



**A PAPER PRESENTED TO THE JOINT WORKSHOP OF**

**THE GOVERNMENT OF KENYA/ USAID**

**FROM THE**

**OFFICE OF THE**

**ATTORNEY GENERAL**

# **LEGAL REFORMS IN STRENGTHENING GOVERNANCE AND DEMOCRACY IN KENYA**

## **Introduction**

### **(a) Background**

In the recent years, Governance has become an integral part of development all over the world. As such it has become a pre-requisite for aid assistance from the developed world to the third world countries. Before the end of the cold war, developed countries were more concerned with expansionism of their respective national interests rather than the quality of governance and democratic institutions in place. However, after the end of the cold war, assistance from the western developed countries to recipient countries demanded good governance and development of democratic institutions before any assistance was made available.

This change of aid policy has not been received well by some of the recipient countries as many governments feel arm twisted and their separate sovereignty threatened. This reservation has become more and more apparent and many lending agencies have thus opted to channel their assistance directly to the civil society and Non-Governmental Organizations (NGOs).

At the same time, globalization and hard economic realities have made many under developed countries in Africa to re-examine their economic and political policies which have called for radical reforms to bring about competitiveness and efficiency in carrying out government business.

The Office of the Attorney General is in the forefront to make sure that all the reforms undertaken are in line with the laws of the land and have the necessary legal backing for implementation. As the current major objective of the

Government is to reduce the level of poverty in the country, the Office of Attorney-General has also taken a lead in identifying and reforming the laws which have a greater impact on poverty reduction. The Poverty Reduction Strategy Paper (PRSP) is a major Government policy document guiding the whole process.

This paper will address the Legal Reforms in Kenya, Donor assistance and the Kenya Law, Monitoring and Evaluation of donor funds and finally suggest the way forward.

## **(b) Legal Reforms in Kenya**

The Primary development goals for Kenya as emphasized in various sessional papers, and other policy papers – is to achieve a broad based improvement in the economic well being of all Kenyans. The intention to alleviate poverty as has been stated since independence has been reaffirmed through the introduction of the Poverty Reduction Strategy Paper (PRSP) as a blueprint for development to be implemented through the Medium Term Expenditure Framework (MTEF) approach to budgeting.

To achieve this objective it requires a dynamic partnership between the public and private sectors, guided by a functional legal framework, which provides certainty and predictability through judicious legal decisions. For a conducive legal framework to be in place the Office of the Attorney General has put in place two important institutions to address the problem. These institutions are - the Kenya Law Reform Commission and the Expanded Technical Committee on Implementation of the Legal Sector Reform Program. The two institutions are supplemented by various task forces appointed by the Attorney General from time to time to look into the specific laws as per their terms of reference and the problem at hand.

Several laws have been reviewed, Bills drafted for legislation and enactment to create a conducive and enabling environment for the on-going economic and political reforms in the country. Notably, new Procurement Procedures for Public Goods and

Services have been gazzeted and in use since March 2001, the Children Bill has been passed into law, the Constitutional Review Process is underway, identification of Laws related to poverty reduction is on-going and the review of the Local Government Act is also on-going among others.

An amendment to revoke the appointment of Auditor-General (Corporations) and return the duties and powers vested in this Office to the Controller and Auditor-General was prepared by Treasury and the Office of the Attorney-General to be included in 2001 Finance Bill.

In December 2001 this clause was rejected by Kenyan Parliament although the Parliament's Public Accounts Committee had recommended the merger. The Government intends to re-introduce the merger legislation as part of a Miscellaneous Statute Amendment Bill, which it expects to table in Parliament during the first Parliamentary Session of 2002 commencing in March.

Final drafts of the Public Management and Accountability Bill and the Kenya National Audit Office Bill have now been circulated to a wide range of stakeholders, including Accounting Officers for their review and comment. A new Public Code of Conduct and Ethics Bill providing for three separate codes was published on the 16<sup>th</sup> July 2001. It was subsequently withdrawn without debate because after the defeat of Constitutional Amendment aimed at establishing the Kenya Anti-Corruption Authority within the Constitutional framework, it was no longer viewed viable. An anti-corruption unit within the police force was however established last year and is in its initial phase of operation.

**(c) Changing Donor Policy and its Implications to Kenyan Law**

It is a well-known fact that many donors are changing their funding policies from that of projects to sector wide approach. For example, since 1997, USAID worldwide funding no longer comes through project grants agreements signed with host governments. These have been replaced by Strategic Objective Agreements (SOAGS) covering various sectors in the host country. Under these arrangements the bulk of the assistance funds are channeled directly to agencies/organizations identified for assistance by USAID.

The current approach by the Government of Kenya under the Poverty Reduction Strategy Paper (PRSP) is to involve local communities as beneficiaries of any project in its implementation. This is to ensure not only that a project is completed successfully, but also that the community participates, owns and runs such a project. The Government's role therefore would be that of facilitating. For any Strategic Objective Agreements (SOAG's) to work, they must fall within the existing legal framework.

In some cases, USAID has channeled funds directly to organizations but has asked the Government to sign agreements so that such funds could be reflected in the budget estimates.

The laws governing financial management by the Government of Kenya provide for the following:

1. The Constitution of Kenya which is the supreme law in Kenya provides under Section 99 (1) that all revenues or other moneys received for the purposes of the Government of Kenya shall be paid into and form part of the Consolidated Fund from which no moneys shall be withdrawn except as may be authorised by the Constitution, or by an Act of Parliament or by a vote on account passed by the National Assembly under section 101.

Section 99 (2) provides further that provision may be made by or under an Act of Parliament for any revenues or other moneys received for the purposes of the Government of Kenya to be paid into some public fund other than the Consolidated Fund established for a specific purpose, or to be retained by the authority that received them for the purpose of defraying the expenses of that authority, but no moneys shall be withdrawn from any such public fund unless the issue of those moneys has been authorised by or under a law.

The Government of Kenya is mandated to pay such revenue or moneys out of that fund only to the person or authority to which payment is due.

2. The Exchequer and Audit Act (Chapter 412, Laws of Kenya) in section 4 (3) empowers the Treasury (Ministry of Finance) to superintend the expenditure of public moneys to ensure that proper arrangements for accounting to the National Assembly for such expenditure are made.
3. The External Loans and Credit Act (Chapter 422, Laws of Kenya) section 3 states that no goods or services shall be purchased on credit under this Act except such as are required for the purposes for which provision is made in the estimates of expenditure approved by Parliament.

From these few fundamental laws governing financial management, it is patently clear that for any officer of the Government of Kenya to commit the State to any financial agreement, such agreement MUST conform to these and other relevant laws.

The Constitution is in itself very clear on this. All funds received by the Government of Kenya must be deposited into a public fund and must be accounted for to Parliament. My office has both a moral and legal obligation to ensure that these principles are upheld. As the custodian of the country's laws it behooves me to uphold them even in the face of adversity.

In the circumstance aforesaid, for the Government of Kenya to be expected to be signatory to funds that bypass the Consolidated Fund and over which the Government has no control is unconstitutional. The rule of law requires that for the Government to sign for any funds, such funds must be fully accounted for to the Kenyan Parliament.

Granting such funds to any authority other than the Government of Kenya, whose authority is not accountable to Parliament, thus constitutes a private contractual agreement between the donor and the recipient. Any requirement for the Government of Kenya to be a signatory to such a grant cannot hence be upheld under Kenyan law. This requirement should be revisited with a view to bringing it into conformity with our laws. I do hope this workshop will yield positive results in this regard.

While I understand that USAID is implementing the laws of the United States Congress, it must take cognisance of our laws and come up with policies that can be implemented within the Government of Kenya's legal framework.

The Office of the Attorney General is at present undertaking major steps in the legal reform process. For instance, it is in the initial stages of establishing national committees in the fields of International Humanitarian Law and Human Rights and formulating a legal aid policy framework. To expedite these processes, the Government would require substantial external funding.

#### **(d) Monitoring and Evaluation of Donor Funds**

Monitoring and Evaluation is part of the program/project implementation and is done at various stages during the implementation process. Monitoring traces the progress made in the implementation stages and whether the program/project objectives are being met. The information relayed from Monitoring assists the managers to make decisions on the program/project status – whether to continue or make

corrections if the objectives are not being met by the program/project during implementation period.

Therefore it is important that donor funded projects must be monitored jointly to ascertain whether they are meeting their original stated objectives. For this monitoring to be successful, parties- the donor and the Government- must work together closely and agree on the Monitoring and Evaluation systems to be put in place for reliable and predictable results. At the same time, sustainable Monitoring and Evaluation systems must involve the beneficiaries.

It is equally important that at the end of the program/project implementation, an Evaluation be done to ascertain whether the project created the intended impact for replication in other areas or sectors.

For instance, records indicate that under the sector of Democracy and Governance, USAID has allocated Kshs.104 million as assistance, which my Office is not aware of. This in itself brings about duplication of efforts because we never sat together to agree on areas which were a priority in my sector and how we were to monitor the progress of the funds allocated.

Under the current Poverty Reduction Strategy Paper (PRSP), participatory approach to development is highly encouraged both from the donors, government and the beneficiaries. It is only through such an approach that we may jointly be able to achieve substantial results from our developmental efforts at the least cost.

#### **(e) Way Forward**

Keeping the above mentioned facts in mind, the way forward can be mapped out taking into consideration that:

- More and closer working relationship with donors through quarterly meetings such as this one should be encouraged to forestall any complication in program/projects implementation due to policy changes.
- Any anticipated donor policy changes should be discussed and inputs sought from the recipient country through participatory approaches before the new policy is effected.
- Office of the Attorney General should always be involved in formulation of anticipated policy changes so as to give its legal opinion and implications of the changes to the Kenyan law.
- Any complications arising due to change of donor policy should be discussed with both parties in the presence of the Attorney General's representative and iron out any differences without contravening any law of the countries involved.
- Joint formulation of the sectors and projects for donor assistance is encouraged so that the objectives of the involved partners in development could be harmonized before implementation.

**(f) Conclusion**

The on-going economic and political reforms in Kenya must be backed by legal reforms to avoid any conflict of law. Consequently, any policy change in donor assistance must be well thought out through several consultations between the donor country and the recipient, to avoid conflict in law during the implementation of donor assisted program/projects. This will foster a closer link and common understanding between donors and the host country in implementing the agreed set of programs. The implementing officers and the donor agencies should hold frequent meetings to discuss the progress and constraints met during the implementation of specific donor

assisted programs/projects to avoid abrupt deadlocks during implementation.

Despite the resource constraints, the Office of the Attorney General will strive to achieve its objective of providing quality legal services both to the government and as applicable to the private sector. The Office will also continue to identify laws related to poverty alleviation and good governance for review and legislation.