

REPUBLIC OF KENYA



GOVERNANCE, JUSTICE, LAW AND ORDER SECTOR (GJLOS) REFORM PROGRAMME

POLICIES, LAWS AND REGULATIONS ASSESSMENT REPORT

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LIST OF ABBREVIATIONS

4Cs	Citizens Coalition for Constitutional Change
ACC	Advocates Complaints Commission
AG	Attorney General
AT	Advisory Team
CEDMAC	Consortium for the Empowerment and Development of Marginalised Communities
CKRC	Constitution of Kenya Review Commission
CLARION	Centre for Law and Research International
COMESA	Common Market for Eastern & Southern Africa
CRADLE	Child Rights Advisory and Documentation Legal Centre
CSO	Civil Society Organisation
ECWD	Education Centre for Women in Democracy
E-LSRP	Expanded Legal Sector Reform Programme
ERSWEC	Economic Recovery Strategy for Wealth and Employment Creation
FECCLAHA	Fellowship of Christian Councils and Churches in the Great Lakes Area and the Horn of Africa
FGD	Focus Group Discussion
FMA	Financial Management Agency
GJLOS	Governance Justice Law and Order Sector
GOK	Government of Kenya
HBC	House Business Committee
HIV/AIDS	Human Immune Virus/ Acquired Immune Deficiency Syndrome
HRADP	Human Rights Approach to Development Programming
IASC	Inter-Agency Steering Committee
IDP	International Development Partner
JRM	Joint Review Meeting
KACC	Kenya Anti-Corruption Commission
KEPSA	Kenya Private Sector Alliance
KLRC	Kenya Law Reform Commission
KNCHR	Kenya National Commission on Human Rights
KR	Key Result
LSRP	Legal Sector Reform Programme
MCRC	Multi-sectoral Constitution Review Committee
MDA	Ministries, Departments and Agencies
MOJCA	Ministry of Justice and Constitutional Affairs
MP	Member of Parliament
M&E	Monitoring and Evaluation
MTS	Medium-Term Strategy
NACADA	National Campaign Against Drug Abuse
NACCSC	National Anti-Corruption Steering Committee
NCLR	National Council for Law Reporting
NEMA	National Environment Management Authority
NSA	Non State Actor
PACL	Projects & Allied Consultants Limited
OP	Office of the President
PCO	Programme Coordination Office
PPF	Policy Framework Paper

PRSP	Poverty Reduction Strategy Paper
RP	Reform Programme
SAGA	Semi-autonomous Government Agency
STPP	Short Term Priorities Programme
SWAp	Sector Wide Approach
TCC	Technical Coordinating Committee
ToRs	Terms of Reference

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FOREWORD

The Governance, Justice, Law and Order Sector (GJLOS) Reform Programme was launched on 11th November 2003. Its primary goal is to improve the quality of life for Kenyans, especially the poor, marginalised and the vulnerable. Developed in the context of Kenya's over-arching development policy document, the Economic Recovery Strategy for Wealth and Employment Creation (ERSCWEC), this programme targets to effectively and systematically promote good governance, respect for human rights, equal access to justice and respect for the rule of law in Kenya.

Designed as a five year programme, the GJLOS Reform Programme is currently in its second phase under a four-year Medium Term Strategy (MTS). This followed an earlier, one-year Short Term Priorities Programme (STPP) which targeted "quick wins" while building an appetite for reforms among GJLOS institutions and stakeholders. The focus for the MTS is deep, sustainable sector-wide reforms in the priority areas of governance, ethics and integrity, including the fight against corruption; respect for human rights in Government institutions; access to justice, particularly for the poor, marginalised and vulnerable; crime prevention, police reforms and penal reforms; enhanced public prosecutions and legal services to the public; and reformist-led capacity building with a focus on attitude and culture change.

Against such a wide-ranging reform agenda, six key results were identified at the programme level. These key results, individually and collectively, contribute to the programme purpose as well as towards the achievement of sector-wide priorities. The key results are: i) Responsive and enforceable policy, law and regulations; ii) More effective GJLOS institutions; iii) Reduced corruption related impunity; iv) Improved access to justice especially for the poor, marginalized and vulnerable; v) More informed and participative citizenry and non-state actors; and vi) Effective management and coordination of the GJLOS programme.


To facilitate the assessment of progress towards achieving the key results under the MTS Programme, a GJLOS MTS Programme logical framework was developed with 21 Objectively Verifiable Indicators (OVIs). One of these OVIs, percentage of targeted policies, laws and regulations reviewed/enacted annually, can only be monitored through establishing, reviewing and assessing policies, laws and regulations necessary to realize the GJLOS programme vision. To this end, the purpose of this review was to establish and examine the existing and required GJLOS-relevant universe of policies, laws and regulations and assess their relevance to the vision of the GJLOS reform programme and propose others that will help achieve the programme's vision and agenda; determine the indicators and criteria for measuring the responsiveness and enforceability of policies, laws and regulations that have been addressed or are being addressed under the GJLOS reforms; identify the challenges and obstacles to the formulation/making of responsive and enforceable policies, laws and regulations; and make appropriate recommendations on how to surmount the identified challenges and obstacles to the achievement of the GJLOS vision and agenda. The review was to provide a mechanism for measuring programme progress and impact over time and informing the setting of specific end-programme performance targets against which progress is measured. The baseline information is also expected to contribute to a functional and comprehensive Monitoring & Evaluation system that is able to track progress in moving from baseline to target, and to evaluate shortcomings that hamper attainment of these targets.

The findings, conclusions and recommendations of this report are based on analysis of data collected through review of literature on the GJLOS Reform Programme, interviews with key

officers (informants) in the GJLOS institutions, self administered questionnaires for heads of departments/ key GOK officials involved in public policy formulation and focus group discussions.

The main findings of this assessment report confirm that the GJLOS-relevant universe of policies, laws and regulations can be described as the sum totality (both in existence and anticipated) of policies, laws and regulations necessary to help overcome the GJLOS challenges and realise the GJLOS vision. The report then proceeds to broadly identify a number of public policies, laws and regulations that constitute this universe. The baseline is the current status of policies, laws and regulations and currently consists of 6 Policy documents, 92 laws and 145 regulations. The report also highlights broad areas that represent gaps between the universe and the baseline including policies for better governance, policies for better justice and policies for better law and order. Key blockages in reforming of policies, laws and regulations are captured as follows: sitting time of Parliament; lack of a clear and documented process for public policy development; lack of adequate citizen involvement; lack of adequate linkage between GJLOS and Parliament; political interference and infighting and lack of implementation synergy between departments. In addition to enhancing effective M&E, the findings of this report will inform the GJLOS programme planning, prioritization, budgeting and resource allocations. Opportunities for non-state actors and development partners' engagement and participation also emerge from the current gaps highlighted in the findings. The report remains a production of GJLOS and those who wish to make reference to it may do so by acknowledging the source.

In conclusion, this report on the GJLOS policies, laws and regulations assessment is the culmination of a process in which many individuals and organisations have been involved. I most sincerely thank all those who participated in this assessment and in particular, the GJLOS Programme Coordinating Office(PCO) that provided invaluable support and guidance to the whole process; the GJLOS Policies, Laws and Regulations Assessment Reference Group comprised of a multi-stakeholder mix of Government, private sector, civil society and international development partner representatives; the Projects and Allied Consultants Limited who carried out the assessment and above all, the respondents / informant whose participation made the assessment successful.



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EXECUTIVE SUMMARY

1. This report is the result of a study to review and assess policies, laws and regulations, in order to determine and propose those that are necessary for the realization of the vision and agenda of the ongoing Governance, Justice and Law Sector (GJLOS) Reform Programme (RP). The assignment was awarded to Projects and Allied Consultants Limited (PACL) by the GJLOS RP and was carried out between February and August 2007. GJLOS is a government-led institutional and legal reform initiative that is meant to positively transform service delivery to Kenyans in the GJLOS sector, in a bid to achieve the country's vision as embraced in the Economic Recovery Strategy for Wealth and Employment Creation (ERSWEC).

2. The vision of the GJLOS RP is to realize *a safe, secure, democratic, just, and corruption-free, human rights respecting and prosperous Kenya for all*. Its mission is *to reform and strengthen sector institutions for enhanced protection of human rights, efficient, accountable and transparent governance and justice*. In other words, the purpose of GJLOS RP is to make the government more responsive to the needs and rights of society.

3. The assignment is part of the broad GJLOS baseline studies being undertaken to provide the programme with the state of affairs that the programme aims to improve on. The overall objective of this assignment, drawing from the TORs, was to establish, review and assess policies, laws and regulations necessary to realize the GJLOS programme vision.

4. The specific objectives of the assignment were to:

- establish and examine the existing and required GJLOS-relevant universe of policies, laws and regulations and assess their relevance to the vision of the GJLOS reform programme and propose others that will help achieve programme's vision and agenda;
- determine the indicators and criteria for measuring the responsiveness and enforceability of policies, laws and regulations that have been addressed or are being addressed under the GJLOS reforms;
- identify the challenges and obstacles to the formulation/making of responsive and enforceable policies, laws and regulations; and
- make appropriate recommendations on how to surmount the identified challenges and obstacles to the achievement of the GJLOS vision and agenda.

5. The report describes the GJLOS-relevant universe of policies, laws and regulations as *the sum totality (both in existence and anticipated) of policies, laws and regulations necessary to help overcome the GJLOS challenges and realise the GJLOS vision*. It then proceeds to identify a number of public policy, legal and regulatory foci that constitute this universe. Its baseline is the *current status of policies, laws and regulations*; it currently consists of 6 policy documents, 92 laws and 145 regulations. The report also highlights broad areas that represent gaps between the universe and the baseline. The quantitative indicator for performance will be the number of responsive policies, laws and regulations adopted through various programme interventions while the qualitative indicators for each policy, law or regulation will be:

- the extent to which it addresses societal demand and needs, especially its alignment with the GJLOS vision;
- the extent of involvement of stakeholders in its formulation;
- the acceptability of its proposals and solutions by society;
- the strength of the institutional and other structures it establishes for ensuring implementation: for every law passed;
- the extent of involvement of stakeholders in its implementation structures and processes;
- the extent to which it adopts measures for education and awareness creation for attitudinal change as opposed to pure compulsion; and
- its overall constitutionality, clarity and conformity with international standards

6. The report highlights the key reform blockages in reform of policies, laws and regulations as follows:

- Sitting time of Parliament;
- Lack of a clear and documented process for public policy development;
- Lack of adequate citizen involvement and support
- Lack of adequate linkage between GJLOS RP and Parliament;
- Political interference and infighting; and
- Lack of implementation synergy between departments.

7. Overall, the report makes the following conclusions and recommendations:

Conclusions	Recommendations
1. Determination of the universe at this stage in the process has been done, but is an inexact science in terms of the actual number of policies, laws and regulations required.	<ul style="list-style-type: none"> • The GJLOS programme should constantly collect information from all MDAs on policies, laws and regulations that the MDAs are reviewing to clarify the broad parameters of the universe in addition to assessing progress.
2. Substantial work needs to be done in filling the gaps that exist between target and the current state of affairs, as well as move towards clarifying the quantitative aspects of the gaps over time.	<ul style="list-style-type: none"> • Greater attention should be paid to getting existing policy, legislative and regulatory drafts moved through the pipeline. • As the universe gains more clarity, there is need to simultaneously tighten the quantitative aspects of the gap analysis as well.
3. Content analysis is the nerve centre of the tracking process as well as reporting on results and therefore needs to be mainstreamed into all aspects of KR1 work.	<ul style="list-style-type: none"> • The programme should institutionalize on-going reform content analysis across the project management cycle of policy, legal and regulatory reform, principally through the Thematic Groups, PCO and the TCC.
4. The programme has a number of critical reform blockages in the processes of reform as well as the institutional linkages and public participation, which constrain the achievement of better results in KR1.	<ul style="list-style-type: none"> • There is need for a central depository of public policies made by the government that is fully accessible by both the programme and the public at large. • Linkages need to be established with the technocrats in Parliament as well as departmental committees.
5. This report is only an initial first step in developing an M&E framework for tracking the progressive realization of a supportive	<ul style="list-style-type: none"> • The programme should constantly collect information on policies, laws and regulations that are proposed, being developed or adopted.

Conclusions	Recommendations
<p>policy, legal and regulatory framework for achievement of the GJLOS vision. Its products will need regular “sharpening” and modification.</p>	<ul style="list-style-type: none"> • On an annual basis, the programme should evaluate the qualitative and quantitative progress from the baseline against the universe. • The programme should annually keep re-evaluating the utility of the proposed indicators for the assessment of GJLOS-relevant policies, laws and regulations

CHAPTER 1: INTRODUCTION AND CONTEXT

8. Following the 2002 elections, in which Kenyans voted for “a new Kenya”¹, there was not only great public optimism but also challenges for the new administration. The optimism was due to the dawn of a new era and the promise of improved livelihoods and socio-economic conditions in the country following many years of misrule and bad governance. The challenge for the new administration was how to reverse the effects of those years of misrule, fulfil the promises it made during campaigns and usher Kenya into the league of prosperous and democratic states.

9. In the context of the national development framework, it is noteworthy that one of the new administration’s initial responses to the challenges facing the country was the development and launch of the Economic Recovery Strategy for Wealth and Employment Creation (ERSWEC). The Investment Programme of the ERSWEC outlined a three-fold economic recovery agenda consisting of economic growth; equity and poverty reduction; and governance, built on four strategic pillars.²

10. Following the adoption of the ERSWEC, the government set out on the path of its implementation. Several initiatives were soon undertaken. In the area of governance, Government launched the Governance Justice Law and Order Sector (GJLOS) Reform Programme (RP) in November 2003. It was intended to be an improvement on, and a consolidation of, previous reform efforts, such as the establishment of the Kenya Law Reform Commission in 1982; formation of 15 task forces by the Attorney-General to address various legal reform themes; the 1998 Committee on the Administration of Justice in Kenya (the Kwach Committee); the Legal Sector Reform Programme (LSRP) and the Expanded Legal Sector Reform Programme (E-LSRP).

11. GJLOS proceeded from the standpoint that good governance is a prerequisite for economic development, just as had been posited in the ERSWEC. It, however, went a step further to hold that governance, is not just one of the several pillars of reform, rather it is the bedrock of reform. Put differently, without good governance all the other reforms would be difficult to achieve. Thus the GJLOS reform agenda was at the foundation of the country’s economic reform strategies and efforts. As the bedrock of reform, GJLOS has a double focus, on improving the supply-side of laws, institutional service delivery and systems that enhance governance and justice, and are accessible by the poor, marginalised and vulnerable; but also by creating the demand-led space for participatory governance, an important concept often ignored in governance reform.

12. The GJLOS Reform Programme (RP) is a sector-wide, cross-institutional reform programme that is currently being implemented in some 32 government institutions located in, or linked to, the Office of the President, Office of the Vice-President, MOJCA,

¹ GOK, *GJLOS Medium Term Strategy (Version 5)*, 2005, page 2.

² These pillars are (i) a stable macro-economic framework, characterized by enhanced revenue collection, expenditure restructuring and a monetary policy that targets price stability; (ii) strengthened institutions of governance, through appropriate anti-corruption legislation, better rule of law via a strong Judiciary, enhanced local governance through devolution and sweeping public sector reform; (iii) rehabilitation and expansion of infrastructure in six focus areas; roads, energy, telecommunications, railways, ports and air transport; and (iv) investments in the human capital of the poor, concentrating mainly in education and health.

the State Law Office and the Judiciary. Its implementation is carried out in partnership with a group of 15 international development partners (IDPs), private sector and civil society. From the perspective of the three branches of government, the programme encompasses the entire Judicial branch of government and a considerable part of the Executive branch. As this study shows, the programme relies on substantial input from the Legislative branch as well.

13. The ERSWEC comes to an end in 2007. As such, Government is presently developing equitable growth-led medium-term strategies within the context of a long-term vision titled *Vision 2030* to succeed the ERSWEC. The draft *Vision 2030* is anchored on three pillars (economic, social and political pillars).³ It is expected that GJLOS will feature prominently in all three pillars of *Vision 2030*; namely the Economic Pillar (by providing a corruption-free and secure enabling environment for national growth and development), the Social Pillar (by underpinning the country's progression towards a more just, human-rights respecting and cohesive society) and the Political Pillar (by promoting issue-based, people-centred and results-oriented democratic governance).⁴

14. In the context of the wider Government reforms, GJLOS reforms are to be seen in the context of wider national reforms, the most prominent of which are constitutional reform, parliamentary reform, broader public service reform, local government reform and financial planning and budget reform. Indeed, the core justification of the envisioned GJLOS Policy Framework Paper (PFP) is to more effectively integrate the GJLOS reform agenda into the wider government reform efforts. This GJLOS Policy Framework Paper is seen as the crucial policy-level link between GJLOS and the national and constitutional development contexts. Its development is justified by the need to make GJLOS reforms more predictable; the need to ensure greater sustainability of GJLOS reforms; the need to foster a longer-term sense of commitment by GJLOS stakeholders; official recognition of inter-agency cooperation and cross-institutional cooperation necessary to achieve the GJLOS vision; the imperative of a common GJLOS approach to reforms; and a more structured way of making GJLOS responsive to society's needs and rights.

15. In terms of a quick overview of the programme's history, GJLOS RP implementation began with the implementation of a short-term priorities programme (STTP), which was intended to support a number of 'quick wins' and to create an "appetite" for reform. Consequently, a 5-year medium term strategy (MTS) that bespoke a holistic approach to sectoral reform work and a choice to 'focus on sector-wide opportunities for reform and change', was completed in May 2005 and informs current implementation.

16. The vision for GJLOS, as a sector, is *a safe, secure, democratic, just, corruption-free, human rights respecting and prosperous Kenya for all* while its *raison d'être* (or mission) is *to reform and strengthen sector institutions for enhanced protection of human*

³ The economic pillar targets economic transformation of the country targeting an average economic growth rate of over ten percent over the next twenty five years; the social pillar seeks to create and build a just, cohesive society, with equitable social development, in a clean and secure environment, while the political pillar focuses on the realisation of a democratic political system that nurtures issue-based politics, the rule of law, and protect and all the rights and freedoms of every individual in society.

⁴ MOJCA, *GJLOS Policy Framework Paper Concept Paper (Comprehensive Working Version)*, 30 March 2007, p. 8.

rights, efficient, accountable and transparent governance and justice. This vision and mission are in turn underpinned by the following core values:

- integrity and openness;
- respect for the rule of law;
- rights-based reform;
- gender responsiveness;
- effective partnerships;
- affordable, speedy and fair dispensation of justice; and
- community safety and security

17. The MTS builds a case for reform; defines the reform space and contains a detailed framework for realizing the GJLOS reform agenda including a logical framework which captures the relationship between efforts and results. It situates GJLOS in the wider national reforms, and states its goal as *improved quality of life for the people of Kenya, especially the poor, marginalized and the vulnerable* and its purpose as *improved Governance, Justice, Law and Order*. It identifies 6 sector priorities for reforms and 6 key results (KRs). There are 7 Thematic Groups which serve as shared spaces in which to design and track implementation of sector-wide reforms. An annual joint review meeting (JRM) is held at which the GJLOS stakeholders discuss the achievements of the programme in the context of a *GOK report* on progress and the report of an independent Advisory Team (AT) on programme performance. To date, three JRMs have been held against the backdrop of as many reports by both GOK and the AT and a fourth is planned. A mid-term review of the programme has also been completed.

18. Against this backdrop, this report focuses on only one of the six KRs identified in the MTS. The KR with which this report is concerned, is KR1 dealing with Responsive and Enforceable Policy, Law and Regulation. However, the discussions link KR1 to the other KRs as responsive and enforceable policies, laws and regulations impact on the achievement of the entire GJLOS vision and sector priorities.

19. The assignment from which this report is derived is part of the broad GJLOS baseline studies being undertaken to provide the programme with the state of affairs from which the programme proceeds. It specifically focuses on the baseline status of policies, laws and regulations. The report proceeds against the backdrop of the need to understand and assess the role of and improve the link(s) with Parliament in the GJLOS RP and further to contextualize the process and dynamics of public policy making in Kenya.

CHAPTER 2: ASSESSMENT OF POLICIES, LAWS AND REGULATIONS

2.1 The Rationale and Objectives of the Assessment

20. As stated in Chapter 1, the implementation of the GJLOS RP targets the realisation of 6 key results (KRs) in 6 reform priorities. Of the 6 KRs, KR 1 relates to responsive and enforceable policy, law and regulation. This KR aims at the creation of an enabling environment through progressive adoption of a legal, policy and regulatory framework that supports the GJLOS RP's purpose and vision. To assess progress on this key result, the MTS identified as a key indicator the measurement of the percentage of targeted laws, policies and regulations adopted annually. Overall, however, progress will be determined by the extent to which the laws, policies and regulations for the sector help address the sector priorities and thus achieve the GJLOS vision. Consequently, the focus is on the quantity of laws passed, their quality in terms of responsiveness and enforceability and their ability to ensure better governance, better justice and better law and order for all in society, especially the poor and marginalised.

21. To enable measurement and tracking of progress, it is imperative that the programme should have a clear delineation of the universe of policies laws and regulations. This universe will be the *target* which the programme specifically, and the sector generally, should have in place to ensure achievement and realisation of the vision of GJLOS. Following identification of the target, the next step is the determination of *baseline* information on policies, laws and regulations. This refers to the *status quo* both in terms of quantity and quality. It is only from this identification that it will be possible to identify gaps and regularly measure the progress made towards achieving the target. Further the programme needs to refine the indicators for measuring progress so as to ensure adequate focus is paid to both quantitative and qualitative indicators during the assessment. The percentage of policies, laws and regulations adopted annually, while useful, does not adequately measure progress in the achievement of KR 1. It needs to be augmented by an assessment of the quality of such policies, laws and regulations, in terms their responsiveness and enforceability. Secondly, in addition to the quantitative assessment, an expert panel is expected to periodically conduct a quality assessment of the policies, laws and regulations to determine qualitative progress on attaining KR1.

22. Flowing from the foregoing, the achievement of KR1 faces two overarching challenges.

- (i) The first is “to identify and critically assess the reform contribution of the existing processes of policy formulation, law-making and regulations adoption”.
- (ii) The second is “to analyze the content and appropriateness of policies and laws that make it into the statute books as well as the regulations that are changed as part of the Reform Programme, and their contribution to the reform agenda”.

23. These challenges suggest two responsibilities for the Programme. The first is that it needs to be aware of, and track, what is being done in respect to GJLOS-supporting policies, laws and regulations. The second is to be aware of, and track, the reform content of these policies, laws and regulations with a view to assessing their contribution to the overall reform effort.

24. To undertake these responsibilities, the programme requires to have a clear mapping of the GJLOS universe of policies, laws and regulations needed to realize the GJLOS vision and a baseline of policies, laws and regulations that exists currently. It is from the foregoing that progress in the movement from the baseline to the desired target of the universe can be tracked and monitored. PACL (hereinafter, the Consultants) were contracted to undertake this assessment of policies, laws and regulations.

2.2 Scope of the Assessment

25. The overall objective of the assignment was stated as being to review, analyze and make recommendations regarding the progress, and content of policy development, and legal and regulatory reform in Kenya within the GJLOS reform programme framework and the extent to which these reflect the GJLOS reform agenda. From this broad objective, the following specific objectives were to be achieved:

- Definition of the GJLOS-relevant *universe* of policies, laws and regulations in place or needed to realize the GJLOS reform vision in practice as well as criteria against which the reform contribution of policies will be measured;
- A critical analysis of policies, laws and regulatory changes required for the GJLOS reform vision to be realized in practice;
- Critical analysis of the process of policy formulation and of steering of Bills through Parliament;
- Critical analysis of the reform contribution and quality of policies, legal and regulatory reform occurring under the GJLOS reform programme;
- Critical analysis of the reform consistency across different policies, legal and regulatory reform (including cross-cutting human rights issues) undertaken as part of the GJLOS Reform Programme; and
- Making recommendations that enhance the reform agenda with regard to policy, legislative and/or regulatory environment in order to ensure realization of management utility by GJLOS reform programme implementing departments

26. The Consultants understood their task to require an assessment of the current state of the policy legal and regulatory reform work relative to the programme's reform agenda and to make recommendations geared to improving focus on the appropriate future policy, legal and regulatory reform work. They therefore treated the assignment as the first step in a process that will attend the implementation of the programme to its logical conclusion in the indefinite future, with necessary changes from time to time. Put differently, they treated this first review as responding both to the *immediate need of target setting, assessment and re-alignment* of policy, legal and regulatory development/reform work and the establishment of a framework for future reviews, with changes as necessary.

27. In the Consultants' understanding, they were also expected to recommend ways and means for review, analysis and tracking of GJLOS-relevant policies, laws and regulations and the extent to which the said policies, laws and regulations reflect the GJLOS agenda of, and for, change. In performing the said tasks, the Consultants were guided by the need to help realize the GJLOS vision of *a safe, secure, democratic, just, corruption-free, human rights respecting and prosperous Kenya for all.*

28. The Consultants understood this overall objective as capable of being broken down into several specific imperatives, as follows:

- (i) To *review and analyze* GJLOS work in the policy, legal and regulatory arena and assess the *progress* made in that regard. The Consultants understood this to mean that the review would cut across the expected results in both the STPP and MTS, with their analysis nuanced to reflect the expected results in both phases. This would help to answer the questions: What policies, laws and regulations were needed (this would respond to the issue of universe of policies, laws and regulations needed to be in place to realize the GJLOS vision. This universe would be the target for the sector and programme and would include those policies, laws and regulations that exist currently, those that although in existence are in need of reform and new policies, laws and regulations needed to be put in place)?; What policy, legislative and regulatory reform work was planned? What policies, laws and regulations have been promulgated/developed/amended? It is about determining where the sector – and by extension sector institutions – sit in regard to KR 1: Responsive and Enforceable Policy, Law and Regulation. This requires the determination of the universe of policies, laws and regulations and the baseline of the existing policies, laws and regulations that are part of the universe. From this, the gap between the baseline and universe will be determined. It is this gap that the programme will strive to fill progressively and against which its progress in KR1 will be measured
- (ii) To make *proposals on indicators* for measuring the “responsiveness” and “enforceability” of policies, laws and regulations promulgated/developed and amended under KR1 as part of the GJLOS RP. The GJLOS RP, as the MTS correctly provides, prioritizes doing the right things over doing things right. Regarding policies, laws and regulations, the key priority is and should be the responsiveness and enforceability and not mainly about the number of policies, laws and regulations enacted or promulgated. To assess responsiveness, the programme must be able to determine that the policies, laws and regulations being promulgated arise as a result of a demand for them and that they address themselves to that demand. This requires responding to questions like: Who should demand for policies, laws and regulations? How do you determine that the enacted law, policy or regulation addresses the real issues for which it is prepared? How do you determine that the policies, laws and regulations are effective? And that they contribute to realization of the vision of the GJLOS RP?
- (iii) To *identify challenges and obstacles* to appropriate lawmaking, policy formulation, and development of regulations and to *make recommendations* on how to surmount the challenges/obstacles. This entails an examination of reform blockages (that is, challenges/obstacles to policy, law, and regulatory reform) and the contributory factors to those blockages. This includes both specific and cross-cutting challenges and obstacles. Efforts have been made in identifying internal and external ones as well. This was to help answer the questions: What prevents satisfactory policy and legal reform? What are the underlying reasons for this? What can be done to surmount these obstacles? Proposals for overcoming these challenges have also been made.

(iv) To *review and analyze* the changes in policy law and regulation with respect to the stated *reform intentions* of the Programme and make recommendations on their overall contribution to the GJLOS reform agenda. This is a macro-level analysis to compare planned policy, legal and regulatory reform work on the one hand, and executed policy, legal and regulatory reform work on the other, to the overall reform agenda of the Programme. This is done to help to answer the questions: How did the planned legal and policy reform work relate to the intended results? What has been the impact of implemented policy and legal reform work in supporting the GJLOS reform agenda? What is the projected impact? What can be done to improve impact? In the final analysis, however, this part of the assignment was also to answer the questions: Is the policy and legal reform work designed to succeed? Based on how it is working, is it destined to succeed? In this respect, it was to link on-going work with the GJLOS reform agenda and the obstacles/challenges to public policy, legal and regulatory reform and delve into the role of policy, law and regulations in delivering on, for example, the programme's pro-poor and rights-based agenda.

2.3 Methodology

29. The following methods were employed in carrying out assessment and producing this report.

2.3.1 Literature Review

30. The Consultants reviewed literature relating to the programme in order to understand the programme and its reform agenda. These included, the Programme Document for the GJLOS Short Term Priorities Programme (STPP); Government Progress Reports on the STTP; the GJLOS Medium Term Strategy (MTS) (2005/6-2008/9)⁵; the MTS annual work plans; Advisory Team Reports to the Programme; the Mid-term Review Report; the Concept Paper for the GJLOS Policy Framework Paper (PFP); the GJLOS National Integrated Household Baseline Survey Report; and the Governance Action Plan (GAP) July 2006-June 2007. In addition, the Consultants perused the ERSWEC; strategic plans, annual reports, work plans and documentation from Ministries, Departments and Agencies (MDAs) and other institutions involved in the GJLOS programme, and Draft Final Report for Vision 2030 (April 2007).

31. The Consultants also perused the Index to the Laws of Kenya as well as existing and available policy, legal and regulations reform proposals made in the life of the programme to obtain an understanding of the universe of GJLOS laws and policies for reform. Literature on public policy and law reform from other jurisdictions was also perused to discern lessons that would be useful for GJLOS, especially in jurisdictions where this has been attempted in the context of a sector-wide approach (SWAp). They also perused Thematic Group minutes to develop an understanding of the legal, policy and regulatory reform content of Thematic Group work. Terminology and criteria against which the reform contributions of existing and proposed policies/laws can be assessed emerged from this literature review.

⁵ Version 5 dated 25th June 2005.

2.3.2 Interviews with Key Informants

32. The sample of those to be interviewed was determined by the list obtained from the PCO. The guiding criterion was the need to have representative views of the MDAs and other stakeholders of the programme. The research being largely qualitative, the consultants adopted a purposive sampling procedure. This was to ensure that those who held information critical to the assignment were targeted to gather their insights. The data collection was thus done using questionnaires (both self-administered and as a guide for key informant interviews and Focus Group Discussions).

33. A total of 43 people were interviewed, with the aid of a semi-structured questionnaire, with sector role players including representatives from MDAs involved in the GJLOS reform programme.⁶ Representatives of other relevant institutions involved in policy, legal and regulatory reform, such as Parliament, were also interviewed. Interviews were aimed at obtaining information from the sector players on their reform efforts, justifications for the same and their opinions on what more needs to be done relative to the reform agenda of GJLOS. They were also used to verify information obtained from the literature review on policy, legal and regulatory reform processes.

34. Also included in this tally were interviews with a select panel of “stakeholders” mainly civil society and private sector representatives. These interviews enabled the Consultants to deepen their assessment of the existing reform needs, to buttress data obtained from the literature review and interviews with the sector role players, and to obtain opinions from the “stakeholders” on ways of deepening the reform focus of policy, regulation and legal reforms.

2.3.3 Self-administered Questionnaires

35. In addition to literature review and face to face interviews, respondents were asked to fill in and return questionnaires. The questionnaires sought to obtain detailed information on the process of policy, law and regulation enactment, plans underway and areas in need of laws, policies and regulations.⁷ A total of 36 questionnaires were sent out and 11 returned.

2.3.4 Focus Group Discussions (FGD)

36. One FGD was conducted for 9 senior representatives of civil society organizations. This method was considered the most appropriate way of getting the views of the sector players, given their fewer number and the concerns of time overall.

2.3.5 Analysis and Report Writing

37. The information obtained from the foregoing sources was collated and analyzed against the analytical frames of the four specific imperatives of this exercise discussed above. The analysis was a qualitative one to bring out the salient issues necessary to help determine the universes and baseline of policies, laws and regulations; improve the process of policy, legal and regulatory reform and contribute to the better and effective realization of the GJLOS vision.

⁶ A full list of those interviewed can be found in annex 3 to this report.

⁷ The questionnaires are attached as Annex 1 to this report.

2.4 Problems and Limitations of the Study

38. A key limitation of the study was the slow response to the questionnaires sent out to the MDAs under the programme. In addition to the slow pace of filing and returning of questionnaires many of the targeted MDAs did not return the questionnaires sent to them. This meant that original intention that was sought to be served by the self-administered questionnaires was largely unrealised. Thus instead of gaining full, accurate and first hand information on the status of policy, legal and regulatory reform from each MDA through the questionnaires, reliance had to be placed on other data collection methods. Specifically, the Consultants relied on secondary sources like annual reports and strategic plans of the MDAs and information available on various government websites. To augment the secondary sources, the Consultants carried out face to face interviews.

39. The lack and/or unavailability of a central depository of government policies was another key hindrance and limitation. Despite several efforts during the period of the entire assignment, the Consultants were unable to access a representative of the Cabinet Office both for an interview and to obtain the list of policies that have been adopted by the country. This made it extremely difficult for the Consultants to come up with a comprehensive and accurate baseline list of the policies. The Consultants had to rely on both secondary sources of information and interviews to determine the baseline. As such, the baseline list of public policies may not be as comprehensive and exhaustive as would otherwise have been the case.

40. Finally, obtaining interviews with high-level MDA representatives was both difficult and time consuming. While some eventually were available, others proved difficult to obtain to the very end of the exercise.

CHAPTER 3: THE GJLOS UNIVERSE AND BASELINE OF POLICIES, LAWS AND REGULATIONS

3.1 Defining the Universe

41. Attaining the GJLOS vision is predicated on, amongst others, an enabling policy, legal and regulatory framework. Tracking progress in the development of relevant GJLOS policies, laws and regulations requires an initial determination of the complete set of policies, laws and regulations necessary for the achievement of the GJLOS vision. This complete set is what the MTS refers to as the universe of policies, laws and regulations. In this chapter, the report provides an in-depth description of what this universe consists of and the current baseline of laws, policies and regulations.

42. The starting point in the determination of the GJLOS universe of policies, laws and regulations is the appreciation of the challenges facing the sector. Overall, the specific challenges facing GJLOS, and which require intervention, were captured in the MTS as consisting of governance challenges; justice challenges; and law and order challenges. The concept paper for the GJLOS Policy Framework Paper (PFP) adds onto this backdrop by outlining essential principles that comprise both the GJLOS agenda and values society seeks to promote and preserve. These are reduced to 6 thematic principles. From the standpoint of the MTS, the achievement of the GJLOS key results is geared towards addressing these challenges. From the standpoint of the GJLOS PFP, the thematic principles⁸ will underpin work to address those challenges by acting “as a ‘signpost’ for the problems, issues and challenges that the GJLOS PFP is expected to address, as well as the known successes and emerging opportunities that the PFP is expected to safeguard”⁹.

43. In outlining the reform agenda, the MTS identifies the three-pronged purpose of the programme as the attainment of a state of affairs in which there is *better governance*; *better justice*; and *better law and order*. Between the programme purpose and detailed results, the MTS takes on board Government’s policy priorities for the GJLO sector. These are the priorities that will drive the sector-wide focus of the programme, and have been defined by Government as governance reforms; human rights reforms; justice reforms; law and order reforms; and reform-oriented capacity building consistent with the attitudinal change at the heart of the MTS. These priorities are all underpinned by a supportive constitutional framework.

44. Therefore, the GJLOS universe of policies, laws regulations can be defined as *the sum totality (both in existence and anticipated) of policies, laws and regulations necessary to help overcome the GJLOS challenges and realise the GJLOS vision*. This totality of policies, laws and regulations is nevertheless limited by the priorities that Government has defined to drive the sector-wide focus of the programme. Thus, although the definition of governance, for example, is much wider, the determination of the universe needs to be restricted to the priorities for realising the vision. Proceeding from this basis, this report describes the set of policies, laws and regulations that constitute this

⁸ Now renamed “policy themes” in the forthcoming version of the PFP (as per information from Reference Group).

⁹ MOJCA, *GJLOS Policy Framework Paper Concept Paper (Comprehensive Working Version)*, 30 March 2007, p. 16.

universe. Due to challenges in obtaining data on specific aspects of this work, and the need to provide for policy shifts by government, the universe as defined in this report should not be seen as cast in stone. It will change as the programme continues to adjust to emerging realities and demands. It is therefore imperative that the universe be continuously updated as new priorities emerge, and as new evidence defines the challenges in the sector.

3.2 Universe Component 1: Policies

45. There is no universal definition of the term policy. It has been defined differently by different authors and scholars. Wikipedia defines a policy as:

a plan of action to guide decisions and actions. The term may apply to government, private sector organizations and groups, and individuals. The policy process includes the identification of different alternatives, such as programs or spending priorities, and choosing among them on the basis of the impact they will have. Policies can be understood as political, management, financial, and administrative mechanisms arranged to reach explicit goals.¹⁰

46. Hodgwood and Gunn¹¹ classified the meaning of the word policy into ten typologies. These include defining policy as either of the following: a label for a field of activity, an expression of general purpose or desired state of affairs; specific proposals, decisions of government; formal authorisation; a programme, an output, an outcome, a theory or model; and a process.

47. Policy can be made either by a government, club, society or any other entity. It can be made by both a private and public entity. Our concern in this review and the focus of KR1 is with policies made by public entities. It is therefore more accurate to refer to the term “public policy”. Even for the term public policy there is no universally accepted definition for the term. Although writing in the context of South Africa, Dr. J.E. Plessis in the foreword to a book on public policy by S.X. Hanekom captured this reality as follows:

“The author states that he could not identify any universally accepted definition of public policy. Neither can there be any universally accepted model of public policy-making. There are almost as many definitions and models of public policy as there are authors on the subject. In fact, public policy changes according to the country or situation to which it is applied.”¹²

48. From the above, and in the context of government reforms, a public policy is a strategy or plan of action on a particular area or issue. In this review, the word public policy is used to mean the Government’s strategy, plan of action or guiding framework for implementation in a specific area. A public policy can either be written or unwritten. In our view, however, a public policy should have the following components:

¹⁰ Wikipedia is the free online encyclopedia hosted by the Wikipedia Foundation, a non-profit organization that also hosts Wiktionary (dictionary and thesaurus); Wikibooks (free textbooks and manuals); Wikiversity (free learning materials and activities); Wikinews (free-content news); Wikispecies (directory of species); Commons (shared media repository); Wikiquote (collection of quotations); Wikisource (free-content library); and Meta-Wiki (wikipedia project coordination). http://en.wikipedia.org/wiki/Public_policy (accessed on August 18, 2007 at 1413 hrs.)

¹¹ Hogwood, B.W and Gunn, L.A., *Policy Analysis for the Real World* (Oxford, Oxford University Press, 1984)

¹² Hanekom, S.X., *Public Policy-Framework and Instrument for Action*(Pretoria, Macmillan South Africa(Publishers(Pty) Ltd, 1987)

- (i) Identification of a problem either at central or local government level;
- (ii) A strategy to address the problem; and
- (iii) A comprehensively codified strategy (document);

49. Public policies relate to laws and regulations by the fact that policies, by and large require laws and regulations to complement them and fully implement them. While a public policy is informed by the government's political agenda, laws and regulations are informed by the need to establish an enabling legal framework for the realisation of that political agenda – whether that agenda is written or unwritten. It is from this standpoint that it is advisable for public policy formulation to precede promulgation of legal frameworks. Put differently, passing a law in an area where public policy direction is clear is not only easier but potentially more effective than doing so in an environment where public policy direction is uncertain.

50. In the context of the GJLOS universe, there is need for an over-arching public policy framework to provide high-level guidance to existing (or proposed) public policy or programmes. A GJLOS framework is also useful for another reason: it acts as the touchstone from which further policies spring and a basis for assessing the responsiveness of the policies to be adopted under KR 1 in furtherance of the identified GJLOS priorities.

51. In addition to the GJLOS policy framework, in each of the reform challenges, to wit governance, justice, and law and order, policies should be adopted to provide political direction on specific areas of endeavour. The process of developing policies for the GJLOS RP is expected to gain inspiration from the GJLOS Policy Framework and proceed sector-wide.

3.2.1 Policies for Better Governance

52. In the area of governance, the priorities of the government are respect for the Rule of Law; zero tolerance to corruption; openness, of processes and information, to the general public; participation and inclusiveness, transparency, accountability, integrity, predictability and rationality of actions and decisions taken in the public interest; institutional independence from interference or control; and non-state actor and parliamentary oversight. From the perspective of human rights, explicit pro-poor focus, promotion and protection of human rights, human rights approach to development programming (HRADP), engagement with international human rights machinery, transitional justice and national healing and reconciliation are also key priorities. Added to all this is the imperative of re-orienting public service behaviour to support GJLOS reforms.

53. It follows therefore that there is need for the following public policy foci:
- (i) a national anti-corruption policy, to include the framework for protection of whistle blowers and protection of witnesses in anti-corruption matters and strategies for ethics and integrity in the public service;
 - (ii) a national human rights policy to guide respect for, protection and promotion of human rights (this should include transitional justice issues and modalities for incorporating a rights-based approach in development programming);
 - (iii) a policy to govern access to information held by the government and other public agencies;
 - (iv) a policy on citizen participation in public processes to address the need for participation and inclusion; and

- (v) a policy on the structure, principles and role of the public service, including performance contracting and policies to insulate public servants from political interference, to deal with the need to re-orient public service behaviour in ways that would support GJLOS service delivery.

3.2.2 Policies for Better Justice

54. In the area of justice, the priorities for the government are respect for the Rule of Law, access to justice, explicit pro-poor focus, fair, equitable and responsive legal framework, accessible courts, affordable justice, community/informal justice, speedy and fair dispensation of justice, user confidence in the justice system, judicial outcomes consistent with community well-being, alternative dispute resolution, institutional independence from interference or control, as well as non-state actor and parliamentary oversight.

55. The public policy reform agenda for improving justice should focus on access to justice policy. This should provide a framework to improve access to justice, especially for the poor, marginalised and vulnerable. The public policy should also focus on both state and non-state justice systems. Indeed, a good access to justice policy would address all the current priorities for improving justice above.

3.2.3 Policies for Better Law and Order

56. As regards law and order reforms, government has prioritised respect for Rule of Law, situational crime prevention (dealing with opportunities for crime), social crime prevention (dealing with the context and motive for crime), drug and substance abuse, citizen participation (community policing), enhanced safety and security in public and private places, public confidence in law enforcement agencies, restorative justice, rehabilitation and reintegration, eradication of small-arms trafficking and crime, sound immigration and national population registration control, institutional independence from interference or control, independent civilian oversight, non-state actor and parliamentary oversight, and addressing prison overcrowding and alternatives to rehabilitation.

57. The necessary public policy foci in respect to law and order reforms should be as follows:

- (i) a public safety and security policy, which would provide comprehensive measures to deter, detect and reduce crime, reduce trafficking of small arms, community policing, drug and substance abuse, to enhance safety and security in public and private places;
- (ii) a national prosecution policy, to provide guidance on the conduct of public prosecutions, including shielding the prosecution machinery from political interference;
- (iii) a penal system and correctional institutions policy, to address sentencing considerations, overcrowding in prisons and recidivism; and
- (iv) a national registration and immigration policy, which would deal with effective registration of births and deaths, registration of organizations, as well as immigration controls.

58. A further look at the KRs reveals that there are other aspects that require public policy intervention if the GJLOS vision is to be realised. The first aspect relates to the cross-cutting issues. The MTS has identified four such issues that are cross-cutting and need to be mainstreamed. These include gender, environment, HIV/AIDS and Children.

The government priorities here are equity and equality, destigmatisation, environmental protection, and inclusion and participation. In the context of the GJLOS RP, these priorities should be covered in the GJLOS Policy Framework Paper, which should provide guidance on how to mainstream cross-cutting issues in public policies relating to GJLOS.

3.3 Universe Component 2: Laws

3.3.1 *A Rights-Based, Gender-Sensitive and Fiscally-Affordable Constitution*

59. The demand for a new constitution has been with the country for a long time. When the current administration took over power, the process of reviewing the constitution was already underway. By then, the Constitution of Kenya Review Commission (CKRC) had already collected views from Kenyans, collated the same and produced a Draft Constitution.

60. The MTS identified the enactment of a new constitution as one of the key priorities of the country and further identified it as a key governance challenge. In defining the GJLOS universe this fact needs to be kept in mind, for two reasons. In the first place, in the hierarchy of laws enumerated in the Judicature Act¹³, the Constitution of Kenya occupies the first place in the hierarchical order. Indeed, section 3 of the Constitution of Kenya stipulates that any law that is inconsistent with the Constitution will be null and void to the extent of that inconsistency. Secondly, the enactment of a new constitution would improve the foundational framework for new laws and public policies to be enacted and adopted respectively. Although, it is possible to delineate the universe in the context of the current constitution, the programme conceptualisation highlighted the importance of a new constitutional dispensation to the GJLOS vision. This is summed up in the GJLOS PFP as the “foundational context” for the programme’s sector-wide prioritisation in terms of “the progressive movement towards a rights-based, gender-sensitive and fiscally-affordable Constitution for Kenya”.

3.3.2 *Other Laws*

61. Just like public policy, the word “law” is subject to varied definitions. Indeed, even amongst lawyers and legal writers, there is disagreement as to the exact meaning of law. These disagreements emanate from varied views on the role of law in society. From a purely legalistic view, laws emanate from several sources as enumerated in the Judicature Act (Chapter 8, Laws of Kenya). These include statutes, customary law, equity, interpretations by judges and the Common Law of England. In the context of this review, however, reference to laws will be restricted to rules as promulgated by Parliament and which eventually are expressed in the form of Acts of parliament. However, even if Parliament is the one bestowed with the task of making laws this is done within a societal context. The involvement of the society in the process of lawmaking is therefore an important criterion for lawmaking as it will determine whether what is made is, in reality, law made for and by the society.

¹³ Chapter 8, Laws of Kenya.

62. The totality of existing laws in Kenya as enacted by Parliament is contained in the Index to the Laws of Kenya. In addition, several other laws have been passed by Parliament since 1992 when the current edition of the Index to the Laws of Kenya was published. Although these are not contained in the Index they form part of the totality of laws. Not all of these form part of the universe of laws for the GJLOS RP. While all might impact on the programme, the universe, in the consultant's view, contains only those that have a direct bearing on the realisation of the GJLOS vision, that is, the laws that are necessary to address the governance, justice, and law and order challenges. These laws include those that already exist, those that though in existence are in need of amendment to align them to the GJLOS vision, and those that do not exist but need to be put in place so as to help achieve the vision of GJLOS.

63. **Governance:** In order to achieve better governance, there is need for a legal framework to deal with government's priorities in regard to the governance challenges. There is therefore need for laws to strengthen the respect for the Rule of Law; to enforce zero tolerance for corruption and deal with impunity; to guarantee openness, of processes and information, to the general public; to improve citizen participation and inclusiveness, transparency, accountability, integrity, predictability and rationality of actions and decisions taken in the public interest; to buttress institutional independence from interference or control; and secure non-state actor and parliamentary oversight. From the perspective of human rights, with an explicit pro-poor focus, promotion and protection of human rights, HRADP, engagement with international human rights machinery, transitional justice and national healing and reconciliation are also key priorities that will require legal frameworks. Even re-orienting public service behaviour to support GJLOS reforms will require a supporting legal framework.

64. **Justice:** With regard to better justice, the laws to strengthen respect for the Rule of Law, improve access to justice and with explicit pro-poor focus will be necessary. In order to establish a fair, equitable and responsive legal framework, there will be need to re-look critical laws and either pass new laws, repeal bad laws or amend those that are in need of amendment. Attention should also be paid to laws to make the courts more accessible, to make justice more affordable, to recognize community/informal justice, to ensure speedy and fair dispensation of justice, and to foster user confidence in the justice system. Additionally, laws to guide interpretation and ensure judicial outcomes consistent with community well-being, to guide the use of informal justice and alternative dispute resolution, to secure the judiciary's independence from interference or control, as well as provide for non-state actor and parliamentary oversight will also be needed.

65. **Law and Order:** In the case of better law and order, there is need for laws that strengthen respect for Rule of Law, and address situational crime prevention (dealing with opportunities for crime) as well as social crime prevention (dealing with the context and motive for crime) factors. Laws on drug and substance abuse, citizen participation (community policing), enhanced safety and security in public and private places, public confidence in law enforcement agencies, restorative justice, rehabilitation and reintegration, eradicate small-arms trafficking and crime, sound immigration and national population registration control, institutional independence from interference or control, independent civilian oversight, non-state actor and parliamentary oversight, and addressing prison overcrowding and alternatives to rehabilitation will also be needed.

3.4 Universe Component 3: Regulations

66. “Regulations” in this report is synonymous with subsidiary legislation (which can either be in the form of “regulations”, “rules”, “standing orders”, “orders”, “codes of conduct”, or “by-laws”) – which are laws promulgated by agencies other than Parliament in accordance with powers delegated by Parliament. This is why this type of laws is sometimes referred to as *delegated legislation*. The laws they are made under are generally referred to as *parent* laws or Acts. Usually, the anticipation of regulations will be found in the parent Act, which Act will state that regulations will be made and also state the Minister or other public servant or body responsible for making regulations.

67. In the context of this review, regulations are restricted not to ordinary and day-to-day directives but those required to implement important aspects of the laws and policies. The important point about regulations is that, although they are based on, provide detailed guidance and implement the parent laws, they are not passed by the principal lawmaking organ of government (parliament). Instead they are passed by the executive or other administrative body to which parliament, through the parent law, has given that authority.

68. In the process of lawmaking and public policy implementation, regulations perform a very important function. First, they are a device for providing the detailed procedures and rules necessary to fully elaborate on and implement legal provisions in an Act of Parliament. Secondly, regulations deal with specific technical and detailed stipulations that change very frequently, and which cannot be adequately addressed without requiring frequent amendments to the law. Thirdly, owing to the numerous issues that Parliament needs to deal with and the fact that Parliament and MPs are not technical experts on all the issues they legislate on, the parliamentary calendar should not be bogged down by requiring all technical aspects of an issue to be included in the principal legislation. From the foregoing, the importance of regulations in the GJLOS RP easily emerges. Indeed, to avoid too many laws and clogging of the parliamentary calendar, some necessary reform measures can adequately be carried out better and faster through resort to regulations under the existing statutes without the need to pass new laws or amend existing ones. Further, regulations are much quicker to pass once agreed upon.

69. The universe of regulations refers to *the totality of regulations necessary to help realize the GJLOS vision*. The guiding criterion for necessary regulations is the relationship between laws and regulations. As pointed out above, regulations supply detailed procedures and technical specifications that cannot be included in the parent Act. It follows, therefore, that the universe regulations consists of all regulations necessary to supply operational measures, procedures and technical specifications to all the parent laws that comprise the GJLOS universe. Further, it should be realized that some parent laws will require more than one set of regulations for effective implementation.

3.5 Beyond Numbers: Responsiveness and Enforceability of Policies, Laws and Regulations

70. The promulgation of public policies, enactment of laws and adoption of regulations for the GJLOS reform agenda is more about quality as opposed to quantity. The programme, aims at reforming and improving the process of public policy formulation, lawmaking and development and adoption of regulations. For laws, for

example, while the passage of the laws is important, the programme seeks to influence the content of those laws and puts as part of its yardstick the requirement that the laws to be passed by Parliament that concern the governance, justice, law and order sector need to be “responsive” and “enforceable”. This yardstick applies not just to laws but also to regulations and public policies as well. The concern of responsiveness and enforceability is hence critical for the determination of the universe of public policies, laws and regulations.

71. The universe of policies, laws and regulations comprise of those that exist; those that although in existence are in need of amendment or reform; and new ones that need to be enacted. The test that those that exist and those that are being proposed need to be subjected to is that of determining whether they are responsive and enforceable. For those that exist but are not responsive and/or enforceable, the programme should work towards their amendment/peel as part of realization of the GJLOS vision.

3.5.1 The Concept of Responsiveness

72. The term “responsiveness” is derived from the word “respond” whose ordinary meaning is to react to something. The Oxford Advanced Learners’ Dictionary defines responsiveness as reacting quickly and in a positive manner. For action to be said to be responsive, therefore, means that such action must be addressing itself to an issue and doing so in a positive and timely manner. Thus, if we take the application of the term to the policies, laws and regulations to be adopted under KR 1, it is required that these policies, laws and regulations be drafted in response to a recognized governance, justice or law and order problem or challenge. The first step in the legislative, public policymaking or regulation development process should therefore always be an issue of analysis. Following the identification of the issue or problem, the suggested mechanisms of solving the problem also need to be clearly articulated. Lastly, the proposed public policies, laws or regulations should be promulgated speedily so as to ensure that the response comes early enough to address the problem in good time.

73. The other critical criterion for responsiveness of public policy, law and regulation is the *process* by which it is developed. Responsive law is usually developed through a negotiated and consultative process. The process will inevitably involve consultations and input by different stakeholders. This ensures that the final product is one that has taken on board the concerns and interests of the various groups in society and tried to strike a balance between those interests where they do not correspond. Responsive law is thus negotiated and not imposed on society and its people.

74. The aim of the process of consultation is two fold. In the first instance, it enables citizens to participate in the process of designing legal or public policy solutions to their problem and putting in place an appropriate public policy or legal framework while giving the policymakers or lawmakers the benefit of inputs from society. In the second instance, it ensures that the policies, laws and regulations that get drafted and passed not only address themselves to the issues in society but also that the said policies, laws and regulations are “customer-driven”. For, in the final analysis laws are made to regulate conduct in society. They are a public expression of societal expectations, and must therefore be in tune with what society aspires for and expects. In the final analysis, what makes law responsive is its acknowledgement of the diversity of interests in society and an admission that this diversity is legitimate. Further, for law to be responsive, it needs to

accord all actors a measure of respect.¹⁴ In the context of GJLOS, this would require consultation with relevant GJLOS stakeholders to appreciate their interests as part of the process of lawmaking.

75. The example of the efforts to draft a Freedom of Information Policy and Law would illustrate this point. In Kenya, the *Official Secrets Act*¹⁵ imposes a statutory obligation on all civil servants and government officials not to release information obtained in the course of their public duty. This is done through the statutory obligation to swear and sign an oath that such information as one comes across in the course of her or his duty, shall not be released to any person or body outside the Government bureaucracy. Breach of this statutory requirement is punishable by imprisonment.

76. This Act has been used to conceal important governance, justice, and law and order related information from the public. In this regard, the Official Secrets Act has partly contributed to scams such as the infamous Goldenberg and Anglo Leasing,¹⁶ as neither the media nor the public could lay their hands on the procurement documents and the costs related thereto. Were it possible to have information on the two scandals, they could have probably been prevented altogether or stopped in their early stages.

77. For better governance, among other reasons, the public and the media began agitating for the reform and/or repeal of the Official Secrets Act. In its place, they wanted a Freedom of Information Law that could allow the public access to information held by public authorities and to impose an obligation on key Government authorities to publish information on their own accord. A proper freedom of information law would include the public's right to access information held by public authorities, which is an identified GJLOS priority, and impose an obligation on public authorities to publish key categories of information with exceptions allowed only to the extent allowable in a free democratic state. This would respond to the societal need to access information held by public authorities as a tool for holding government accountable to its citizens.

3.5.2 *The Concept of Enforceability*

78. Enforceability tries to address the question whether the law, public policy or regulation is *capable of being complied with or implemented*. Does the implementing agency rely on the law, regulation or public policy to ensure that the desired results are achieved? What mechanisms exist for ensuring compliance? And what is the cost of compliance? From interviews, it emerged that the most enforceable laws, regulations and policies are not those that are backed by the compulsive arm of the state but those that in the first place are responsive and that have the support of the public. Such laws, regulations and policies, to be enforceable, should be in tune with societal expectations and standards. This raises two issues, firstly, where law or public policy is to be developed; they should take into consideration the obtaining societal realities and try to align themselves as much as possible to those realities. Secondly, in circumstances where the societal realities are not in conformity with the expected situation,¹⁷ then the process

¹⁴ Witteveen, W & van Klink B. "Why is Soft Law Really Law: A Communicative Approach" <http://rechten.uvt.nl/bartvanklink/softlaw.pdf> (accessed on 14th March 2007)

¹⁵ Chapter 187 of the Laws of Kenya.

¹⁶ Through the former, the public lost billions of Kenya Shillings through secret compensation for fictitious gold and diamond exports, while the latter consisted of commitments running into billions of Kenya Shillings on security related contracts.

¹⁷ For instance where the anticipated legislation aims to curb a long-established practice or custom.

of lawmaking, regulation development and public policy formulation needs to be accompanied by programmes and activities geared towards changing societal realities and norms. This is due to the fact that law can also act as tool of “social engineering”¹⁸.

79. The other consideration in enforceability is costs. Policies, laws and regulations developed in consultation with stakeholders and that receive their support will be much easier and cheaper to enforce than those which are developed without public input. Even if such become law, the probability that citizens will disregard them and thus make compliance with them more difficult is much higher.

80. The assessment of enforceability needs to also look at the structures put in place by the policy, law or regulation to supervise its implementation and adherence. Thus, if a law is enacted to address terrorism and its associated threats to society, one of the issues that will determine its enforceability is the existence of institutional mechanisms to monitor and prevent terrorist threats and actions. The structures should also include accountability mechanisms for public oversight on the manner in which the law is being enforced.

81. In sum therefore enforceability of a law, public policy or regulation will depend on its responsiveness and vice versa. Both factors aim at capturing the involvement and support of society in the process of developing and implementing laws, policies and regulations. In the words of Selznick, responsive laws are about “the integration of law and society, requiring a responsive legal order in the interests of social justice.”¹⁹

82. Thus the critical issue that should be at the root of all efforts to measure responsiveness and enforceability is the capability of the law, regulation or public policy to address the concerns of society and ensure that the challenges in the GJLOS sector are dealt with. For in the final analysis:

A responsive legal order is not set over society. Rather, it treats social interests as potential claims to intrinsic worth and therefore as objects of moral concern. Responsiveness demands conformity to social ideals, including principles of justice, but the premise is that “the center of gravity of legal development lies not in juristic science, nor in judicial decision, but in society itself.”²⁰

83. A law which illustrates the challenges of enforceability and its linkages with the responsiveness is the Sexual Offences Act. This Act was passed by Parliament in July, 2006. The Bill was brought to Parliament by a private member, Hon. Njoki Ndung’u. The Bill was prepared in response to an upsurge of sexual violence (including rape, incest,

¹⁸ This school of thought was propounded by Roscoe Pound. In his view: “While philosophers are debating whether a scheme of values is possible, lawyers and courts have found a workable one which has proved as adequate to its task as any practical method in any practical activity. Without putting it that way, they have treated the task of the legal order as an engineering task of achieving practical results with a minimum of friction and waste. We must not forget that law is not the only agency of social control. The household, the church, the school, voluntary organizations, such trade associations, professional associations, social clubs and fraternal organizational organizations, each with their canons of conduct, do a greater or lesser part of the task of social engineering. But the brunt of the task falls on the legal order.” (**Emphasis added**). Pound, R. “A Measure of Values (1940)” Reproduced in Llyod, Lord of Hampstead & Freeman, M.D.A., *Introduction to Jurisprudence*, 5th Edition.

¹⁹ Phillip, Selznick, *The Moral Commonwealth*, University of California Press, Berkely 1992 at p. 463.

²⁰ Ibid., p.468

indecent assaults, defilement of minors, and rape in marriage) against women generally but specifically against toddlers and girls under the age of 12.

84. In her remarks, while moving the motion, Hon. Njoki Ndung'u was of the view that the Penal Code did not provide sufficiently for sexual offences in terms of the definition and severity of sentence, apart from failing to meet public expectations. Unfortunately certain institutions in the justice sector, for example, magistrates, probation officers, and social workers were not involved in the law making process. Amongst others, the Act repealed the relevant sections of the Penal Code and provided stiffer punishment for sexual offences.

85. The deficiency of the new law then began being seen after it came into operation. For instance, section 46 of the Act prescribes that a policy shall be formulated for the enforcement of the Act; that it shall be reviewed after 5 years and be amended on a need basis. The Act also requires a number of Ministers to develop regulations for the implementation of the Act. This process is not yet complete. Indeed, it reaffirms the fact that for policy coherence and better implementation, the law and regulations should emerge as a consequence of public policy and not the other way round. It is only recently that the Attorney General put in place a task force to look into the development of a public policy framework and implementation of the Sexual Offences Act.

86. Therefore, much as the law was responsive to public demand and social imperatives, its enforceability is facing problems due to lack of a public policy and ministerial regulations. This may impede effective enforcement as, the police, magistrates and other actors in the justice chain are skeptical about the reasoning behind the sentences that Magistrates must impose under the Act.

3.6 State of the Art: Baseline of Policies, Laws and Regulations

87. Once the universe had been determined, the next task under this assignment was to determine the baseline of policies, laws and regulations. In the context of monitoring and evaluation (M&E), baseline data refers to critical information gathered at the beginning of a development undertaking against which variations found subsequent to the undertaking are measured. It can also be taken to mean a known value or quantity with which an unknown is compared when measured or assessed. Ideally baseline data should be collected prior to program and activity implementation.

88. In the context of this assignment, baseline of policies, laws and regulations refers to *the public policies, laws and regulations in place at the commencement of the GJLOS RP*. This is both a quantitative and qualitative issue. Quantitatively, the data needed is the number of policies, laws and regulations that were in place at the commencement of the GJLOS RP. The qualitative part of the discussion on baseline needs to respond to the questions: given the type of public policies laws, and regulations that are needed what is the type of public policies, laws and regulations that existed at the commencement of the GJLOS RP? The answer to this question is found in the requirement for responsiveness and enforceability which has been expounded on above. The requirement is therefore for an assessment as to whether the policies, laws and regulations that exist as part of the universe are responsive and enforceable. This report makes a general qualitative assessment on the enforceability and responsiveness of policies, laws and regulations and

then proposes indicators for measuring responsiveness and enforceability. These indicators should be applied as part of the continuing M&E process to all policies, laws and regulations that are part of the universe to determine the responsiveness and enforceability of each.

89. It should be pointed out that although baseline information is one that is collected at the beginning of the programme, this report, coming in the middle of the implementation of the GJLOS MTS, takes as its timeframe for the baseline, the situation *currently* obtaining and not at the start of the programme as would have otherwise been the case.

3.6.1 Current Constitution

90. At the commencement of the GJLOS RP a progressive constitutional foundation for policies, laws and regulations was being sought. The current Constitution of Kenya is largely out of tune with the status, needs and aspirations of the Kenyan society. It has, since its adoption, undergone a series of amendments, a number of which were motivated by the intention of strengthening the Executive at the expense of the other arms of government. Some of these amendments have whittled its effectiveness as an instrument of placing real limitations on the manner in which power is exercised in a modern democratic state.

91. The Kenyan Nation State is also over 40 years older than it was at the point when it obtained internal self-government and received the Independence Constitution as one of the instruments of power on the departure of the British colonialists. It is for these reasons that the country has spent enormous time and resources in the process of developing, agreeing on and enacting a new constitution. In terms of a constitutional baseline, the country is still at the same point where it was when the Constitution of Kenya Review Commission was appointed and charged with the task of collecting and collating views and guiding the process of getting Kenya a new constitution. With the rejection of the Draft New Constitution at the November 2005 referendum, the constitutional development exercise was taken back to the drawing board. Until the process is jumpstarted and a new Constitution adopted, or other amendments made to it in the meantime, the country still operates on the current Constitution, as the baseline, and therefore lacks an adequate and supportive constitutional framework for realizing the GJLOS vision.

3.6.2 Existing Policies

92. In the area of public policy, GJLOS does not have an over-arching policy framework. Nevertheless there are a number of policies in existence that are of direct relevance to GJLOS work. These are as follows:

- (i) Economic Recovery Strategy for Wealth and Employment Creation;
- (ii) Policy on Orphans and Children Made Vulnerable by HIV/AIDS;
- (iii) Sessional Paper No. 5 of 2005 on Gender & Development;
- (iv) Sessional Paper No. 1 of 2006 on Non-governmental Organizations;
- (v) National Anti-corruption Plan; and
- (vi) Community Policing Framework.

3.6.3 Existing Laws

93. There is a raft of laws governing the GJLO sector, though these laws are inadequate for the fulfillment of the GJLOS vision. The inadequacy is both in terms of numbers and areas of focus and also in terms of quality and responsiveness. Against the universe of laws there are currently 92 laws in existence with a direct bearing on the realization of the GJLOS vision. The bulk of these laws were enacted before the GJLOS RP came into place, though there are a number that have been enacted in the life of the programme.

94. Closely related to the above, is the fact that the laws are not in tune with the GJLOS vision and structure as a SWAp. Many of the laws that exist in our statute books were not only enacted before the GJLOS RP was developed but were enacted during the colonial period. During that time the bulk of the laws (especially the laws dealing with law and order issues) had, as their primary purpose the control of “natives” in the Kenyan colony and the preservation of the apparatus of colonialism. At independence, many of them were adopted hook, line and sinker, with some only changing title from “Ordinance” to “Act”. More than 40 years after independence this legacy of authoritarian laws is still firmly embedded in our statute books. A cursory glance at the laws will reveal that some have not even been amended since Kenya attained independence in 1963. There is inadequate linkage amongst the laws; some of them are in potential conflict with the expected progressive new constitution; and they lack sectoral linkages, with focus primarily on the components of the sector (e.g. public order) and not as a comprehensive whole (for instance, public security).

95. At present, the following laws with a direct bearing on the realization of the GJLOS vision are on the statute books (Table 1):

Table 1: Baseline of Laws

No.	Act/Chapter No.	Legislation
1.	N/A	Constitution of Kenya Act
2.	Cap. 1	Revision of the Laws Act
3.	Cap. 2	Interpretation and General Provisions Act
4.	Cap. 3	Law Reform Commission Act
5.	Cap. 3A	Constitution of Kenya Review Act
6.	Cap. 5	National Assembly Remuneration Act
7.	Cap. 6	National Assembly (Powers and Privileges) Act
8.	Cap. 7	National Assembly and Presidential Elections Act
9.	Cap. 8	Judicature Act
10.	Cap. 9	Appellate Jurisdiction Act
11.	Cap. 10	Magistrates' Courts Act
12.	Cap. 11	Kadhis' Courts Act
13.	Cap. 12	Commissioners of Assize Act
14.	Cap. 14	Records Disposal Act
15.	Cap. 15	Oaths and Statutory Declarations Act
16.	Cap. 16	Advocates Act
17.	Cap. 16A	Council of Legal Education Act
18.	Cap. 17	Notaries Public Act
19.	Cap. 18	Law Society of Kenya Act
20.	Cap. 21	Civil Procedure Act
21.	Cap. 22	Limitations of Actions Act
22.	Cap. 26	Law Reform Act

No.	Act/Chapter No.	Legislation
23.	Cap. 39	Public Authorities Limitation Act
24.	Cap. 40	Government Proceedings Act
25.	Cap. 41	Vexatious Proceedings Act
26.	Cap. 42	Debts (Summary Recovery) Act
27.	Cap. 56	Public Order Act
28.	Cap. 57	Preservation of Public Security Act
29.	Cap. 63	Penal Code
30.	Cap. 64	Probation of Offenders Act
31.	Cap. 66	Election Offences Act
32.	Cap. 67	Witchcraft Act
33.	Cap. 70	Chang'aa Prohibition Act
34.	Cap. 75	Criminal Procedure Code
35.	Cap. 80	Evidence Act
36.	Cap. 84	Police Act
37.	Cap. 85	Administration Police Act
38.	Cap. 87	Fugitive Offenders Pursuit Act
39.	Cap. 90	Prisons Act
40.	Cap. 92	Borstal Institutions Act
41.	Cap. 102	Commissions of Inquiry Act
42.	Cap. 106	Public Collections Act
43.	Cap. 107	Registration of Persons Act
44.	Cap. 114	Firearms Act
45.	Cap. 115	Explosives Act
46.	Cap. 121	Liquor Licensing Act
47.	Cap. 128	Chiefs' Authority Act
48.	Cap. 149	Births and Deaths Registration Act
49.	Cap. 152	Matrimonial Causes Act
50.	Cap. 153	Subordinate Courts (Separation and Maintenance) Act
51.	Cap. 154	Maintenance Orders Enforcements Act
52.	Cap. 160	Law of Succession Act
53.	Cap. 168	Public Trustee Act
54.	Cap. 170	Kenya Citizenship Act
55.	Cap. 172	Immigration Act
56.	Cap. 173	Aliens Restriction Act
57.	Cap. 185	Service Commissions Act
58.	Cap. 187	Official Secrets Act
59.	Cap. 208	National Youth Service Act
60.	Cap. 226	Employment Act
61.	Cap. 229	Regulation of Wages and Conditions of Employment Act
62.	Cap. 233	Trade Unions Act
63.	Cap. 234	Trade Disputes Act
64.	Cap. 236	Workmen's Compensation Act
65.	Cap. 403	Traffic Act
66.	Cap. 404	Transport Licensing Act
67.	Cap. 412	Exchequer and Audit Act
68.	Cap. 423	Constitutional Offices (Remuneration) Act
69.	Act No. 19 of 1990	Non Governmental Organizations Co-ordination Act
70.	Act No. 4 of 1994	Narcotic Drugs and Psychotropic Substances Control Act
71.	Act No. 11 of 1994	National Council for Law Reporting Act
72.	Act No. 4 of 1995	Arbitration Act
73.	Act No. 2 of 1996	Kenya Institute of Administration Act
74.	Act No. 5 of 1996	Auctioneers Act

No.	Act/Chapter No.	Legislation
75.	Act No. 4 of 1997	National Crime Research Centre Act
76.	Act No. 10 of 1998	Community Service Orders Act
77.	Act No. 11 of 1998	National Security Intelligence Service Act
78.	Act No. 8 of 1999	Environmental Management and Co-ordination Act
79.	Act No. 8 of 2001	Children Act
80.	Act No. 9 of 2002	Kenya National Commission of Human Rights Act
81.	Act No. 3 of 2003	Anti-Corruption and Economic Crimes Act
82.	Act No. 4 of 2003	Public Officer Ethics Act
83.	Act No. 12 of 2003	Public Audit Act
84.	Act No. 13 of 2003	National Commission on Gender and Development Act
85.	Act No. 14 of 2003	Persons with Disabilities Act
86.	Act No. 5 of 2004	Government Financial Management Act
87.	Act No. 2 of 2005	Privatization Act
88.	Act No. 3 of 2005	Public Procurement and Disposal Act
89.	Act No. 3 of 2006	Sexual Offences Act
90.	Act No. 16 of 2006	Witness Protection Act
91.	Act No. 13 of 2006	Refugees Act
92.	Act No. 14 of 2006	HIV and AIDS Prevention and Control Act

3.6.4 Current Regulations

96. A review of regulations shows that although most of the laws made by Parliament make provision for regulations to be adopted by the agencies charged with the implementation of the Acts of parliament, there has been very sparing and limited use of these regulations. This is notwithstanding the fact that the process of enacting regulations is faster than that of making laws. A deeper analysis of the universe of laws would probably reveal that in some of the areas there is no need for fresh laws. Instead the same end can be achieved through development and adoption of regulations under existing laws.

97. Currently, the following 142 regulations with a direct bearing on the realization of the GJLOS vision are in existence (Table 2):

Table 2: Baseline of Regulations

Legislation	Regulations
1. Constitution of Kenya Act	1. The Constitution (Public Security) Order 2. The Constitution of Kenya (Supervisory Jurisdiction and Protection of Fundamental Rights and Freedoms of the Individual) High Court Practice and Procedure Rules, 2006.
2. Revision of the Laws Act	
3. Interpretation and General Provisions Act	
4. Law Reform Commission Act	
5. Constitution of Kenya Review Act	3. The Constitution of Kenya Review (National Constitutional Conference) (Procedure) Regulations, 2003
6. National Assembly Remuneration Act	
7. National Assembly (Powers and Privileges) Act	

Legislation	Regulations
8. National Assembly and Presidential Elections Act	4. Code of Conduct for Members and Staff of the Electoral Commission 5. Proceedings of the Electoral Commission 6. Electoral Code of Conduct 7. The National Assembly and Presidential Elections (Electoral Code of Conduct) Practice Rules, 2002 8. National Assembly Elections (Election Petition) Rules 1993 9. The National Assembly Elections (Registration of Voters) Regulations 2002 10. Presidential and Parliamentary Elections Regulations 2002
9. Judicature Act	
10. Appellate Jurisdiction Act	
11. Magistrates' Courts Act	11. The Magistrates' Courts (Criminal Jurisdiction Of Magistrates' Courts of the Third Class) Order
12. Kadhis' Courts Act	12. The Kadhis' Courts Order
13. Commissioners of Assize Act	
14. Records Disposal Act	13. The Records Disposal (Courts) Rules
15. Oaths and Statutory Declarations Act	14. The Oaths And Statutory Declarations Rules
16. Advocates Act	15. The Advocates (Admission) Regulations 16. The Advocates (Fees for Restoration to the Roll) Regulations 17. The Advocates (Degree Qualification) Regulations 18. Advocates (Disciplinary Committee) Rules 19. Advocates (Accounts) Rules 20. Advocates (Practice) Rules 21. The Advocates (Deposit Interest) Rules 22. The Advocates (Accountants Certificate) Rules 23. The Advocates (Practising Certificates) (fees) Rules 24. The Advocates (Continuing Legal Education) Regulations, 2004 25. The Advocates (Professional Indemnity) Regulations, 2004 26. The Advocates (Practicing Certificates) (fees) Rules, 2003 27. The Advocates (Complaints Commission) (Structure and Procedure) Rules, 2003 28. The Advocates (Remuneration) (Amendment) Order, 1997
17. Council of Legal Education Act	
18. Notaries Public Act	29. The Notaries Public Rules
19. Law Society of Kenya Act	30. The Law Society of Kenya (General) Regulations 31. The Law Society of Kenya (Arbitration) Regulations, 1997
20. Civil Procedure Act	32. Civil Procedure Rules
21. Limitations of Actions Act	
22. Law Reform Act	
23. Public Authorities Limitation Act	
24. Government Proceedings Act	
25. Vexatious Proceedings Act	
26. Debts (Summary Recovery) Act	33. The Debts (Summary Recovery) Rules

Legislation	Regulations
27. Public Order Act	34. The Public Order (Licences for Meetings or Processions) Regulations 35. The Public Order (Banning of Political Uniforms)
28. Preservation of Public Security Act	36. The North-eastern Province and Contiguous Districts Regulations 37. The Public Security (Armed Forces) Regulations The Public Security (Control of Movement) Regulations The Public Security (Meru) Regulations 38. The Public Security (Detained and Restricted Persons) Regulations 39. The Public Security (Detained and Restricted Persons) Rules 40. The Public Security (Armed Forces) Order
29. Penal Code	41. The Penal Code (Prohibited Publications) Order
30. Probation of Offenders Act	42. The Probation of Offenders (Central Probation Committee) Rules 43. The Probation of Offenders (Case Committees) Rules 44. The Probation of Offenders Rules 45. The Probation of Offenders (Institutions) Rules
31. Election Offences Act	
32. Witchcraft Act	
33. Chang'aa Prohibition Act	
34. Criminal Procedure Code	46. The Criminal Procedure (Record of Evidence in the High Court) Rules 47. The Criminal Procedure (Police Supervision) Rules 48. The Criminal Procedure (Appeal from Refusal of Bail) Rules 49. The Criminal Procedure (Directions in the Nature of Habeas Corpus) Rules 50. The Criminal Procedure (Remuneration of Witnesses and Assessors) Rules 51. The Criminal Procedure (Expert Witnesses Fees) Rules
35. Evidence Act	
36. Police Act	
37. Administration Police Act	
38. Fugitive Offenders Pursuit Act	
39. Prisons Act	52. The Prisons (Prisons Council) Rules 53. The Prisons Rules The Prisons (Kenya Prisons Representative Association) Rules
40. Borstal Institutions Act	54. The Borstal Institution Rules
41. Commissions of Inquiry Act	
42. Public Collections Act	55. The Public Collections Regulations
43. Registration of Persons Act	56. The Registration of Persons Rules
44. Firearms Act	57. The Firearm Rules
45. Explosives Act	58. The Explosives (Blasting Explosives) Rules 59. The Explosives (Fireworks) Rules
46. Liquor Licensing Act	60. The Liquor Licensing Rules
47. Chiefs' Authority Act	
48. Births and Deaths Registration Act	
49. Matrimonial Causes Act	
50. Subordinate Courts	

Legislation	Regulations
(Separation and Maintenance) Act	
51. Maintenance Orders Enforcements Act	
52. Law of Succession Act	61. The Probate and Administration Rules
53. Public Trustee Act	62. The Public Trustee Rules
54. Kenya Citizenship Act	63. The Kenya Citizenship (Forms and Fees) Regulations
55. Immigration Act	64. The Immigration Regulations
56. Aliens Restriction Act	
57. Service Commissions Act	65. The Public Service Commission Regulations, 2005
58. Official Secrets Act	
59. National Youth Service Act	66. The National Youth Service Regulations
60. Employment Act	67. The Employment (Children) Rules 68. The Employment (Medical Treatment) Rules
61. Regulation of Wages and Conditions of Employment Act	69. The Regulation of Wages (Tailoring, Garment Making and Associated Trades Wages Council Establishment) Order 70. The Regulation of Wages (Hotel and Catering Trades Wages Council Establishment) Order 71. The Regulation of Wages (Road Transport Wages Council Establishment) Order 72. The Regulation of Wages (Building and Construction Industry Wages Council Establishment) Order 73. The Regulation of Wages (Laundry, Cleaning and Dyeing Trades Wages Council Establishment) Order 74. The Regulation of Wages (Footwear Industry Wages Council Establishment) Order 75. The Regulation of Wages (Agricultural Industry Wages Council Establishment) Order 76. The Regulation of Wages (Petrol and Service Stations Wages Council Establishment) Order 77. The Regulation of Wages (Domestic Servants Wages Council Establishment) Order 78. The Regulation of Wages (Electrical Construction Industry Wages Council Establishment) Order 79. The Regulation of Wages (Timber and Sawmilling Trades Wages Council Establishment) Order 80. The Regulation of Wages (Protective Security Services) Order, 1998 81. The Regulation of Wages (Petrol and Service Stations) Order 82. The Regulation of Wages (Exhibition of Notices) Rules 83. The Regulation of Wages (Meetings of Boards) Rules 84. The Regulation of Wages (Wages Councils) Rules 85. The Regulation of Wages (Motor Engineering Trades Wages Council Establishment) Order 86. The Regulation of Wages (Baking, Flour Confectionery and Biscuit Making Trades Wages Council Establishment) Order 87. The Regulation of Wages (Wholesale and Retail Distributive Trades Wages Council Establishment) Order 88. The Regulation of Wages (Furniture, Boat, Door and Window Making Industry Wages Council Establishment) Order

Legislation	Regulations
	89. The Regulation of Wages (General) Order 90. Regulation of Wages (Hotel and Catering Trades) Order 91. Regulation of Wages (Motor Engineering Trades) Order 92. The Regulation of Wages (Wholesale and Retail Distributive Trades) Order 93. The Regulation of Wages (Tailoring, Garment Making and Associated Trades) Order 94. The Regulation of Wages (Road Transport) Order 95. The Regulation of Wages (Timber and Sawmilling Trades) Order 96. Regulation of Wages (Agricultural Industry) Order 97. The Regulation of Wages (Building and Construction Industry) Order, 2004
62. Trade Unions Act	
63. Trade Disputes Act	98. The Trade Disputes (Establishment of Industrial Court) Order 99. The Collection of Subscription (Kenya Local Government Workers' Union) Order, 1992 100. The Kenya Union of Kenya Civil Servants (Collection of Trade Union Dues)
64. Workmen's Compensation Act	
65. Traffic Act	101. Traffic (Minor Offences) Rules 102. The Municipal Council of Kisumu (Designated Parking Places) By-Laws, 2000 103. The Traffic Rules 104. The Traffic (Vehicle Licences) (Duration, Fees and Refund) Rules, 2002 105. The Traffic (Nyali Bridge) Rules 106. The Traffic (Movement) Rules 107. The Traffic (Speed Limits) Rules
66. Transport Licensing Act	
67. Exchequer and Audit Act	108. The Exchequer and Audit (District Development Fund) 109. The Exchequer and Audit (Prison Industries Fund) 110. The Exchequer and Audit (Jua Kali Fund) 111. The Exchequer and Audit (Medical Supplies Fund) 112. The Exchequer and Audit (Government Commuter Bus Services Fund) Regulations, 1987 113. The Exchequer and Audit (Prison Farms Fund) Regulations, 1993 114. The Exchequer and Audit (Agricultural Information Centres Revolving Fund) Regulations, 1993 115. The Exchequer and Audit (Veterinary Services) Regulations 116. The Exchequer and Audit (Community Development Trust Fund) 117. The Exchequer and Audit (Members of the National Assembly Car Loan Scheme Fund) Regulations, 1999 118. The Exchequer and Audit (Special Emergency Fund) Regulations, 1998 119. The Exchequer and Audit (Rural Enterprise Fund) Regulations, 1992 120. The Exchequer and Audit (Parliamentary Mortgage

Legislation	Regulations
	<p>Scheme Fund) Regulations, 2002</p> <p>121. The Exchequer and Audit (Anti-poverty Trust Fund) Regulations, 2001</p> <p>122. The Exchequer and Audit (Micro Enterprises Support Programme Trust Fund) Regulations, 2001</p> <p>123. The Exchequer and Audit (Intelligence Service Development Fund) Regulations, 2002</p> <p>124. The Exchequer and Audit (Strategic Grain Reserve Trust Fund) Regulations, 2002</p> <p>125. The Exchequer and Audit (District Cash Fund) Regulations, 2002</p> <p>126. The Exchequer and Audit (Members of the Electoral Commission Car Loan Scheme Fund) Regulations, 2001</p> <p>127. The Exchequer and Audit (Tourism Fund) Regulations, 2001</p> <p>128. The Exchequer and Audit (Mechanical and Transport) Regulations</p> <p>129. The Exchequer and Audit (Public Procurement) Regulations, 2001</p>
68. Constitutional Offices (Remuneration) Act	
69. Non Governmental Organizations Co-ordination Act	<p>130. The Non-governmental Organizations Co-ordination Regulations, 1992</p> <p>131. Non-governmental Organizations Code of Conduct</p>
70. Narcotic Drugs and Psychotropic Substances Control Act	132. Drugs and Psychotropic Substances (Control) (Seizure, Analysis and Disposal) Regulations, 2006
71. National Council for Law Reporting Act	
72. Arbitration Act	133. The Arbitration Rules
73. Kenya Institute of Administration Act	
74. Auctioneers Act	
75. National Crime Research Centre Act	
76. Community Service Orders Act	
77. National Security Intelligence Service Act	134. The National Security Intelligence Service (Complaints Commission) Regulations, 2006
78. Environmental Management and Co-ordination Act	<p>135. The Environmental (Impact Assessment and Audit) Regulations, 2003</p> <p>136. The National Environmental Tribunal Rules</p> <p>137. The National Environmental Tribunal Procedure Rules, 2003</p> <p>138. The Environmental (Prevention of Pollution in Coastal Zone and Other Segments of the Environment) Regulation, 2003</p> <p>139. Environmental Management and Co-ordination (Fossil Fuel Emission Control) Regulations, 2006</p> <p>140. The Environmental Management and Co-ordination (Water Quality) Regulations, 2006</p> <p>141. The Environmental Management and Co-ordination (Waste Management) Regulations, 2006</p>

Legislation	Regulations
79. Children Act	142. The Children (Adoption) Regulations, 2005 143. The Children (Charitable Children's Institutions) Regulations, 2006
80. Kenya National Commission of Human Rights Act	144. The Kenya National Commission on Human Rights (Complaints Procedures) Regulations, 2005
81. Anti-Corruption and Economic Crimes Act	
82. Public Officer Ethics Act	
83. Public Audit Act	
84. National Commission on Gender and Development Act	
85. Persons with Disabilities Act	
86. Government Financial Management Act	
87. Privatization Act	
88. Public Procurement and Disposal Act	145. The Public Procurement and Disposal Regulations, 2006
89. Sexual Offences Act	
90. Witness Protection Act	
91. Refugees Act	
92. HIV and AIDS Prevention and Control Act	

3.7 Gap Analysis

98. From the previous discussion, the gap is the divergence that exists between the baseline and target universe. The programme's task is to fill this gap. The GJLOS RP has, since inception, made some progress in reducing the gap between baseline and universe. In describing this progress, the report includes progress already made in the form of drafts policies, laws and regulations.

3.7.1 Policy Reform Gaps

99. Although there is lack of an overall policy framework to govern the sector, the concept paper for GJLOS Policy Framework has been prepared and is under discussion. The next stage is the development of the policy framework paper in accordance with the schedule set out in the concept paper.

100. **Governance:** There is no policy to provide direction on the country's anti-corruption efforts. What exists is a national anti-corruption action plan, though there have been discussions on developing a national anti-corruption policy. MDAs have developed service charters detailing their commitments to the public and to enhance integrity and reduce opportunities for rent-seeking and corruption. With respect to public information, it is significant that the country still lacks a freedom of information policy. A draft has already been prepared and is in the process of discussion and finalization. In the human rights domain, nationwide consultations on a national human rights policy and action plan are currently ongoing. There is no public policy on citizen participation and on role and structure of public service. What exist are periodic circulars on government structures. A

Draft Policy on Orphans and Children Made Vulnerable by HIV/AIDS has also been prepared.

101. **Justice:** Flowing from the discussion on universe and baseline, the key gap in the area of policies on justice is the lack of an Access to Justice Policy. Developments in this area have included drafts of a Legal Aid Policy and a Policy on Legal Education. Focus is now needed on adopting an Access to Justice Policy as a priority.

102. **Law and Order:** There is no public safety and security policy. To address these lacunae, a draft National Community Policing Policy has been drafted, as well as a draft National Crime Prevention Strategy, a draft Firearms Policy, and a Peace Building and Conflict Management Policy. Regarding public prosecutions, there is no Prosecutions Policy (both for public and private prosecutions). A Draft National Prosecution Policy has nevertheless been prepared. While several reform initiatives have been undertaken in the area of prisons, penal systems and other correctional institutions, public policy developments in this area still lack sufficient public policy grounding. Nevertheless, an After Care Policy has now been drafted. Lastly, under national registration and immigration, while there is no adopted policy, there is a draft policy for the integration of registration departments and a draft National Immigration Policy. Finally, there is a draft Alcohol Policy and a draft National Strategy for the Prevention, Control and Mitigation of Drugs and Substances.

103. The other issue regarding policies is the imperative that laws be anchored on public policies. Therefore, every law should be anchored on a public policy. It should follow, for example, that if a proposal is made to enact a law on Freedom of Information, the first question that the programme and other stakeholders should ask is whether there is in existence a policy on freedom of information. If it is found that such public policy does not exist, then the starting point should be the development and adoption of such a public policy. This is due to the relationship between public policy and law. While a public policy is the broad government action plan or framework, the law is then the legal framework for the implementation of the measures required to realize that planned action. A law that is developed without a proper public policy foundation leads to possibilities of deviating from or offending overall public policy direction and programmes.

3.7.2 Law Reform Gaps

104. In terms of the country's pursuit of a rights-based, gender-sensitive and fiscally affordable constitution, there has not been much movement towards the universe at the time of writing this report. The latest attempt to jump-start the constitutional review process, the Multi-sectoral Constitution Review Committee (MCRC), seems to have slowed down after some initially promising bi-partisan discussions. The consultations over a minimum reforms agenda have also suffered a similar fate. It is critical that efforts continue being made to finalize the review process.

105. **Governance:** With respect to other laws, from a strict GJLOS focus, bearing in mind the current governance priorities as highlighted in the universe, the gaps that exist are in the areas of access to information; public disclosure of information in wealth declarations; coordination of the multifarious agencies involved in the fight against corruption; a legal framework for public complaints and an ombudsman; continuing domestication of international human rights treaties; harmonization and restructuring of

task forces and commissions of inquiry; establishment of a transitional justice and reconciliation machinery; and a legal framework for re-orienting the public service.

106. **Justice:** In the area of justice, a number of areas are in need of attention. Overall access to justice, especially for the poor, is still weak. In this regard, the establishment of small claims courts, formal recognition of alternative dispute resolution, implementation of a public legal aid scheme and recognition of community/informal justice systems require urgent attention. The courts system also needs to be made more user-friendly, efficient and effective. Introduction of plea bargaining would also speed up criminal justice. A law to strengthen the independence of the Judiciary, including financial independence, is also required.

107. **Law and Order:** In the area of law and order, the process of filling the reform gaps should focus on a legal framework to entrench community policing; to comprehensively address the problem of small arms and light weapons trafficking; comprehensive legislation on drug and substance abuse (that addresses prevention and rehabilitation as well); and to respond to organized crime as well as recent crime forms such as cyber-crime (e.g. identity-theft) and terrorism. Laws to eliminate interference with the operational independence of security agencies, and strengthening of inter-agency collaboration in the fight against crime will also be required. Independent civilian oversight of security agencies also needs to be given legal force. Harmonization of civil registration systems, thorough-going immigration reform, and overhaul of the country's correctional system will also add to the needed reforms in this area.

108. Filling the above gaps will require more than mere adoption of new laws. It should start from a content analysis of the existing laws related to the law reform priorities to determine whether amendments or adoption of regulations may suffice. Only where these alternatives are unlikely to address the root cause of the problem should new laws be formulated for enactment.

109. There have recently been some efforts to fill the foregoing gaps. Notably, the interviews and literature review have revealed that the following law reform efforts have been so far made:

- (i) Administration Police (Amendment) Bill;
- (ii) Anti-Terrorism Bill;
- (iii) Draft Civil Registration (Births and Deaths) Bill;
- (iv) Amendment proposals to Citizenship Act, Immigration Act and the Alien Restrictions Act;
- (v) Companies Bill;
- (vi) Private Prosecutions Bill;
- (vii) Review of Prisons Act;
- (viii) Legal Framework for Plea Bargaining;
- (ix) Legal Framework for Legal Education;
- (x) Political Parties Bill;
- (xi) Media Bill;
- (xii) Landlord & Tenant Bill;
- (xiii) Legal framework for integration of registration departments;
- (xiv) Kenya Law Reform Commission Bill;
- (xv) Elections Bill;
- (xvi) Small Claims Bill;

- (xvii) Matrimonial Property Bill;
- (xviii) Marriage Bill;
- (xix) Domestic Violence Bill;
- (xx) Gender Equality Bill;
- (xxi) Children (Amendment) Bill;
- (xxii) Persons with Disability (Amendment) Bill;
- (xxiii) Employment Bill;
- (xxiv) Labour Relations Bill;
- (xxv) Labour Institutions Bill;
- (xxvi) Work Injury Benefits Bill; and
- (xxvii) Occupational Health and Safety Bill

3.7.3 Regulatory Gaps

110. There is very limited use of regulations to address the challenges facing the sector. A detailed list of gaps will only emerge from the detailed content analysis of each law. This task is to be carried out in subsequent phases of the M&E process as envisaged in the TORs for this assignment. In an effort to fill the gap, the programme has developed the Public Officer Ethics (Wealth Declaration) Regulations. Others will be necessary to expound on the aims of the law reforms gaps highlighted above, based on the logic that regulations will normally follow the trail blazed by substantive law reforms or ensue upon a substantive content analysis of existing law. For instance, the Civil Procedure Rules – which are made by a Rules Committee consisting of both Bench and Bar representation – will be brought sharply into focus by any attempt to make the justice system friendlier, more efficient and effective.

3.8 Measurement Indicators for Responsiveness and Enforceability

111. This report has given a top-line analysis of the gaps that exist between the universe, on the one hand, and the baseline, on the other, of public policies, laws and regulations. While it is limited, by lack of sufficient time and scope of the current assignment, from undertaking an in-depth analysis on content of all public policies, laws and regulations both existing and in draft form, it makes future analysis easier by clarifying the universe as well as the baseline. Such future analyses are expected to go into such depth if they are to provide realistic determination of the second critical aspect of the monitoring of policies, laws and regulations – their responsiveness and enforceability. In this last section, the report provides indicators that should be used for the future task of detailed content analysis of all public policies, laws and regulations.

112. The indicators for measuring responsiveness and enforceability that emerges from this assessment include:

- the extent to which the policy, law and regulation addresses societal demand and needs, especially its alignment with the GJLOS vision;
- the extent of involvement of stakeholders in its formulation;
- the acceptability of its proposals and solutions by society;
- the strength of the institutional and other structures it establishes for ensuring implementation: for every law passed an assessment needs to be made of what framework is required for its implementation and for adherence to its requirement;
- the extent of involvement of stakeholders in its implementation structures and processes; and

- the extent to which it adopts measures for education and awareness creation for attitudinal change as opposed to pure compulsion.

113. With respect to enforceability, the following are also important indicators.

- (i) *Constitutionality of the Law*: This is a key test of enforceability of laws. A law will only be enforceable if it is in conformity with the constitution. It is therefore imperative that, for any law that is passed to be enforceable, it requires to pass the constitutionality test. There are numerous examples of statutes that have been shot down by the courts due to being unconstitutional. A good example would be the *Prevention of Corruption Act* which was declared unconstitutional in 2000. This law therefore became unenforceable. Another issue under constitutionality is the requirement a law should be non-retroactive. Thus a law should not be passed that criminalises activities that were not criminal at the time the law was passed. A law should be forward looking and not backward looking
- (ii) *Clarity*: To be enforceable, a law needs to be clear and ascertainable. This is a key test of legality. This will ensure that disputes are resolved on the basis of legal rules that have been declared and known beforehand and thus avoid situations where legal rules are altered after the event through discretionary acts. The indicator also requires and thus measures the extent to which the rule clearly identifies the problems, stipulates manner in which the problem is to be resolved and ascribes power to an institution for purposes of solving the problem or dealing with the issue
- (iii) *Conformity to international standards*: We live in a globalised world and thus what we do in Kenya invariably has impact on and should be guided by international trends and standards. It is therefore important that the policies, laws and regulations that we adopt should be alive to and conform to international standards. Thus if we were to enact a law on money laundering, in determining what kind of law we should have, recourse should be had to international standards adopted on the area of money laundering. This way the policy, law and regulation we adopt will not only be responsive to the needs of Kenyans but also to our international commitments as a member of the global community.

114. The next stage of the assessment will be to determine whether that structure exists and if so how well equipped is it to handle the task. Should the structure be lacking then the law must create it and equip it with sufficient powers to carry out the tasks under the said law. In the process, however, the lawmakers need to pay particular attention to the issue of institutional harmony and coordination so as to avoid institutional overlap and conflicts, which have been known to reduce the overall enforceability of laws.

115. In operationalising the indicators above, we recommend that the public be involved in the process. Several institutions already undertake such public engagements. Discussions with the Kenya Anti-corruption Commission (KACC) and the Kenya National Commission of Human Rights (KNCHR) revealed that they employed surveys and focus group discussions to improve public participation in their work. We recommend that all the MDAs under the GJLOS RP adopt surveys, focus group discussions and public meetings as a means of measuring the reform content of laws. If the process of lawmaking and policy formulation involves citizens then it is only rational that they be given a chance to determine whether their inputs have been taken on board

and whether the final product addresses their concerns. In addition to this GJLOS should have focussed group discussions with key stakeholders in a particular sector once a law or public policy has been enacted to assess on the basis of the criteria enumerated above, the reform content of laws and policies.

116. The above process is applicable where policies, laws and regulations are in the process of being formulated under the GJLIOS RP. For policies, laws and regulations that are already in existence, it is imperative that a detailed content analysis of these laws be undertaken by the programme to ensure that they are in tune with the GJLOS vision. From this content analysis, areas which are found to be at variance with the GJLOS vision should be immediately amended. A content analysis of the criminal laws for example may reveal the existence of several offences which do not need to exist in our statute books, for example vagrancy or loitering with intent. These offences, in addition to being at variance with the GJLOS vision, unduly criminalise poverty, and end up clogging the prison system as those who are arrested and charged with them invariably end up in prison. Their removal would therefore not only align the criminal laws to the GJLOS vision but also help in de-congesting prisons, which is one of the priorities of the GJLOS RP.

CHAPTER 4: ANALYSIS OF THE PROCESSES OF POLICY FORMULATION, LAWMAKING AND PROMULGATION OF REGULATIONS

4.1 The Process of Policy Formulation

117. In order to realize change, it is important for the programme to understand the processes through which this change happens. Public policies and the making of public policy are the preserve of the Executive branch of government. It is the duty of the Executive to draft the policies and spearhead the process of their discussion and finalisation. There is currently no clearly defined and commonly known procedure for development of policies. The essential stages of public policy formulation involve the drafting of a policy by the relevant ministry, comments on and input to it, and interrogation by the public and its discussion and approval by cabinet. Thereafter the relevant MDA can publish it as a policy or, in certain cases, take it to Parliament for discussion and adoption as a sessional paper. Unlike laws, therefore, there is no mandatory involvement of Parliament or the relevant Parliamentary committee in the process of public policy formulation.

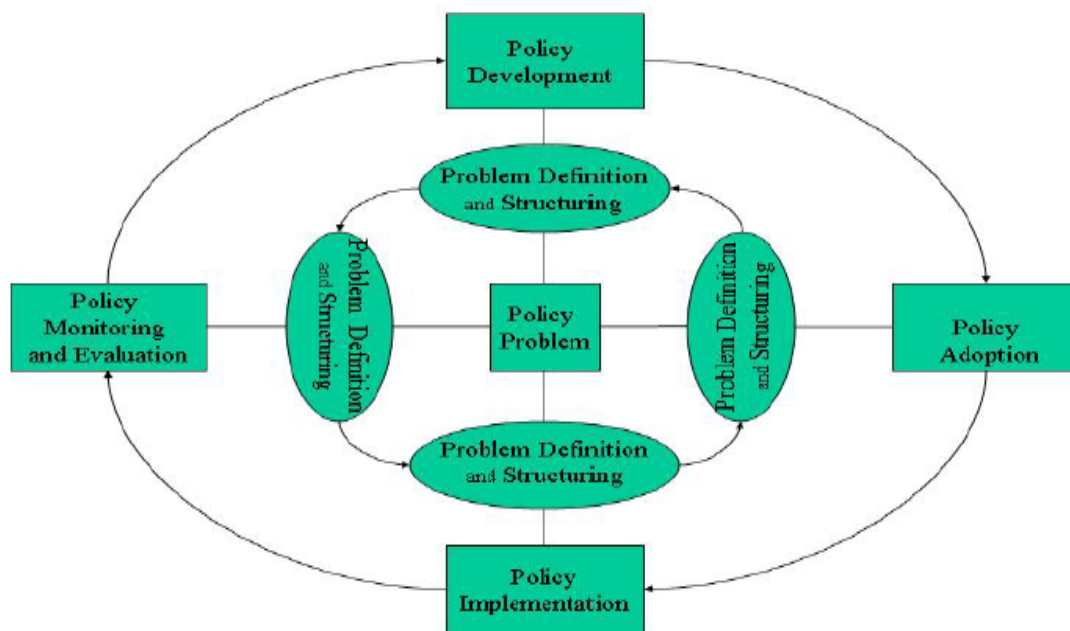
118. Kenya has developed many policies in several areas, starting with important policies during the colonial period like the 1923 Devonshire White Paper and the 1954 Swynnerton Plan. Notable policies developed since independence include Sessional Paper Number 10 of 1965 on African Socialism and its Application to Kenya and Sessional Paper No. 1 of 1986 on Economic Management for Renewed Growth. More recent policies include the 2003 ERSWEC, the 2007 Draft Land Policy and the 2005 Draft Youth Policy.

119. As there is no formal process for public policy making in Kenya, the Consultants reviewed the processes used in developing past policies to see if this would reveal an established trend in public policy making. The finding is that the processes followed in developing public policies differ. In the course of the interviews, a common explanation given for this disparity was that policies are of different hierarchy. Due to this, the process to be followed will depend on the hierarchical level of the policy. There are overarching, fundamental and national ones which must be taken to Parliament for debate, while others are sectoral and issue-based and might not reach Parliament. It is, however not clear how the decision is reached as to which public policy should go to Parliament, the levels of consultation and the stages to be followed before the policies get adopted. The importance of having a well known and agreed policy-making process will not only democratise policy-making but also enhance public participation in the making of public policy. The World Bank acknowledged this fact when it indicated several years ago that it needed to “continue to shift [our] focus from the content of public policy to the way policy is made and implemented” and “rather than focus primarily on providing policy prescriptions, the World Bank needs to focus more on helping countries develop the processes and incentives to design good policies themselves.”²¹

²¹ World Bank, *Reforming Public Institutions and Strengthening Governance: A World Bank Strategy* Washington D.C., World Bank, 2000) Available at <http://worldbank.org/publicsector/service/strategy.pdf>. (Accessed on 2nd May, 2007).

120. Internationally, there are good practices of public policy making. Writing on the policy-making process in Slovakia, Katarina Stranova captured the intellectual discourse on the policy-making process and stated that the first scholar to breakdown the policymaking process into distinct stages was Harold Lasswell who identified seven categories²². She then points out that in current discourse, the process ranges from three to seven stages. The key components are policy development, adoption, implementation and M&E. These constitute the public policy cycle. In designing an effective policy making process the above key stages need to be integrated. She states five principles of good governance that are essential in the process of public policy formulation, namely *openness, participation, accountability, effectiveness and coherence*, and proposes a policy making cycle such as the one shown in Figure 1 below.

Figure 1: A simple model of public policy making



Source: Katarina, Stranova, “Analysis of the Policy Making Process in Slovakia”, 2002.

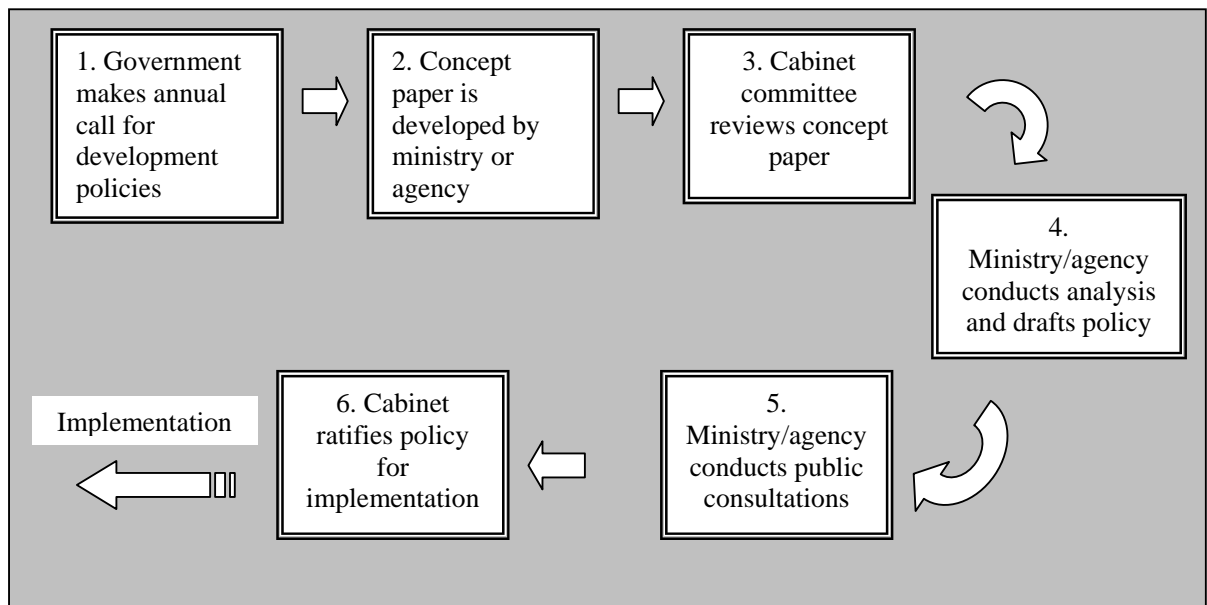
121. The Government of Jamaica has a six-stage process for public policy development (Figure 2). Every year the cabinet is advised, through an annual call for Policies for Development, on policy initiatives in process and upcoming policy relevant activities. The Ministry or Agency responsible then develops a concept paper which includes background and justification, linkages to national priorities, problems, research findings where necessary, issues to be resolved, options, evidence of stakeholder support, financial and budgetary implications and implications for other areas. This concept paper is then reviewed on the basis of agreed criteria and then accepted by cabinet committee as priority for action. In approving the concept paper, the cabinet indicates conditionalities for policy process including partnerships. The Ministry then develops action plan for policy development, including timelines and resources.

²² Katarina, Stranova, “Analysis of the Policy Making Process in Slovakia”, 2002. Available at www.policy.hu/staronova/FinalResearch.pdf. (Accessed on 5th May 2007).

122. The process then proceeds to policy preparation and analysis. This involves literature review, consultations, technical inputs, reviews and preparation of draft policy. The draft is then submitted to the relevant cabinet committee which can approve the document with or without amendments, refer the document to public consultations or request for substantial revisions before resubmission.

123. The next stage is to subject the draft Policy to public consultations if needed. After the consultations, the revised document incorporating the views of the public will then be submitted to the cabinet. The report should highlight the changes proposed by the public consultations. The report should be submitted formally to cabinet for its ratification.

Figure 2: Public policy development in Jamaica



Source: Author’s graphical interpretation.

124. In a publication intended to enable citizens understand the New Forest Policy and Forest Act, in Kenya²³, a proposal on the process for public policy making in Kenya is made. The proposal involves eight stages. The first stage is the diagnosis of problem. The problem is defined, background information on the problem supplied and tentative solutions highlighted. The next stage is then for the relevant sector or ministry to design a policy either through establishing an internal committee or a multi-sectoral task force which will frame the problem and consider policy options. In certain instances a consultant can be hired at this stage to undertake an in-depth study before proposing policy options. The third stage is then stakeholder dialogue and inputs. This is the most important stage in the policy making process as it opens public policy formulation to various interest groups and to the society generally. This is then followed by a review by

²³ Ludeki, V.L. et al (2006), *Environmental Management in Kenya: A Framework for Sustainable Forest Management in Kenya: Understanding the New Forest Policy and Forests Act, 2005*

an inter-ministerial technical committee to ensure cross-sectoral linkages between policies to avoid obvious contradictions. Following this, the sector ministry then prepares a cabinet memorandum outlining the basis upon which the new policy was developed with highlights and key milestones that the new policy aims to achieve. This will then accompany the draft policy and be presented to cabinet for approval. If cabinet rejects the draft then the responsible ministry must undertake further work on it. Should cabinet approve the draft, it paves the way for draft to be prepared for presentation to Parliament for debate and approval. After approval by cabinet, the relevant minister in collaboration with the Attorney General office will prepare it for presentation, debate and approval by Parliament. The approved draft is then published in the Kenyan gazette as a sessional paper and is available as an official public policy. The last stage in the process is that of policy implementation. The above proposal should be compared to the process proposed to be adopted in coming up with the GJLOS Policy Framework Paper.

125. From the foregoing, it is clear that the situation in Kenya is similar to that in Slovakia where it has been written that “there exist no formal rules or guidelines in regard to a broader public policy process that encompasses the formulation of problem, design of concepts, strategies and policy analyses or design of action plans, implementation, M&E.”²⁴ It is therefore imperative that the process of developing policies be reduced into a formal policy making guide and be made available to government, private sector, civil society and the wider public.

126. Against this backdrop, there is no clear cut and publicly available and agreed process and framework for public policy making in Kenya. Further, there has not been deliberate linkage between public policy and laws and public policy and law-making in Kenya. While the ideal public policy-making process requires that policies underlie and provide the base from which laws should spring, the process of making laws has proceeded in certain instances without a public policy base. The KRs and priority sectors of the GJLOS RP also lacked policies at the commencement of the programme. To date commendable effort has been made in developing policies. However, certain key areas like access to information and access to justice still lack final and adopted policies.

4.2 The Process of Law Making

127. Lawmaking is the function of Parliament. Section 30 of the Constitution of Kenya²⁵ stipulates that the national assembly shall be responsible for making laws. Together with the National Assembly (Powers and Privileges) Act,²⁶ it governs the procedure of lawmaking. The process is further regulated by the Standing orders of Parliament.

128. The process of making laws is exercisable through discussions of and eventual passage of Bills.²⁷ The first stage in the process normally takes place outside Parliament. This is the process of development of the legislative proposals and drafting of the Bills. The process depends on the type of Bill in question. There are two types of Bills. These are private Bills and Public Bills. The object of a public Bill (as opposed to a private Bill)

²⁴ Supra note 20, at page 8.

²⁵ Constitution of the Republic Kenya, 1998 Edition.

²⁶ Chapter 6, Laws of Kenya.

²⁷ Although written in 1975, the book by Ndoria Gicheru remains the most authoritative writing on parliamentary process in Kenya including the legislative process.

is to alter the general law on a question of public policy.²⁸ A private Members Bill is the second category of Bills. The difference between the two is that a private member's Bill is promoted by a private member of Parliament while a public Bill is promoted by the government.

129. The difference in the process depends on whether the Bill is a public Bill or a Private member's Bill. For the former the proposal originate from the government. This will involve the Ministry concerned, the legislative drafting department of the State Law Office (Attorney General's chambers) and the Kenya Law Reform Commission.

130. The Attorney General has developed guidelines to guide the process of preparing Public Bills. This involves generation of legislative proposals for fresh bills or amendments by relevant MDAS. The process of developing the proposals might involve the MDA undertaking consultations with different stakeholders. In the process, the MDA might consult and require the services of the Kenya Law Reform commission in undertaking research, public consultations and preparing draft Bills. The legislative drafting department of the Attorney General Chambers then receives the draft proposals from the relevant MDA. In the view of the department, what they receive from MDAs are lay proposals. The legal drafting is undertaken by their department and not MDAS or KLRC. This is the method used to prepare the bulk of the Bills. Kenyan's parliamentary practice is such that the bulk of the Bills are drafted and presented to Parliament by the government.

131. Private members Bills are drafted by the private members themselves and sometimes with the assistance of civil society organisations and other interest groups. However, once the Bills reach the floor of the house after being allocated time by the House Business Committee (HBC) the Bills go through a similar legislative process. No difference in procedure exists between Private Members Bills and Public Bills except as regards who moves them.

132. Once the Bill has been prepared it will be published in the Kenyan gazette. It will thereafter be introduced in the house for debate either by the minister concerned if it is a public Bill or by the private member for private Bills. This will be done on a day and a time allocated by the HBC. The standing orders then detail the stages that a Bill should undergo once it reaches the floor of the house and stipulates that no more than one stage of a Bill may be taken at one sitting of Parliament except with leave of the house.²⁹ There are four stages that any Bill has to go through in the house. These are the first reading, second reading, committee stage and Third reading. Following these stages, and if the Bill gets the approval of the house, it will be passed and transmitted to the president for his assent.

133. Overall, the process is therefore not only technical and laborious, but it also does not always deliver the expected results – namely a law at the end of the pipeline. An analysis of Parliament's performance between 2003 and 2006 shows that it has been passing, on average, less than 50% of the Bills brought before it for debate and enactment (Table 3). This is the result of Parliament's own technical procedures, mainly the Standing Orders, and challenges with the MDAs responsible for the legislative proposals.

²⁸ Gicheru, N., *Parliamentary Practice in Kenya*, (Nairobi, Transafrica Publishers, 1975) p. 93.

²⁹ Republic of Kenya, *National Assembly Standing Orders (Revised Edition 2002)*, Standing Order No. 99.

Table 3: Parliament’s law-making track record (2003-2006)

Year	Bill Brought	Bills Passed	%Rate
2003	25	11	44.00%
2004	25	12	48.00%
2005	25	7	28.00%
2006	32	19	59.38%
Average			44.84%

Source: Parliament of Kenya website www.bunge.go.ke – Bill Trackers

4.2.1 The Role of Parliament in GJLOS Reforms

134. The GJLOS Reform programme targeted change principally in 32 MDAs. As regards the classification of government into three arms, namely the judiciary, executive and legislature, the executive and judicial arm of government are the focus of the sector. Although some members of Parliament participate in GJLOS activities, Parliament as an institution does not formally participate in the GJLOS RP. It does not sit either in the IASC, TCC or the sector working groups. Moreover, there are no formal linkages currently between GJLOS and Parliament or its committees. The non-involvement of Parliament within GJLOS has been explained on the basis of history and due to the doctrine of separation of powers. Historically, GJLOS as a RP traces its origins to efforts to undertake judicial reforms which expanded to legal sector reforms and eventually to expanded legal sector reforms. This explains the involvement of the judiciary in GJLOS. In addition to the Judiciary, the programme targets the executive arm and Semi-autonomous Government Agencies (SAGAs). Parliament, was historically not part of the reform programme. Secondly, interviewees indicated that the doctrine of separation of powers was such that it was necessary to keep Parliament formally outside the GJLOS Reform Programme.

135. Further, interviews revealed, that some level of linkage existed between the programme and parliament. The executive is also part of Parliament and forms the majority in the House Business Committee. Indeed, the Chair of the IASC, His Excellency the Vice-President also chairs the HBC of parliament. This then is an opportunity to ensure that the focus of GJLOS is fed into the legislative process too.

136. Despite the above explanations, the consultants take the view that the level of involvement of and linkage with Parliament is very limited. This has implications on the success of the programme and realisation of its vision. Firstly, reform in the sector will not be complete until Parliament as an institution is also reformed. This is because of the important role of Parliament in governance, as the institution that represents people’s interests in the governance process, the organ that carries out oversight functions over the executive and as the lawmaking body. Secondly, and as is quite evident from the GJLOS MTS and an assessment of the implementation of the reform programme, the achievement of some of the result requires the input of Parliament. KR 1, the focus of this assignment, cannot be realised by any of the 32 MDAs alone or the whole of them without the involvement and support of Parliament. The only body with the constitutional mandate to enact, amend or repeal any parent law in this country, is Parliament. There is no way that the GJLOS programme will achieve the promulgation of responsive and enforceable laws unless Parliament performs its lawmaking function and does so timely and in congruence with the GJLOS vision. The best that the MDAs, can guarantee is the development of legislative proposals that are responsive. These proposals, however, will

not be of much value until they go through the Parliamentary lawmaking process and are turned from proposed laws into actual legislation. The constitutional function of lawmaking can and should be performed by Parliament even if they are not part of GJLOS. The government, by its superior numbers in parliament, can and should also ensure that its legislative agenda is carried out in parliament. However, the performance of Parliament as an institution reveals its hindrance to reforms. Many Bills take inordinately long and lapse even before debate. The Political Parties Bill is one example of a proposed law which even after finalisation through GJLOS RP, has never been finally passed by parliament.

137. It is necessary that Parliament and parliamentarians get socialised to GJLOS RP so that they appreciate its focus and priority. This will enable legislators play their role as lawmakers with information on GJLOS. The customers who are demanding the legislative enactments and for whom the laws are intended to impact in a positive manner are the constituents of these Members of Parliament (MPs). They would thus see the connection between the focus of the programme and their role as MPs.

138. While one may appreciate that there is the difficulty of having Parliament sit formally in the GJLOS structure due to the doctrine of separation of powers between the arms of government, GJLOS should and is much broader than the executive arm. Although it is driven largely by the executive the involvement of the judiciary, private sector, civil society means that it is prudent to design mechanisms for greater integration and linkages with Parliament as an institution and with MPS. There should be liaison with relevant departmental committees in the process of developing responsive and enforceable Policies, Laws and Regulations. The programme should also prepare regular updates to MPS on the programme. Lastly, greater linkage should be made between GJLOS reforms and parliamentary reforms. Some efforts were made, for example, in efforts to reform parliamentary standing orders. These should be built on and institutionalised.

4.2.2 The Process of Adoption of Regulations

139. Regulations by definition are rules to implement the provisions of laws made by Parliament. They are also sometimes referred to as delegated legislation. Invariably, regulations are made by the body charged with the task of ensuring that the specified legislation is implemented. This is normally the relevant ministry. Unlike policies, however, sometimes these are promulgated by the minister responsible issuing a gazette notice or at other times they are developed through consultations. But again just like policies there is no standard process for their development.

4.3 Shortcomings in Reform Process

140. From the foregoing discussion, there are a number of deficiencies that need to be attended to, to improve the process of policy making, lawmaking and adoption of regulations. This part of the report highlights them for the benefit of the programme planning.

141. *Sitting time of Parliament:* There is the lack of sufficient time for Parliament to sit, debate and pass the necessary legislations required under the programme. The standing orders stipulate a very short sitting time for Parliament. To enable it to

adequately cover the numerous bills brought before it, it is imperative that the standing orders be amended so that Parliament can sit for longer hours, for more days in a week and go for fewer breaks in a year. The efforts underway to amend the standing orders should address this shortcoming.

142. *Lack of a clear process for public policy development:* There does not seem to be a clear and laid out procedure for policy formulation within government. There has emerged a practice in government which has two strands. In the first strand, a policy once formulated by the Ministry is taken to the cabinet for discussion and after approval is published as a sessional paper. The other practice involves the above procedure with the addition that after cabinet approval it is laid before Parliament for debate. It is not clear on what basis a decision can be made to adopt either of these positions and whose duty it is to make that decision. Further the lack of a clearly laid down procedure means that stakeholder consultation, while desirable and in most cases has been undertaken, is carried out not as a result of a requirement of procedure but largely out of good practice and in certain cases benevolence. This is evident from the fact that even the level of consultation required and actually undertaken varies from Ministry to Ministry. For example, while the process of land policy formulation has been extremely elaborate and consultative, the same cannot be said of the process of formulating a Mining Policy.

143. *Lack of adequate citizen involvement:* The level of citizen involvement in the legislative process, regulation adoption and policy formulation process is still very low. For Bills, for example, neither at the stage of developing proposals nor in the process of debating Bills and inputting into them in Parliament are citizens involved in a structured manner. Although some limited attempts are made, for example, when Kenya Law Reform Commission consults the public in the process which is ongoing of developing a matrimonial Property Bill or when some departmental committees hold public hearings on proposed legislations, these are not mandatory requirements and are not done at all times.

144. *Lack of adequate linkages between GJLOS RP and Parliament:* The lack of involvement of Parliament and its departmental committees in the GJLOS programme is a great hindrance to the success of the programme. With greater linkages, the vision of GJLOS RP would be realised in a more effective and efficient manner.

145. *Political interference and infighting:* The other obstacle to the reform process is the impact of politics and political interference. Politics is a necessary part of societal affairs. However, its negative impacts (especially when it becomes sectarian and narrow) have had and continue to pose a serious challenge to the implementation of reforms. Several Bills³⁰ have suffered rejection in parliament, not because of their technical deficiencies but largely due to political differences amongst MPs.

146. *Lack of implementation synergy between departments:* One of the aims of the GJLOS RP was to lead to a sector-wide outlook and approach to issues around the sector. This requires that departments work in harmony and have a common vision of the programme. While some progress has been made in this regard there is still lack of sufficient coordination. In certain instances, departments complained about lack of sufficient support from other departments within the sector in the carrying out of their

³⁰ For example the 2004 Forests Bill.

tasks. The introduction of performance contracting, for example, made heads of MDAs, see only the achievement of targets under their respective ministry, agency or department and not the wider sector. This, would, for example, make it difficult to determine which law should be given priority by the sector when every ministry wants their Bill to be fast-tracked. The GJLOS PFP is expected to deal with this in some measure.

147. *Lack of support from the public:* There is need for strong public support for the GJLOS RP and for the realisation of KR1. In the final analysis the demand for the reforms need to be sustained by the wider public too. However, the level of public awareness, and hence engagement with the GJLOS programme, is still low. The consequence is lack of strong public support for and awareness of the programme, its activities and achievements. Yet public participation in public policy formulation, law making and adoption of regulations is a necessary index of the responsiveness of both the process of reform and its final products.

CHAPTER 5: CONCLUSIONS AND RECOMMENDATIONS

5.1 Conclusions

148. Based on the information available from the study and the Consultants' own analysis, it is possible to make a number of conclusions for further implementation of the policy and lawmaking and promulgation of regulations agenda and how this may be tracked in terms of the performance of the GJLOS RP over time. These have been grouped into 5 key areas based on the TORs for the assignment.

5.1.1 *The Universe and Baseline*

149. That the universe of GJLOS policies, laws and regulations is *the sum totality (both in existence and anticipated) of policies, laws and regulations necessary to help overcome the GJLOS challenges and realise the GJLOS vision* is an easy determination to make. Its exact size and scope are where the inexactness lies. This report has been guided by existing priorities, which has helped to narrow down the possible catchment area dramatically. Still, there is an appreciation of the fact that what exists in terms of the universe at this stage, due to the lack of a content analysis, are broad public policy foci and areas of legal reform with attendant areas for regulatory intervention. Ideally, the programme would be much easier to monitor and evaluate if tracking of results happened on the basis of more concrete listing of targets and gaps, but this is not feasible – not just with the present exercise but also in future. This is due in part to the nature of development changes being sought, which are in the domain of law, policy and regulations rather than, say, infrastructure. Additionally, the entry and exit criteria for institutional association with GJLOS may also help to clarify the issue of the universe as subject matter has tended to follow institutional mandate. The baseline is faced with less inexactness, and the Consultants have been able to draw up a list of all the policies, laws and regulations that represent the current state of affairs in KR1. However, it may also benefit from availability of more information especially in the area of policies.

5.1.2 *Gap Analysis*

150. Looking at the universe, in relation to the baseline, there is still substantial work that needs to be done in bridging the gap between target and current state of affairs. This fact is apparent even in the absence of a detailed content analysis, so the gap could actually be wider than currently portrayed. In terms of M&E work, due to the inexactness associated with the universe, the real gaps – and the progress in measuring their reduction – will also continue to be an inexact science. However, as more information is availed to the programme and assuming that adaptive management is maintained, it should be possible to reduce the amount of inexactness over time and thereby clarify the universe and gaps better.

5.1.3 *Content Analysis*

151. The study has shown that this is really where the nerve centre of the tracking effort lies. Although the numbers are important, the real measure of qualitative change will be in how the policies, laws and regulations are responsive to the programme's challenges and how enforceable they are to ensure successful implementation. It therefore needs to be mainstreamed into all the aspects of the KR1 work. Put differently, development of reform proposals should be preceded by a content analysis, the structure

of reform proposals should also benefit from a sound content analysis, the tracking of results should include content analysis and reporting on results should contain an analysis of the content. A prior content analysis may, for instance show areas where new law had been anticipated but where amendments to existing law or the promulgation of regulations may still deliver the desired results.

5.1.4 Process Issues

152. Governance and institutional reform, like any other change, happens through processes. In order to realize this change, as aforesaid, the programme requires to understand the processes by which this change happens and to develop approaches and mitigation measures that take into account the nature of those processes. For instance, it is remarkable that though public policy is important in setting direction for legal and regulatory reform, it is presently not formalized. There is not only no formally recognised process of public policy development, but a repository of policies is also seemingly not in place. Either that or the repository is also limited in its support to the programme by some of the access to information bottlenecks that have been identified as a governance challenge.

153. As for lawmaking, it is a complex political process. Parliament's lawmaking capacity is currently at almost 50% based on an analysis of 2003-2006 data. This means that, unless things change, there is always a 50% chance that any Bill sent to Parliament will lapse before it has gone through all the 3 readings. Once that happens, there is still the final hurdle of Presidential assent, which in a few instances has been driven by considerations of responsiveness and/or enforceability³¹. Lack of linkages between the programme and Parliament further adds to the programme's challenges in meeting its law reform intentions. In regard to regulations, there are a number of statutes that provide for the promulgation of rules but these have not been promulgated at all. In other cases, regulations have also not been reviewed since they were first promulgated. There are also cases of statutes without any provision for the making of regulations. Finally, although citizens' participation happens, it is not always so in the cases where it is necessary, and is currently also unstructured and not institutionalized – a challenge that has already been recognized by the programme. All these are considerations that will be important for the programme and its stakeholders to bear in mind as they pursue policy, lawmaking and regulatory interventions.

5.1.5 Assessment of Change

154. This report has provided both a description of the universe and the baseline in a way that is functional for setting up a system of measuring change in regard to KR1 results. A number of indicators for measuring qualitative change have been added to the quantitative indicators in the MTS. In order to maintain their functionality to the programme, as an M&E tool, in addition to the stated need for specifics for the universe and the gap analysis, the indicators will also need to be reviewed over time to gauge their relevance as the programme evolves.

³¹ This was the case in respect of the Wildlife (Conservation and Management) (Amendment) Bill, 2004 and – lately – the Media Bill, 2007.

5.2 Recommendations

155. In the opinion of the Consultants', both the GJLOS RP and stakeholder institutions have to take specific actions in terms of how they are currently discharging their mandates, especially with respect to policy making, lawmaking and promulgation of regulations in order to strengthen KR1 results. The following recommendations, in addition to others in the body of the report, are made with a view of clarifying how this may be achieved:

5.2.1 *Regarding the Universe and Baseline*

156. The GJLOS programme should constantly collect information from all MDAs on policies, laws and regulations that the MDAs are reviewing. This information should be used to clarify the broad parameters of the universe in addition to assessing progress. While the broad parameters are reasonable to start with, it helps to concretize things once it is clear, for example, that consultations have revealed a specific policy, law or set of regulations as encapsulating the response to a particular challenge, say access to information. This way, the programme will develop a firmer grasp of the quantitative aspect of the universe, and therefore make gap analysis that is more concrete in terms of the number of Bills. While the overall assessment is based on both quantitative as well as qualitative factors, the quantity is still important if prioritization emerges as a concern based on Parliament's overall performance on lawmaking for example.

5.2.2 *Regarding the Gap Analysis*

157. There is a need to continue filling the gaps. However, in terms of doing so, there must be greater attention paid to getting existing drafts moved through the pipeline. Current reporting on progress shows substantial input in developing drafts but many of them seem to have remained in draft form for far too long. A look at the policy arena will reveal that there has been very low adoption of policies since the advent of the GJLOS programme. Secondly, as the universe gains more clarity, it will be important to simultaneously tighten the gap analysis as well. The greater clarity that the programme has in terms of the actual gaps, as opposed to the areas in which there are gaps, the easier it will be to make interventions and to capture the results, if any, of those interventions.

5.2.3 *Regarding the Content Analysis*

158. The programme should institutionalize on-going content analysis across the project management cycle of policy, legal and regulatory reform. One way in which this can be done is to charge the Thematic Groups with the task of requiring a context and content analysis for any policy, legal and regulatory reform proposals in the MDAs' work plans. The PCO should also link these reform proposals to overall response, to challenges as well as enforceability considerations. At the TCC level, this is a critical consideration as well since it boils down to one of the programme's key leadership questions: is the programme making the right policy, legal and regulatory interventions – relative to its stated challenges – to provide the enabling framework with which to achieve the stated results?

5.2.4 *Regarding the Process Issues*

159. There is need for a central depository of public policies made by the government that is fully accessible by both the programme and the public at large. This will make it

easy for all interested parties in policy making, legal reform and regulatory reform to gauge the sector needs and engage meaningfully on what is required to realize change in terms of enabling policy, legal and regulatory frameworks. Linkages also need to be established with the technocrats in Parliament as well as departmental committees to ensure that at the very minimum, the programme's reform agenda, its evolution and further clarification of reform priorities, is also constantly known to Parliament.

5.2.5 Regarding Future Assessment of Change

160. The programme should constantly collect information on policies, laws and regulations that are proposed, being developed or adopted. On an annual basis, the programme should evaluate the qualitative and quantitative progress from the baseline against the universe. In addition to using this report and other M&E tools, the programme should also constantly "sharpen" those tools. In the context of KR1, this means that, at least annually, the universe be not only updated to make it more concrete based on continuing consultations and other information in the GJLO sector, but also to keep re-evaluating the utility of the proposed indicators for this work. In the final analysis, while M&E is supposed to inform adaptive management of the programme, its tools are also supposed to be adaptive, changing to remain relevant in terms of giving accurate measurement of both the quantitative and qualitative change that is occurring in the programme – in this case within KR1.

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APPENDICES

Appendix 1: Terms of Reference³²

**Governance, Justice, Law and Order
Sector (GJLOS) Reform Programme**

**Invitation to Bid - Consultancy
services for the assessment of
policies, laws and regulations
Tender No. C008/2006/03
Re-Advertisement**

15 September 2006

This report contains 30 pages

Invitation to Bid - Assessment of policies laws and regulations -
Final

³² Relevant excerpts only, due to length considerations.

4 Terms of Reference

4.1 Background

4.1.1 The GJLOS Reform Programme

The Governance, Justice, Law and Order Sector (GJLOS) Reform Programme is a sector-wide, cross-institutional reform programme led by the Government of Kenya and presently supported by 15 International Development Partners. Coordinated through the Ministry of Justice and Constitutional Affairs, the programme is currently being implemented in over 30 Government Institutions located in, or linked to, the Office of the President, the Office of the Vice President and Ministry for Home Affairs, Ministry of Justice and Constitutional Affairs, State Law Office and Judiciary.

The Vision for the GJLOS sector is “*a safe, secure, democratic, just, corruption-free, human rights respecting and prosperous Kenya for all.*” The Mission of the Sector is “*to reform and strengthen sector institutions for enhanced protection of human rights, efficient, accountable and transparent governance and justice.*” To generate reform momentum, the Government has defined outcomes for selected sector-wide priorities and translated these into programme results and indicators.

Government has selected and prioritised reforms in the following areas:

- (i) governance, ethics and integrity, including the fight against corruption;
- (ii) improving respect for human rights in government institutions;
- (iii) enhancing access to justice, particularly for the poor, marginalised and vulnerable;
- (iv) crime prevention, police reforms (including community policing) and penal reforms (particularly decongestion of prisons);
- (v) strengthening public prosecutions and legal services available to the public; and
- (vi) reformist-led capacity building with a focus on attitude and culture change.

4.1.2 GJLOS Programme Coordination

On a day-to-day basis, programme management and co-ordination rests with two specialist teams, the Programme Coordination Office (PCO) and the Financial Management Agent (FMA).

The Programme Co-Ordination Office (PCO) is presently tasked with overall programme coordination, quality assurance and specialist technical support to the programme and individual GJLOS institutions in the areas of strategy, planning and budgeting, monitoring and evaluation, and information, education and communication (IEC). The PCO reports directly to the Permanent Secretary in the Ministry of Justice and Constitutional Affairs in her capacity as Secretary to the GJLOS Technical Coordination Committee (TCC).

KPMG Kenya is the appointed Financial Management Agent (FMA) for the GJLOS Reform Programme Basket Fund. As the FMA, KPMG Kenya is tasked with the responsibility of managing

basket donor funds, procurement and overall financial management, and also has a specific mandate to build capacity in GJLOS institutions.

4.2 Problem statement

The GJLOS Reform Programme is the vehicle that seeks to change the way sector institutions work, as well as the legal and regulatory framework in which they operate. The Programme focuses on strengthening the sector institutions for efficient, accountable and transparent administration of justice. It involves a wide array of governance and justice institutions.

The GJLOS Reform Programme Medium Term Strategy (MTS) includes a list of relevant laws requiring reform or re-publication. In addition, policies are being developed by the sector while regulations are continually being assessed and revised. These (and other laws) have to contribute to the reform agenda of the GJLOS Programme, as set out in the MTS.

The challenge faced is two-fold: (1) to identify and critically assess the reform contribution of the existing processes of policy formulation, law-making and regulations amendments, and (2) to analyse the content and appropriateness of policies and laws that make it into the statute books as well as regulations that are changed as part of the Reform Programme; and their contribution to the reform agenda.

4.3 Overall objective

The overall objective of this consultancy is to review, analyse and make recommendations regarding the progress and content of policy development, and the legal and regulatory reform in Kenya within the GJLOS Reform Programme framework and the extent to which these reflect the GJLOS reform agenda.

- 1 Definition of the GJLOS-relevant universe of policies, laws and regulations in place or needed to realise the GJLOS reform vision in practice as well as criteria against which the reform contribution of policies will be measured;
- 2 A critical analysis of policies, laws and regulatory changes required for the GJLOS reform vision to be realised in practice;
- 3 Critical analysis of the process of policy formulation and of steering of bills through Parliament (for instance, the participation of non-state actors, quality of drafting, role of parliamentarians and parliamentary committees);
- 4 Critical analysis of the reform contribution and quality of policies, legal and regulatory reform occurring under the GJLOS Reform Programme;
- 5 At the macro-level critical analysis of reform consistency across different policies, legal and regulatory reform (including cross-cutting human rights issues) undertaken as part of the GJLOS Reform Programme; and
- 6 Make recommendations that enhance the reform agenda with regard to the policy, legislative and/or regulatory environment in order to ensure realisation of management utility by GJLOS Reform Programme implementing departments.

4.4 Scope of work

To achieve the objectives of this consultancy, the team of consultants shall:

- 1 Develop a detailed understanding of the GJLOS Reform Programme via key documents, including but not limited to the following:
 - Medium Term Strategy (2005);
 - Bi-annual Advisory Team reports (2004 – 2006); and
 - Mid-term Review reports.
- 2 Define the GJLOS-relevant universe of policies, laws and regulations needed to realise the GJLOS Reform Programme vision;
- 3 Develop a detailed understanding of the existing and proposed policies in GJLOS, proposed new laws and regulations, ongoing changes to existing laws and regulations;
- 4 Develop the terminology and criteria against which the reform contribution of policies, laws and regulations will be measured, in consultation with the implementing departments, the PCO and a Reference Group;
- 5 Provide a detailed analysis of the policy, legislative and regulatory reform framework that will be required for the GJLOS reform vision to be realised, by analysing existing laws and regulations including laws currently being drafted, identify any gaps and make recommendations on how these gaps may be filled (this will be a one-off output occurring in the first year of the consultancy);
- 6 Interview key sector role players, including but not limited to the following:
 - Kenya Law Reform Commission,
 - Kenya National Commission on Human Rights,
 - State Law Office,
 - Gender Commission,
 - the Judiciary,
 - relevant Parliamentary Committee members,
 - a panel of “users” affected by policy, law and regulation change, and
 - other relevant institutions involved in the drafting and/or passing and/or enacting/enforcing legal and regulatory reforms;
- Produce clear and concise reports that analyse progress made with regard to policy formulation and related processes, legislative and regulatory reform; identify challenges and obstacles, and recommendations to redress them; and offer macro-level analysis and recommendations on the

contribution of legal and regulatory reform to the broader GJLOS Reform Agenda, and how to address any gaps identified.

This assignment forms the initial consultancy with a possibility of being extended for a further three-year period (2006 and 2009) depending on performance.

4.5 Deliverables

The team of consultants shall produce:

- An Inception report within the first two weeks including a detailed workplan for the assignment;
- A draft report;
- A brief concise final report that addresses the consultancy objectives, and shall address the following:
 - Define the GJLOS universe of policies, laws and regulations;
 - Analyse the laws and regulations that have been promulgated/amended in terms of their contribution to the GJLOS Reform Agenda;
 - Analyse laws and regulations that require amendment/promulgation/enactment if the GJLOS reform agenda is to be realised;
 - Includes direct analysis of the performance of GJLOS (in the area of policy, law and regulation change) against appropriate indicators from the Programme log-frame;
 - Identifies blockages and recommends ways of removing them; and
 - Makes recommendations for enhancing and deepening GJLOS Reform Agenda in the relevant sector institutions.

Five copies of all instruments and reports will be submitted to the GJLOS PCO. A soft copy of the report shall be submitted in Microsoft Word (Office 2000 or XP version).

4.6 Expertise required

The team of consultants should demonstrate the following:

- 1 Demonstrated expertise in their respective fields;
- 2 A mix of academic qualifications and experience including:
 - A law professional with at least seven (7) years experience in legal research and policy development and advocacy;

- A social scientist with relevant Masters degree, or preferably a doctoral degree, and at least seven (7) years experience in policy formulation and advocacy; and
 - A law academic with at least a doctorate in law and proven track record in publishing in internationally peer-reviewed journals.
- 3 Previous experience in undertaking similar assignments in an African or developing country context.
 - 4 A mix of Kenyan and international experts is desirable.

4.7 Timing and duration

The proposed time frame for the assignment is 90-man days.

Appendix 2: Questionnaire

GOVERNANCE, JUSTICE, LAW AND ORDER SECTOR (GJLOS) REFORM PROGRAMME – ASSESSMENT OF LAWS, POLICIES AND REGULATIONS

IMPLEMENTERS' AND STAKEHOLDERS' QUESTIONNAIRE

SECTION A: BIO-DATA

1. Name
2. Department
3. Designation
4. Period worked in the department
5. Gender
6. Age
7. Educational Level
6. Other professional qualification

SECTION B: KNOWLEDGE ON or UNDERSTING OF GJLOS REFORM PROGRAMME

9. a) Do you understand what GJLOS means?

1. Yes
2. No

b). Please explain your answer

.....

10. a) Are you conversant with the 'Key Results' contained in the MTS document on GJLOS implementation?

1. Yes
2. No

b) If yes, please highlight them especially the ones most relevant to your work.

.....

c) The 'Key Result 1' of MTS touches on Review of Policies and Laws. Please mention the role your Ministry/Department is expected to play in its implementation.

.....

d) Please mention or list what your Ministry/Department has done so far as pertains to 'Key Result 1' in respect of its expected role(s) in implementation of GJLOS.

.....

11. a) Were you involved in the conceptualization of the and/or documentation of the GJLOS MTS document?

1. Yes

2. No

b) If yes, please explain how, at what level and what role you played.

.....

c) If no, please give reasons.

.....

C: IMPLEMENTATION OF MTS (KEY RESULT AREA 1)

12. a) Are you aware of any existing law(s) relevant to your Ministry/Department or that is implemented by your Ministry/Department that is/are in line with the GJLOS reform program?

1. Yes

2. No

13) Please mention the laws relevant to the work of your ministry/department.

.....

14. a) Are you aware of any existing policy(ies) relevant to your Ministry/Department or that is implemented by your Ministry/Department that is/are in line with the GJLOS reform agenda?

1. Yes

2. No

b) If yes, please mention them.

.....

15. a) Are you aware of any existing regulation(s) relevant to your Ministry/Department or that is implemented by your Ministry/Department that is/are in line with the GJLOS reforms agenda?

1. Yes

2. No

b) If yes, please mention them.

.....

16. a) What areas in your Ministry/Department lacks Law(s), Policy(ies) and/or Regulations in order to deliver efficient services.

.....

b). Please suggest the Law(s), Policy(ies) and/or Regulation(s) that are required to improve performance of your Ministry/Department in this respect. (Mention those in draft and those yet to be drafted)

.....

17. Please fill in the following table any of the existing Law(s), Policy(ies) and/or Regulation(s) relevant to your Ministry/Department that you may regard as indicated:

(Please be as detailed and specific as you can)

Obsolete/outdated	
Cumbersome	
Weak	
Impossible to implement	
Requiring modification	

18. Please mention the new Law(s), Policy(ies) and/Regulation(s) relevant to your Ministry/Department that have been effected since inception of GJLOS programme. Insert the description of the items in the table below:

New Law(s), Policy(ies) and Regulations relevant to the Ministry/Department	Description
Law(s)	
Policy(ies)	
Regulation	

19. Please mention the Law(s), Policy(ies) and/Regulation(s) relevant to your Ministry/Department that have been modified/amended since inception of GJLOS. Insert the description of these items in the table below:

New Law(s), Policy(ies) and Regulations	

relevant to the Ministry/Department	Description
Law(s)	
Policy(ies)	
Regulation(s)	

20. In a ranking order (where the 1st is most urgent and the 5th least urgent), please indicate and give rationale for five (5) Law(s), Policy(ies) and Regulation(s) that are a priority to your Ministry/Department in terms of necessity to enact or amend in the following table:

Prioritized Law(s), Policy(ies) and Regulation(s)	Ranking	Rationale
Law(s)	1.	
	2.	
	3.	
	4.	
	5.	
Policy(ies)	1..	
	2.	
	3.	
	4.	
	5.	
Regulation(s)	1.	
	2.	
	3.	
	4.	
	5.	

21. a) Suggest the best way or method that should be adopted in prioritizing and implementing GJLOS reforms in respect to Law(s), Policy(ies) and Regulation(s) that are relevant to your Ministry/Department.

.....
b) Please describe in detail the process that should be followed as per your suggestions in 21(a) above.

.....
22. a) Comment on the *contribution* of your Ministry/Department in implementing the ‘Key Result 1’ of the MTS.

.....
b) Mention some of the major challenges and/or obstacles that has bedeviled the performance of your Ministry/Department in realizing the ideals of ‘Key Result 1.

.....
c) Suggest ways in which these challenges and/or obstacles (in 22 (b) above) should be addressed.

.....
23. a) In your view, what should be considered in determining the Policies, Laws and Regulations needed to be enacted and/or amended as part of KR 1 of the MTS?

.....
b) List the factors that should inform the analysis of whether or not a proposed, enacted or amended Policy, Law or Regulation is responsive to demand and to the GJLOS agenda.

.....
c) Suggest mechanisms necessary to ensure that Policies, Laws, and Regulations proposed, enacted or amended under Key Result 1 of the MTS are enforceable.

.....
24. a) Comment on the role of Parliament in support of GJLOS in general and ‘Key Result 1 in particular.

.....
b) Suggest ways in which the legislative process can be made more effective, efficient, participatory and supportive of the GJLOS reform agenda.

.....
c) Mention some of the indicators (decipherable from the Laws, Policies and Regulations enacted so far) that can be a measure of the support accorded to the GJLOS agenda by Parliament.

25. a) In your view, what contribution has MTS 'Key Result 1' contributed to the overall GJLOS reform agenda.

.....

b) Suggest ways in which this contribution (24. (a) above) can be deepened for the success of the GJLOS reform agenda.

.....

26. What factors can be used to assess the reform content on Laws, policies and regulations promulgated to determine their conformity to the GJLOS Reform Agenda?

.....

Appendix 3: List of Respondents

In-depth Interviews	
Name	Designation & Organization
1. Ms. Dorothy Angote	PS, Ministry of Justice and Constitutional Affairs
2. Justice Philip Waki	Judge of the Court of Appeal, Chairman TTC
3. Mr. Gichira Kibara	Director of Legal Affairs, Ministry of Justice and Constitutional Affairs
4. Mr. Jacques Carstens	Chief Technical Coordinator, GJLOS Reform Programme
5. Mr. Dennis Kabaara	Strategy, Planning and Budgeting Specialist, Programme Coordination Office
6. Mr. Makali Mulu	Monitoring & Evaluation Specialist, Programme Coordination Office
7. Mr. Kathurima M'Inoti	Chairperson, Kenya Law Reform Commission
8. Ms Christine Agimba	Deputy Solicitor General, State Law Office
9. Ms. Roselyne Lagat Korir	Senior State Counsel, Department of Public Prosecutions
10. Ms. Ann Kaiga	Chairperson, Advocates Complaints Commission
11. Mr. Wanjau Nguiku	Senior Children's Officer, Department of Children's Services
12. Mr. Muchai	Department of Children's Services
13. Mr. Orindi J. A. O	Assistant Secretary, National Registration Bureau (OP)
14. Mr. John Kimunyu	National Registration Bureau
15. Ms Gladys Shollei	Secretary, National Council for Law Reporting
16. Ms Linnet Okwara	National Coordinator, Community Service Order Programme
17. Dr. Smokin Wanjala	Assistant Director, Kenya Anti-Corruption Commission
18. Mr. Ezekiel Abang	Secretary, Kenya Law Reform Commission
19. Mr. Mburu Gitu	Secretary, Kenya National Commission on Human Rights
20. Ms. Jennifer Kimani	National Coordinator, NACADA
21. Mr. Fred Mwei	Chief of Training Research and Development, Administration Police
22. Ms. Elizabeth Nganga	Deputy Head Legislative Drafting Department, State Law Office
23. Mr. Mwadime Lawrence	Senior Deputy Commissioner of Police
24. Mr. Peterlis Nyatuga	Director, National Commission on Gender and Development
25. Ms. Habiba Wako	Assistant Chief Immigration Officer
26. Ms. Eunice Sawe	Administrator General of the Public Trustee
27. Pro. W. Kulundu-Bitonye	Principal, Kenya School of Law
28. Mr. Lawrence Mute	Commissioner, Kenya National Commission on Human Rights
29. Ms Ann Angwenyi	Ag. Director, Legal Services, NEMA
30. Ms Lucy Ndungu	Deputy Registrar General, State Law Office
31. Mr. Francis Kimemia	Deputy Secretary, Office of the President
32. Mr. Polycarp Ochillo	Director, National Anti-Corruption Steering Committee
33. Mr. Charlton Murithi	Staff Officer Personnel, The Kenya Police Department
34. Mr. Johnson Weru	Ministry of Foreign Affairs
35. Mr. Paul Ngetich	Researcher, Parliament

In-depth Interviews	
Name	Designation & Organization
36. Mr. John Omondi	National Youth Service
37. Mr. Samuel Kiptarus	Economist, Judiciary
38. Mr. H. Rapando	Economist, Judiciary
39. Ms. Carole Kariuki	Programme Officer, Kenya Private Sector Alliance
40. Mr. Stanely Mwangi	Probation and After Care
41. Mr. Joshua Siambe	Probation and After Care
42. Mr. Clement Oketch	Probation and After Care
43. Alex Magal	Kenya Prisons Service

Focus Group Discussions	
Name	Designation & Organization
44. Mr. Kepta Ombati	Chief Executive Officer, Youth Agenda
45. Ms. Eva Ayiera	Advocacy & Senior Programme Officer, Refugee Consortium of Kenya
46. Ms. Jane Onyango	Executive Director, FIDA- Kenya
47. Dr. Margaret Hutchinson	Executive Director, ECWD
48. Mr. Paddy Onyango	Executive Director, 4C's
49. Mr. Abubakar Kipoma	Programme Officer, CEDMAC
50. Mr. Fred Nyabera	Programme Officer, FECCLAHA
51. Mr. Gilbert Onyango	Programme Officer, CRADLE
52. Mr. Geoffrey Birundu	Coordinator, NASCON/ CLARION

Appendix 4: List of Questionnaires

Name	Designation & Organization	Returned
1. Hon. Aaron Ringera	Director, Kenya Anti-Corruption Commission	No
2. Mr. Jacques Carstens	Chief Technical Coordinator, GJLOS Reform Programme	No
3. Mr. Polycarp Ochillo	Director, National Anti-Corruption Steering Committee	No
4. Prof. W. Kulundu-Bitonye	Principal, Kenya School of Law	No
5. Mr. Maina Kiai	Chairman, Kenya National Commission on Human Rights	No
6. Mr. Kathurima M'Inoti	Chairperson, Kenya Law Reform Commission	No
7. Mr. Cyrus Gituai	PS, Provincial Administration & Internal Security, Office of the President	No
8. Ms. Nancy Kirui	PS, Ministry of Home Affairs, Office of the Vice President	No
9. Mr. Emanuel Kisombe	PS, Ministry of Immigration & Registration of Persons	No
10. Mr. Keriako Tobiko	Director, Department of Public Prosecutions	Yes
11. Mr. Lawrence Mwadime	Police Commissioner, Kenya Police	Yes
12. Mr. Kinuthia Mbugua	Commandant, Administrative Police	No
13. Mr. JP Omondi	Chief Commandant, National Youth Service	Yes
14. Ms Muthoni Kimani	Deputy Solicitor General, State Law Office	No
15. Ms Christine Agimba	Deputy Solicitor General, State Law Office	Yes
16. Mr. Francis T. Kimemia	Deputy Secretary, Provincial Administration & Internal Security	No
17. Mr. Ann Wangui Kaiga	Senior Principal State Counsel, Advocates Complaints Commission	Yes
18. Mr. Ahmed Hussein	Director, Department of Children's Services	Yes
19. Ms Joyce Mugo	Principal Civil Registrar, Department of Civil Registration	Yes
20. Mr. Reuben Kimotho	Ag. Principal Registrar of Persons, National Registration Bureau	No
21. Mr. Joseph K. Ndathi	Director of Immigration Services, Immigration Department	No
22. Ms Jennifer Kimani	National Coordinator, NACADA	No
23. Mrs. Margaret Nzioka	Chief Parliamentary Counsel, Legislative Drafting Department	No
24. Ms Gladys Shollei	Secretary, National Council for Law Reporting	No
25. Mr. Jerim W. Oloo	Director, Probation & Aftercare Services	Yes

Name	Designation & Organization	Returned
26. Mrs. Eunice Sawe	Administrator General, Public Trustee	No
27. Ms Bernice Gachegu	Registrar General, State Law Office	No
28. Ms Dorcas Achapa	Chief State Counsel, Treaties & Agreements, State Law Office	No
29. Ms Linnet Okwara	National Coordinator, Community Service Orders Programme	No
30. Mr. S. K. Kiptarus	Senior Economist, The Judiciary	Yes
31. Dr. Smokin Wanjala	Assistant Director, Kenya Anti-Corruption Commission	No
32. Mr. Ezekiel Abang	Secretary, Kenya Law Reform Commission	No
33. Mr. Mburu Gitu	Secretary, Kenya National Commission on Human Rights	No
34. Mr. Samuel Gitau	Liaison Officer, GJLOS/MOJCA	Yes
35. Mr. Kinuthia Murugu	PS, Ministry of Youth Affairs	No
36. Losapu Magal/ Anderson Mcharo	Kenya Prisons Service	Yes