in phases or that ameliorating strategies are devised. The policy largely fails to do this.

It is clear that serious injustices occurred. Some involve illegal and irregular allocations of public and reserve lands which deprived local populations of their economic resources and their expansion zones. Some involve actions by officials that may not have been illegal but were certainly badly judged and unfortunate. Others involve actions by private individuals, using land markets to secure land in less sparsely populated areas, as when purchasers from the highlands acquired land in the Rift Valley. To the

extent that the concept of land as a commodity had not been accepted in local value systems, those purchases have been seen by many locals as illegitimate.¹¹ Such resentments lie behind the recent events in the Rift Valley. The dNLP, it should be noted, in talking of historical injustices tends to use the term “illegitimate,” rather than “illegal,” signaling that it seeks redress of shifts of land ownership viewed as unfair, even though legal.

This may not have been strategic. An excellent blueprint has been provided by the Ndung’u Commission for dealing with the narrower and less controversial problems of illegal and irregular allocations of land, reclaiming most of that land. That would have seemed a logical first step, and a possible consensus measure to which there might be foot-dragging by those affected but from which there could be little public dissent. The government would be well advised to proceed as rapidly as possible to establish the Task Force called for by the Ndung’u Report and to legislate to create the Land Title Tribunal called for in the Report to implement its recommendations. The expansion of the call for land reform beyond the Ndung’u Report has been interpreted by some as an attempt to distract attention from what might be difficult but doable by focusing attention of more dramatic reforms which are unlikely to be realized.

Still, other injustices have clearly occurred. How to address them? The policy speaks of restitution, but it is a remarkably difficult thing to reach back into the colonial period, sort out and remedy those injustices. The only real precedent in Africa is the South African case. However, there are important differences: the cut-off date there, 1913, was more recent, within living memory, and the very early date suggested by the draft policy should be reconsidered. In addition, in South Africa, land takings were very well documented, often the result of direct state action through forced removals. Most importantly in South Africa, the whites from whom land is being restituted had already lost a fundamental struggle over political power with the advent of black majority rule. In the Kenyan case, stakeholder groups that are potentially negatively affected by restitution are still in active political contention and are likely to continue in contention. The political tensions around the issue have already led to violence. The dispute is difficult to resolve because both sides feel that their claims are legitimate. They both have a point; sometimes the different claims can each claim some legitimacy, though sometimes under different normative systems.

If the inequities constitute a threat to stability, there is also a danger that a restitution process, resulting in new displacements, will exacerbate existing tensions. This is perilous ground, and if the government does in the end endorse the policy of restitution, USAID and other donors should provide assistance in developing mechanisms that minimize friction and downsides in the process. Are there ways in which such a policy can be made less ethnically specific, even though some of the injustices tend to run along ethnic fault lines? A simple ceilings approach is one possibility, and has been discussed (see Box 4 below). Another would be a process of preemption involving forced resale to the original owners, with the state assisting with credit. This might occasion less resentment than takings. Finally there are variants of market-mechanism land reform that might be considered (Deininger 1999). (South Africa is an example, but also see Box 4 concerning the reform going in southern Malawi.)

The Malawi reform has the great advantage of being localized. It is very difficult to achieve full justice in many situations, finding win-win solutions for all. Working on a more local basis, among those who have been directly involved in conflict, however, it is sometimes easier to dispense at least partial justice, and ease tensions. It is important that all concerned begin looking for opportunities to localize, or at least regionalize these land reform issues and if necessary, deal with them piecemeal.

¹¹ Amy Chua of Yale University Law School in her 2003 book notes the existence of “market dominant minorities.” These are groups like the Kikuyu, whose history introduced them to land markets early and taught them to use markets as a tool to acquire land. She warns of the explosive situations that can ensue when such market-dominant minorities acquire large amounts of land from other ethnicities, even legally, through the market. Amy Chua 2003. *World on Fire: How Exporting Free Market Democracy Breeds Ethnic Hatred and Global Instability* (New York, NY: Doubleday 2003).

BOX. 4. THE MALAWI COMMUNITY-BASED LAND REFORM

This model, also referred to as “community-based reform,” achieved recognition in the 1990s with the support of the World Bank. Instead of the state taking land to redistribute to the poor and landless, the state loans funds to groups of the poor who then purchase large farms on the market and subdivide them among themselves. Piloted in Brazil and a number of other countries, the model is utilized by South Africa in its “willing-buyer, willing-seller” reform.

It is also being implemented in southern Malawi. There, around the old capital of Blantyre, freehold tea and other estates have extensive uncultivated lands and, on many, the cultivated area is shrinking. At the same time, the population of the local communities surrounding the estates, which once held the estate land as their own, has grown and land has become scarce. The Government of Malawi, using funds from the World Bank, is extending credit to groups of local families to purchase land from the estates, often contiguous with their communities. Various controls ensure that the buyers are not cheated. Government registers the new holdings.

The beneficiaries can receive a freehold title, or can, at their option, have the land reintegrated into the customary land tenure system of their community. The government is registering the new titles.

As in South Africa, the process is said to be slow, but it is in fact faster than most compulsory acquisition processes, at least those that are done in accordance with law and subject to reasonable compensation requirements. The process appears to have gone smoothly in part because this is a regional, not a national, political issue, one that national government was keen to see addressed before it festered further.

The community-based land reform process is essentially a state-assisted and state-subsidized market mechanism solution. It involves recognition by the government and the Bank that land markets, without help, will not move land to these smaller and potentially much more efficient land users. The approach has the advantage of not being compulsory, and so the owners do not contest the acquisitions in court.

There is a final and critical set of legal proposals clustered around land reform, proposals for constitutional change that emerged in the discussions of the draft policy and have been incorporated into the draft constitution rejected in the 2006 referendum. That draft will come up for discussion again very shortly, as the parties attempt to deliver on their commitment to provide a new constitution within one year. The issues raised are:

1. The draft constitution provides for conversion of foreign land ownership and 999-year leases to 99-year leases: As suggested earlier in this paper, any taking of an interest in land is of concern but, in these cases, it is not so much the reduction of the duration of these rights to 99 years that is of concern but what the new leases will provide in terms of rent, conditions, and renewal at the end of the term. The redrafting of the section of the draft constitution on property rights virtually exempts these conditions from constitutional challenge. This should not be done. If this is to be handled within the constitution, it should be done far more explicitly to protect those affected from strongly negative impacts over and beyond the reduction in term, and including provisions for compensation for improvements when the leases terminate or are terminated.
2. In addition, the draft of the provision on protection of property rights appears to the author to virtually bar a constitutional challenge to any land reform measure under Chapter 7, the Land Chapter of the draft constitution. It thus largely undermines the compensation requirement for a taking in a land reform program. This is a deeply worrisome provision, and should not stand as it is. It may be appropriate to provide constitutionally for some special measure of compensation for takings in land reform, a measure which is arguably fair in the circumstances, and this was done in South Africa. It is a very different matter to exempt land covered by such programs from constitutional protection entirely, and to define the exemption by reference to Chapter 7, which contains much vague and

aspirational language on land reforms. This is a danger to property rights generally. There is no guarantee that a venal government will not use these provisions to take the land of the rural poor whose interests the drafters probably believe they are advancing.

Further consultation is required on constitutional provisions and recommendations of the dNLP, and it is important that the donor community engage with government on these issues in the context of the forthcoming discussion of the Constitution.

4.2 PROSPECTS FOR DNLP IMPLEMENTATION

The dNLP process has been impressive. It has been comprehensive, and has allowed new policy options to be put forward. It has allowed very substantial involvement by civil society and facilitated civil society mobilization around land issues. The degree of constructive dialogue between civil society and government has been exceptional. The MoL is to be commended for its openness to that dialogue. In the process, new capabilities in policy analysis have been created in both sectors, and key capacity needs in the Ministry identified (e.g., land information system). At the same time, donors have been involved through the DPG and have been sensitized to land tenure and land reform issues in Kenya.

The process, however, seems to have had some limitations as well. It is clear that the private sector was not heavily engaged. This may have been due in part to the slowness of the private sector to take seriously the work on the policy, but it is clear that large commercial farmers have arguments to make that did not surface as early as they should have in the discussions. It is also clear from the field discussions by the two ARD field assessment teams that many people in rural Kenya, even many officials, are unaware of the policy process or at least unaware of the conclusions it has reached. It is clear that the Ministry did make serious, good-faith efforts to provide the public with information on the policy process and the conclusions it was reaching, but getting the word out and eliciting public input may have proven even harder than those involved imagined.

Even without the land-related violence following the elections, it is a long stretch from the policy's recommendations to well-designed programs to implement them. If the policy's virtue is its comprehensiveness, it is also its limitation: in many areas, it only identifies problems and points toward needed actions in general terms. If the policy is approved, there will be a need to elaborate strategies and then design programs with budgets for which government can seek resources. The costs in not just financial but human resources will need to be assessed carefully. If a policy is approved, it appears that it will be the responsibility of those working under the LRTU and the MoL to work out the "how" of these reforms, and to develop implementable programs. Because resources are finite and the proposals of the policy broad and ambitious, implementation priorities will need to be established.

There will be certain "screens" that will help determine priorities in implementation. Some will be political; some reforms may be the subject of insistent public demand, and so will need to take priority. There will be other screening factors as well. How expensive is the reform, and will major donor support be needed for implementation? Does the legal basis for implementation exist, or is new legislation needed? Does the organizational basis for implementation exist, or are organizational reforms needed before implementation is a realistic prospect? These are dealt with in turn below.

Finance: The Ministry of Finance signed off on this proposed policy, but it is unclear whether there was very serious thought given to the costs involved. It would be extremely informative to have even a preliminary take on what measures can be implemented by government agencies working within existing budgets, and where major new funding will be needed. It is important that this reality check take place before the policy is finalized. An approved policy does not bind government to fund it. It is a promise, or rather a very large set of promises, however, and it does raise expectations that have political consequences. It should be approached soberly.

Institutions: How does the implementation of substantive reforms and institutional reforms relate to each other? The institutional re-engineering proposed in Chapter 4 (Institutional Framework) is ambitious. The policy proposes a new National Land Commission, with District Offices; District Land Boards and Community Land Boards; and supporting agencies including the Ministry in charge of Lands, local authorities/district governments, property tribunals, land disputes tribunals, and land courts. It is not clear in the policy which new parts of this land administration machinery are needed for the implementation of the various substantive reforms proposed, or whether some reform initiatives could move forward under existing institutions. This is an important threshold issue in implementation, and the policy is not clear on it.

Legal Basis: A third important screen concerns law reforms. The policy is full of calls for repeal of old laws, or at least their reconsideration, and the passage of new laws, most importantly a new Land Act. In some cases, the viability of a proposed reform hinges on the enactment of such a law. A law may be needed to begin a process of institutional reform such as that mentioned above, but legal changes may also be needed to clear the way for some substantive reforms as well. For example, the proposed measures on land redistribution and recognition of customary land tenure rights would certainly require legal changes. This will necessarily be a long and complex process, but there are valuable lessons available from other countries that have undertaken the reviews of national land law (Bruce 2006).

The above are issues that would have faced those planning for implementation of the policy, even without the recent land-related violence. How does that violence and the prolonged tussle over formation of a new government affect the prospects for approval and implementation of the draft policy? Negatively, it would seem. The policy is often presented as a consensus document, forged in long debate, but it seems that important stakeholder groups remain outside that consensus. When peace is restored, it will be fragile and that will make government reluctant to rush into implementation of some of the more politically sensitive reforms proposed—at the same time that the violence makes the case that these land problems are truly urgent. In practical terms, a cooling off period will be needed, at least on Rift Valley issues, and then a reassertion of a political consensus behind the reform, signaled by the adoption of the policy by the government. The change of government does not doom the policy, because at least from the author's perspective, there appears to be much in the policy that the former opposition could readily accept.

It is clear, however, that the LRTU and its working groups are no longer going to be the only or perhaps even the main fora in which major land policy decisions are made. A number of critical issues that could shape the rest of the policy will be decided in the Constitutional discussion under the Annan process. Again under the Annan process, Agenda 4 for negotiation is Land Reform. The Commission for Peace, Justice and Reconciliation under that process will also tackle land issues. With 300,000 Kenyans displaced by the violence and needing to be returned to the areas from which they were driven or resettled elsewhere, a new Ministry of State for Resettlement in the Ministry of Administrative Reform will be making many critical decisions concerning refugees and the handling of the land from which they were driven that will affect policy decisions.

In this environment of fragmenting decision making by politicians, the dNLP policy process takes on new importance. To ensure that the learning that occurred in that process is conserved, it is important that the LRTU be supported and connected into the discussion in these various fora.

4.3 IMPLICATIONS FOR USAID PROGRAMMING

It is impossible to gauge at this writing the extent to which this government will really try to come to grips with these difficult issues as it should. This is a period of opportunity, but it is not clear if it will be taken. It is not encouraging that, in the negotiations between the two parties over the allocation of ministries among their candidates, each party tried to give the MoL to the other party.

In the interim, USAID does need to work “in light of” the draft policy, that is, in an awareness of where the draft indicates that Kenyan land policy may be going. USAID should not expect that the reforms proposed in the draft land policy will materialize rapidly, or impact its activities seriously in the short term. Given the uncertainty about whether the political will to launch major reform programs will exist in the near term, USAID might want to think about these issues on five levels:

- a. USAID may wish to seek a role in keeping alive the dialogue around the policy issues and the land policy implementation planning process, either through assistance to a LRTU and the MoL and/or the CSOs participating in the process.
- b. Are there legal reforms proposed in the policy that are relevant to USAID’s programmatic objectives in Kenya, and which seem sound and feasible? Some law reform work may be worth supporting, both to ensure its quality and to create the legal conditions for more effective reform activities later on.
- c. Are there institutional reforms that USAID feels are needed? For example, the proposal for district and community land boards puts forward a potentially useful model. USAID might consider helping Kenya refine the proposal (considerable refinement is needed), and support implementation to both deepen democratization of land administration and its efficiency.
- d. Are there concrete measures mentioned in the policy that do not require institutional or legal reforms, and which USAID could consider addressing within its current program of work? There is a fairly strong focus in the policy on marginalized people in arid regions, which connects well with USAID’s work on pastoralists in the northeast and coast. There may be elements in the reforms proposed in the policy which USAID could develop through its programming.
- e. Are there opportunities for USAID to enhance the role of private sector actors, both the business community and civil society, into the reform process? The proposals in the policy are ambitious and it is hard to imagine their implementation without actively involving nongovernment actors.

Finally, USAID should not shrink from engaging on the more political policy issues. There is no forum, for instance, where input on land questions will be more badly needed than in the consideration of the constitutional provisions concerning land. USAID should consider supporting those deliberations through provision of expertise and access to experiences elsewhere.

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