The Politics of Land Reform in Kenya 2012

Ambreena Manji

Abstract: This article provides a critique of the final stages of Kenya's land law reform process, which has resulted in the approval of the 2012 Land Act, Land Registration Act, and National Land Commission Act. It argues that in spite of the constitutional and political importance of the new legislation, the process was marked by haste, lack of engagement by legislators, and little participation by citizens. The new laws can be viewed as a deeply disappointing outcome of a decade's struggle over land policy. The article explores the effects of the constitutional deadlines for new legislation; the contradictory role of civil society in relation to the new laws and the bureaucratic structures they create; and the redistributive intentions and potential of the new land legislation.

Résumé: Cet article présente une critique des dernières étapes du processus de réforme de la loi foncière du Kenya, qui a abouti à l'approbation de la Loi "Land" de 2012, de la Loi sur l'enregistrement des terres, et de la Loi sur la Commission foncière nationale. Il fait valoir que, en dépit de l'importance constitutionnelle et politique de la nouvelle législation, le processus a été marqué par la hâte, le manque d'engagement des législateurs, et une participation minimale des citoyens. Les nouvelles lois peuvent être considérées comme un résultat très décevant de la lutte en cours depuis une décennie sur la politique foncière. L'article explore les effets des délais constitutionnels sur la nouvelle législation, le rôle contradictoire de la société civile en ce qui concerne les nouvelles lois et les structures bureaucratiques qu'elles engendrent, aussi bien que les intentions et le potentiel de la nouvelle législation foncière de redistribution.

Key Words: Land laws; Constitution of Kenya 2010; National Land Policy 2009; civil society

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Introduction

In April 2012 Kenya became the latest of many East African countries to approve new land laws. Tanzania, Uganda, Mozambique, Rwanda, Somaliland, South Sudan, and Zanzibar all introduced new laws in "the era of land law reform" that commenced around 1990 (McAuslan 2013:46). This article provides an account of the months leading up to the passing of the Land Act (No. 6 of 2012), the Land Registration Act (No. 3 of 2012), and the National Land Commission Act (No. 5 of 2012) and shows that both the process of passing the new laws and their substantive content bear out Hornsby's (2012:787) observation that "land remains a key fault line" in Kenya. This is true despite considerable optimism that 2012 represented a historical moment when Kenya's system of land relations, which had been at the root of violent conflict throughout the nation's colonial and postcolonial history, could finally be overhauled. The optimism was the result of two significant achievements: the approval of a National Land Policy in 2009 after a long struggle, and the embedding of land policy in the 2010 Constitution of Kenya (in what is commonly called the "land and environment" chapter). It was widely believed that the achievement of new land laws as mandated by the Constitution would signal a milestone in its implementation (see Harbeson 2012).

A number of key events in the post-2000 era preceded the final accomplishment of the 2012 land laws. These included the publication of the Report of the Commission of Inquiry into the Land Law Systems of Kenya (widely known as the "Njonjo Commission") (Republic of Kenya 2002); the Report of the Commission of Inquiry into Illegal/Irregular Allocation of Land (the "Ndung'u Commission") (Republic of Kenya 2004); the publication of the Report of the Commission of Inquiry into the Post-election Violence Following the December 2007 General Election (the "Waki Report"); the development of the National Land Policy, which was eventually approved by Parliament in 2009; and the inclusion of a land and environment chapter in the 2010 Constitution of Kenya.[1] When on April 27, 2012, the Land Act, the Land Registration Act, and the National Land Commission Act received presidential assent, a decade of debate and activism about land law reform had finally reached a culmination. However, the date also marked the beginning of new struggles over access to land, state authority, and democratic accountability. As commentators have pointed out, the process of converting informal policies into concrete land laws was bound to be fraught with difficulties (see Boone 2012). This article aims to contribute to a well-established literature on the country's often contradictory engagement with land issues before and after independence and to explore some reasons for Kenya's failure to fulfill what Harbeson (2012) called the "promises" of the Constitution in relation to land.[2]

The starting point for this analysis is Harbeson's (2012:29) observation that "the Kenya constitutional moment appears to privilege national level

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procedural and deliberative democracy as the source of substantive democratic land tenure outcomes, and by extension the terms of which Kenyans relate to each other and their rulers." The process of introducing and debating the proposed new land laws can be seen as one of the first, and certainly one of the most important, tests of the new Constitution. Seen in this light, the opacity and lack of debate that surrounded the process did not bode well, and in fact the final stages of Kenya's land law reform process can be described as a last ditch attempt to hinder reform, subvert the intentions of the National Land Policy of 2009, and retract the promises of the Constitution. The article argues not only that national level procedural and deliberative democracy failed to bring about equitable land law reform, but also that what Harbeson refers to as "the way in which Kenyans relate to each other and to their leaders" (2012:15) stands to be irretrievably damaged both by both the manner in which the debate on land law reform took place and by the substantive content of the new acts.

A detailed account of the land legislation's path through Parliament in the first quarter of 2012 is provided in the next section. This concluding stage of the law reform process provided citizens with little meaningful opportunity to express their views of the impending changes. Given the importance attached to land law reform by the Constitution and by citizens, the approval of the legislation was characterized by remarkably little debate or disagreement among legislators: neither the parliamentary committee charged with overseeing the new laws nor Members of Parliament more generally offered substantive comments or suggestions or debated the substance of the proposals. The land bills, far from reflecting the National Land Policy and giving flesh to the land and environment chapter of the Constitution, seemed to be almost entirely disconnected from those guiding documents. In spite of the constitutional and political implications of this problem, their passage through Parliament was relatively smooth. It was marked by consensus and to some degree passivity among members of the National Assembly. As such the new laws can be viewed as a deeply disappointing outcome of a decade's struggle over land policy.

The final sections of this paper discuss in detail three important issues that have arisen in the context of the legislation and the land reform effort and that merit further research. These are (1) the effect of constitutional deadlines for new legislation; (2) the way in which civil society groups responded to the new laws; and (3) the redistributive intentions and potential of the new legislation.

This article arises from my participation in a consortium on land research in Kenya coordinated by the Katiba (Constitution) Institute. The consortium came together in the first instance to try to ensure the draft bills were made available for consideration, to promote debate on the legislation, and to provide detailed commentary on the proposed bills. Its most important task was to review the extent to which the bills were in line with the provisions of the 2010 Constitution of Kenya.

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The Making of New Land Laws, 2012

Article 40 (1) of the Constitution of Kenya sets out the principles governing land policy. It provides that "Land in Kenya shall be held, used and managed in a manner that is equitable, efficient, productive and sustainable" and sets out the principles in accordance with which this should be accomplished. The goals include equitable access to land; security of land rights; sustainable and productive management of land resources; transparent and cost effective administration of land; and elimination of gender discrimination in law, customs, and practice related to land and property in land. Article 61 (1) on the classification of land states that "All land in Kenya belongs to the people of Kenya collectively as a nation, as communities and as individuals." Article 40 protects private property rights; 40 (6) states that "The rights under this article do not extend to any property that is found to have been unlawfully acquired."[3] Article 68 (a) provides that Parliament shall revise, consolidate, and rationalize existing land laws, and Article 68 (c) sets out the areas for future legislation, including legislation to prescribe minimum and maximum private land holding; to regulate the manner in which land may be converted from one category to another; to "protect, conserve and provide access to all public land"; to protect the dependents of deceased persons with interest in any land, including spouses in actual occupation; and to provide "for any other matter necessary" to effect the land and environment of the Constitution. The fifth schedule to Article 261 (1), which was included to specify the time frame within which certain key pieces of legislation must be enacted, requires that land legislation must be enacted by Parliament within eighteen months of the promulgation of the Constitution. As a consequence of this provision, the outer time limit for enacting legislation relating to land was February 27, 2012.[4]

On February 15 and 22, 2012, the Land Bill, the Land Registration Bill, and the National Land Commission Bill were given their first and second readings before the Kenyan National Assembly. In the run-up to these readings academics, commentators, and members of civil society wishing to attend consultative hearings struggled to find and read drafts of the bills. Documents were available for download from various Web sites, such as that of the Ministry of Lands and the Commission for the Implementation of the Constitution, but it was seldom clear that these were the latest and most reliable versions of the bills. They were finally released by the government printer on February 22, the very day that the Committee on Land and Natural Resources held its first consultative hearings with members of the public ("stakeholders"). Most of the groups and individuals who attended that session (which was held in Nairobi), including members of the Law Society of Kenya, the Kenya Human Rights Commission, the Kenya Institution of Surveyors, the Kenya Private Sector Alliance, and the Land Sector Non-State Actors Alliance, had not had the benefit of reading the newly published draft bills. Neither, indeed, had members of the committee themselves, as they openly admitted.[5]

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It was widely recognized and stated publicly by many groups at the meeting that the drafts of the bills failed to enact the land and environment chapter of the Constitution. A number of groups pointed out that as they stood, the bills would fail the test of constitutionality (see *The Standard* 2012a), a powerful claim in the wake of a recent audit by the Commission for the Implementation of the Constitution (CIC) (Republic of Kenya 2012) reporting that many of the new laws approved since the promulgation of the Constitution did not pass this test.[6] Yash Pal Ghai, a constitutional law scholar who was the chairperson of the Constitution of Kenya Review Commission 2004–5 and the founder of the Katiba (Constitution) Institute, told the Committee on Land and Natural Resources (hereafter the Land Committee) that in drafting the bills, the Ministry of Lands "had not been faithful to the National Land Policy 2009, nor to the Constitution of Kenya." The CIC, however, issued a statement that the bills "to the largest extent possible, conform to the Constitution."[7] Many individuals and groups who spoke at the committee hearing and in the media about the inadequacy of the drafts recommended that the bills be withdrawn altogether and that more time be given for the revision, consolidation, and rationalization of the laws. This suggestion was resisted by the Minister of Land, James Orengo, and the Chair of the Land Committee, Mutava Musyimi, on the grounds that the constitutional deadlines could not be breached. Instead, on March 9, 2012, the National Assembly voted by the needed two-thirds majority to delay the final vote on the constitutionally mandated legislation by a further sixty days.[8] The delay was supported by the Constitution Implementation Oversight Committee, the Legal Affairs Committee, and the Land Committee. According to the chairperson of the latter committee (quoted in Ghai 2012), the extra sixty days would allow wider consultation on the draft bills and promote the participatory processes required by the Constitution. The new deadline for enactment of the laws was now set at April 23, 2012.

Between March 19 and 23, members of the Land Committee, having split into small groups, toured Kenya's forty-seven counties. In order to ensure that members of the public received adequate information about the proposed legislation in advance, short "question and answer" pamphlets were drafted in English and Kiswahili by many groups and distributed around the country. Some civil society groups, such as Akiba Mashinani Trust (Slum Dwellers Federation of Kenya), also briefed the media, especially the FM radio stations most widely listened to by Kenyans. Others, such as Kituo cha Sheria and the Institute for Land, Governance and Development (ILGD), placed large spreads in the daily newspapers seeking to inform the public in narrative and cartoon form about the implications of the proposed land laws. Akiba Mashinani Trust used its extensive network of partners at the county level to monitor the extent of public engagement at the meetings. During the consultative tour, reports reached Nairobi that members of the committee were holding severely truncated meetings that allowed little scope for meaningful discussions with members of the public.

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Newspaper reports confirmed this. According to a report in *The Standard* (2012b),

> Concerns have been raised over the manner in which the committee led by Reverend Mutava Musyimi conducted public hearings on the Bills with stakeholders accusing the committee of ineptitude and complacency. "In one of the public hearings, I was shocked that the committee arrived without copies of the bills and proceeded to tell the villagers to download them from the website," says a senior members of a civil society organisation [who] cannot be named because he is still involved in the negotiations. "How do you say that in a village with no electricity[,] leave alone computers—it just shows the level of unpreparedness and casual manner in which the committee is handling the process," he says. In other places the committee barely spent 15 minutes, leaving the venue of the meeting even before all stakeholders arrived. "Such actions raise the question whether what the committee will present before parliament truly reflects the wishes of the public," he says.

It was also alleged that the chairperson of the parliamentary committee was using the tour as an opportunity to launch his campaign for the presidency in an election year (see Makathimo 2012).

Following its consultative tour of the country, the Land Committee convened on retreat in Naivasha to discuss its findings. The content of its deliberations are not known. A further weeklong "technical retreat" then took place in Mombasa. The committee members were joined by representatives from the Commission for the Implementation of the Constitution and the Law Reform Commission, and by all chairs of departmental parliamentary committees. At the public hearings in Nairobi on February 22 there had been a notable degree of consensus about the weaknesses of the bills, but despite the scale of the technical work that was called for, the Minister for Land, James Orengo, told the press on March 4 that the group was "almost through with the work" (*The Standard* 2012c). It was clear that the bills could not have been thoroughly redrafted in that time. According to the comments of the legal scholar Kithure Kindiki and others, testifying at a meeting of the Land Research Consortium with the chairman of the Law Reform Commission (March 21, 2012), the weakness of the bills included incoherent drafting; widespread borrowing of the provisions of the land laws of other African countries without due attention to their relevance or suitability for Kenya; the failure to identify misconduct that the land laws needed to address; inconsistencies between the National Land Policy and the Constitution; and the failure to specify in detail the functions of devolved land administration bodies. The committee had given those attending its hearings cause to believe that it recognized these critical problems and that the Mombasa meeting would result in a review and overhaul of the legislation. On the request of the committee, civil society groups, some working under the umbrella of the Kenya Land Non-State Actors Alliance and others independently, had submitted detailed material to it in

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the form of memoranda, notes, scorecards, and clause-by-clause commentaries. In its submission, the land research group Kituo cha Sheria, in which I participated, made detailed recommendations on the bills, and in a foreword written by Yash Pal Ghai, sought to make a broader point about "the enactment of laws to implement constitutional values and objectives":

> The practice so far has been to issue bills without any useful explanation of what policies are being implemented or how. The people are confronted with lengthy legal texts, for the most part badly drafted, often copied from laws of other countries, often with internal inconsistencies or inconsistencies with other legislation. This is particularly the case with land bills. . . . It is impossible for most Kenyans (including lawyers, other experts, ministers and parliamentarians) to understand the content of the bills (especially since, unlike the constitution, the drafting style is complex, convoluted, old fashioned). This effectively prevents the participation of the people in law making required by the constitution. (Kituo cha Sheria et al. 2012)

Groups attending the consultative meetings were told by the clerk to the Land Committee that a detailed matrix of all comments received had been formulated to assist the committee with its deliberations.

The proposed amendments to the land bills to be presented in Parliament became available on April 16, and it was immediately apparent that what was proposed was not the revision and redrafting widely called for but consisted rather of brief amendments to the three pieces of legislation. The bill had largely been unaltered. The most important changes that had been recommended, and over which there was little or no disagreement among various groups commenting on the land bills—such as the need explicitly to detail the role and powers of the proposed National Land Commission in relation to the Ministry of Lands—had been left unaddressed. Nonetheless, the three bills reached the committee stage in Parliament shortly thereafter and were approved on April 26, 2012. This legislation, therefore, was the result of an extremely flawed process, as is discussed in more detail below.

The Effects of the Deadline for Enactment

A striking feature of the months leading up to the approval of the new land laws was the setting of a specific time frame for the enactment of new legislation in order to rush or foreshorten debate. It is difficult to say to what extent this was a deliberate strategy and to what extent it came about by accident; as Hornsby reminds us, "Kenya's history suggests that there are no easy generalizations about the intertwined challenges of politics, development, security and national identity. Accident and design intermingle . . ." (2012:787). What is clear is that by invoking this deadline, space for detailed consideration of the proposals was limited. Those who argued for strict adherence to the constitutional deadline maintained that a failure to do so would risk the dissolution of Parliament by the attorney general. Those who

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did not think adherence to the time frame was necessary countered that the land bills were an important set of laws and that it was unlikely that Parliament would be dissolved for taking time to consider the proposed laws in detail (see Ghai 2012).

McAuslan (2013) has argued that the time specifications set out in the Constitution were entirely unrealistic. Eighteen months in which to formulate, debate, and enact the legislation was an untenable basis on which to start addressing long-standing land problems, as experiences in Tanzania, Uganda, and Mozambique have shown. McAuslan notes that this was a failure of the drafters of the Constitution, although the argument can be made for a lack of comprehensive research and careful assessment by those responsible for the process of land law reform, including the Ministry of Lands and the Land Committee. Because the deadlines led to rushed legislation and to a lack of participation and debate, it can be argued that they in fact assisted in the defeat of important principles of the Constitution. Although the CIC asserted, contrary to the views of many, that the land legislation passed the test of constitutionality, the process of debating the new land laws did not conform with the spirit of the Constitution with its emphasis on participation in lawmaking.

The idea of including deadlines for the enactment of legislation was that this would prevent legislative drift, as has occurred in other jurisdictions after the promulgation of new constitutions. In Kenya, however, the process of identifying time specifications for legislation mandated by the Constitution was ad hoc and far from comprehensive. Some legislation that was required was not included in the fifth schedule and the lists provided there are to some extent arbitrary. What, for example, is the distinction between legislation on community land, which is mandated within five years, and general land legislation, which had to be enacted within eighteen months? Or indeed between general legislation on land and the legislation on urban areas and cities (Article 184), for which one year was specified? Civil society groups lobbying for land reform, in their anxiety to keep up the momentum on land issues and to ensure that the promised land reform was forthcoming, may not have given enough consideration to the effect of the tight constitutional deadline of eighteen months. The consequence has been confused, contradictory, and rushed legislation. The failure to grasp the enormity of the task of land law reform also explains the National Assembly's extension of the deadline by a mere six weeks. Given that Article 261 (2) allows for an extension of up to one year of the deadlines set out in the fifth schedule, members of parliament could have allowed themselves a great deal more time to consider and debate the complex proposals before them.

The Technical Is Political

Why has there been such a disjuncture between the 2009 National Land Policy and the Constitution on the one hand, and the new land laws on the

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other? Why have the undoubted gains embedded in these two documents not resulted in concrete land laws of the sort expected? The achievement of the National Land Policy and the land chapter of the Constitution can be credited to civil society activists, who have long worked to expose and define Kenya's land problems. As Harbeson recognizes, it is in large part due to such efforts that the 2010 Constitution went beyond guaranteeing respect for basic civil and political rights to ensure that "socioeconomic and cultural requirements and roles within the Kenyan state be constitutionally recognized and upheld" (2012:16). Given the centrality of civil society to the land debate in Kenya, at least some of the explanation for the failure to translate these achievements into concrete laws must be sought in this sphere. In fact, many land-related civil society groups seemed unwilling to challenge the retreat into technical legal responses by some individuals and groups and to show how the process of drafting is itself a highly political and contested matter.

A constant refrain heard during the public meetings of the Land Committee was that the laws were highly technical and complex. This claim, as well as the imposed time limits, seemed to be deployed as strategies to foreshorten debate and to limit citizens' participation. This is not to deny that the land laws in Kenya as elsewhere are complex, but rather to show how objections to more open participation were framed in technical legal terms. McAuslan (2003:251) has noted this tendency elsewhere:

> To move from policy formulation to drafting laws is not, as some people assume, to move from a debate on policy to one on legal technicalities: the move changes the context of the debate but it remains, none the less, a policy debate. . . . The broad general policies set out in, for example, the Tanzanian government's NLP [National Land Policy] or the Namibian government's Land Reform: To Promote Equity and Fairness (1994) can be readily agreed by (almost) everyone. Who, after all, could be against equity and fairness? However, when these ideas are turned into precise powers, duties, limitations, restrictions, procedures, when it becomes clear who is to benefit and who is to lose out, then objections begin to be voiced. These are not, of course, objections on "policy" grounds but on technical legal grounds; a particular clause "wouldn't work"; a certain provision is "unnecessary"; another goes too far or is "inpracticable."

The response of civil society groups involved in land matters was not to challenge the claim that the technical nature of the proposed laws precluded participation, but rather to accept and to some extent reinforce this approach. Far from seeing the ways in which technical legal claims are themselves political, Kenyan civil society groups accepted their position as necessary mediators between the law and the people.

Distrust of bureaucratic power over land is widespread among citizens, as analyses of land grabbing in Kenya have shown (see Klopp 2001; Southall 2005). The allocation of public land has long been exercised by successive

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presidents and their land commissioners in pursuit of political patronage and personal accumulation (Harrington & Manji 2011). The new land laws were widely seen as an opportunity to redress Kenya's grossly skewed structure of land management and end predatory land practices by the state. But the achievement of this aim would have required civil society to wrest control of the debate from bureaucrats, to see the process of discussing proposed new land laws as a political and not simply a technical exercise, to resist the rush to legislate, and to make real the Constitution's promise of participation by the people in major policy changes.

Redistributive Land Law?

Despite what Boone (2012) called the "intensely redistributive potential . . . in Kenya's land regime" as envisaged by the National Land Policy and the Constitution, the new legislation is not redistributive of land in either its intention or its effect. There is a distinction between what may be called *deep* redistributive land reform—the aim of which is to change the nature and foundations of land ownership by redistributing land from the wealthy to the poor and landless—and *shallow* redistributive land reform—which is concerned solely with land administration and aims to wrest control over land from a centralized and corrupt state. In their intention, Kenya's new land laws are redistributive in the latter rather than the former sense: they challenge bureaucratic power rather than the structure of land holding. However, even the limited task of challenging centralized bureaucratic power has not been accomplished. First, however, it is important to explore why redistributive land reform has not been on the political agenda.

In general, the 1990s witnessed "a global intellectual climate" which "in effect encouraged or pushed countries into seeing that land law reform . . . was, if not essential, then certainly something that was an appropriate way forward to developing a better system of land management" (McAuslan 2013:60). I have argued elsewhere (Manji 2006) that in Tanzania, for example, the land law reforms of the late 1990s closely linked formalization of tenure with the promotion of the rule of law. In the process, however, the emphasis on the reform of land *law* foreclosed debates about redistribution. David Kennedy has argued that there is an unarticulated hope among scholars and law and development practitioners that working within a strictly legal framework can substitute for, and thus avoid confrontation with, "perplexing political and economic choices." The scholars have placed "law, legal institution building, the techniques of legal policy-making and implementation—the 'rule of law' broadly conceived—front and centre" (2003:17), and thus have excluded, rather than encouraged, contestation over economic and political choices.

Debates over land reform in Kenya can be said to have taken place within these strictly proscribed parameters. With an intellectual formation that predisposes them to embrace ideals of the rule of law and administrative justice over substantive redistribution, civil society groups proved ineffective in

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revealing the political import of the final stages of land law reform. The neoliberal thrust of global land policy supported by the World Bank and bilateral donors (see Manji 2006) means that deep redistributive land reform was not a real possibility: the land debate in Kenya was always about the redistribution of bureaucratic control over land, as well as transparency of decision making, rather than the redistribution of land *qua* land. Ironically, the incoherent land laws that have resulted threaten further to undermine the rule of law and to perpetuate Kenya's long-running land problems.

At the level of process, it is clear that the debate surrounding new land laws failed to engage citizens in any meaningful way. It was conducted largely out of public view, in closed workshops and consultative meetings that remained inaccessible to the public and almost entirely neglected by the media. What little public consultation took place occurred in the final moments of the process when the Land Committee toured the country to consult the public and when, arguably, very little substantive change to the draft bills could be achieved. This is not especially novel: lack of consultation has dogged most African countries that have passed new land laws in the last two decades (Manji 1998). What is different in the case of Kenya is that the country has embedded the principles of participation and procedural fairness in its 2010 Constitution, and citizens' hopes in this regard—both generally and in relation to land issues—are high.[9] Nonetheless, the new laws are located firmly within a neoliberal international context, which prioritizes the rule of law, administrative justice, and the formalization of tenure relations. Insofar as controlling Kenya's infamously predatory land bureaucracy might lead to better land outcomes for citizens (e.g., greater consultation before land is given to foreign investors, opportunities to challenge acquisition of public or community land, greater transparency at land registries, etc.), it is possible that the legislation does offer some means to challenge bad administrative practices and so perhaps retain citizens' access to land. But the new laws are not redistributive in any deep or positive way; they are not *transformative* of land relations and do not address long-standing grievances about Kenya's grossly unequal land distribution. This despite the fact that Kenya is surely a nation "where the foundations of the property regime itself are or should be in question" (van der Walt 2009, cited in McAuslan 2012:11).

The clearest example of the influence of global land policy on Kenya's new land laws is contained in sections 5 (i) (c) and 5 (iii) of the National Land Commission Act, which provides that the commission will "advise the national government on a comprehensive program for the registration of title in land throughout Kenya" and announces that it "shall ensure that all unregistered land is registered within ten years from the commencement of this Act," a central plank of World Bank land policy (World Bank 2003). Furthermore, both the Constitution and the Land Act defer discussion of potentially redistributive land measures. The Constitution stipulates at Article 68 (c) (i) that Parliament shall enact legislation to prescribe minimum and maximum land holding acreages in respect of private land.

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Section 159 (1) of the Land Act says that "Within one year of the coming into force of this Act, the Cabinet Secretary shall commission a scientific study to determine the economic viability of minimum and maximum acreages in respect of private land for various land zones in the country." By employing the words "economic feasibility," the legislation leaves open the possibility of developing arguments against maximum land size regulations on the grounds that ceilings on the size of landholdings would hinder development and growth. Given opposition to the setting of ceilings in global land policy (World Bank 2003), it is unlikely that the provision will be used to promote the redistribution of land in the future.

Conclusion: Land and the Constitution in the Future

Kenyans in the front line of opposition to authoritarianism who joined in the struggle for democratization viewed the promulgation of the Constitution in August 2010 as radical and transformative (see Murunga & Nasong'o 2007). In particular, the "promise" of the Constitution (Harbeson 2012:29) to address long-standing grievances over land—not least the centralized, corrupt, and inefficient system of land administration identified by a series of reports of inquiry (Republic of Kenya 2002, 2004) as well as "present and historical land injustices" (Article 67 [1] [e])—has meant that land promises and constitutional promises have become intricately intertwined in the minds of the people. According to this reading, the constitutionalizing of matters of land tenure has raised the stakes: disillusionment with the failure to resolve Kenya's land issues runs the risk of spilling over and being perceived as a failure of the Constitution itself.[10]

This article has argued that the new Kenyan land laws are neither redistributive nor transformational. They show marked continuity with the past in promoting land markets, providing for the individualization of land tenure, and embedding in law a presumption against customary tenure. The central concern of the land laws is bureaucratic power and its control. Yet the demand that political control over allocation and management of land be brought to an end is but one element of Kenya's land problems. The prospect of land reform was central to Kenya's hope-filled, though endlessly manipulated, constitutional reform process and the euphoria that surrounded the promulgation of the new Constitution. Harbeson (2012:15) has written of the 2009 National Land Policy and the Constitution that these "two signal achievements have inserted the interests of ordinary Kenyans into this constitutional moment in a way that elections and constitutional ratification alone would not have." This article argues that the National Land Policy and the Constitution have not culminated, as had been hoped, in equitable land laws. Nor has the level of participation in law-making envisaged by the Constitution been realized. There has been a disjuncture between a decade-long struggle to achieve equitable land policies and the resulting land laws. The implications for the future can be understood by reference to Harbeson's (2012:15) warning that "upon the outcomes of these

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deliberations may well hinge the future stability as well as the democratic quality of the Kenyan state."

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Notes

1. Debates about, and struggles over, land tenure and relations between the state and citizens, as well as among citizens themselves, have of course characterized Kenya since its birth. Examples include the Crown Land Ordinances of 1902, 1915, and 1926, which brought land under the direct control of the colonial governor; the Mau Mau insurgency and the Land Consolidation and Registration Programme which followed; the Swynnerton Plan; the East African Royal Commission (1953–55); and the Million Acre Scheme; as well as the postindependence Settlement Schemes. For detailed historical accounts see Harbeson (2012), especially section 3, "The Past as Prologue"; Boone (2012); Anderson (2005). Land has also been at the root of election violence: it has been identified as a critical factor in the elections in 1992, 1997, and 2007. See Throup and Hornsby (1998); Branch (2011).
2. Also see Okoth-Ogendo (1991); Berry (2004); Southall (2005); Kanyinga (2005); Throup and Hornsby (1998); Klopp (2008); Kanyinga (2009); Rutten and Owuor (2009); Alden Wily (2011); Boone (2012); McAuslan (2013).
3. This is important given Kenya's long history of land grabbing (see Klopp 2001; Manji 2012).
4. The cut-off date derives from the date when the Constitution of Kenya was promulgated, on August 27, 2010. Article 261 (1) states that "Parliament shall enact any legislation required by this Constitution to be required to be enacted to govern a particular matter within the period specified in the Fifth Schedule,

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commencing on the effective date." It should be noted that the following time specifications relating to the land and environment chapter are also provided in Article 261 (1): community land (Article 63) within five years; regulation of land use and property (Article 66), five years; agreements relating to natural resources (Article 71), five years; and legislation regarding environment (Article 72), four years. The consequences of setting out time specifications in the Constitution are discussed below.

5. I attended hearings of the Parliamentary Committee on Land and Natural Resources on February 16, 2012, February 22, 2012, and March 13, 2012. I received copies of the draft bills through the perseverance of a graduate assistant from the British Institute in Eastern Africa an hour before the first meeting.
6. The CIC was established under Section 5 of the 6th Schedule of the Constitution of Kenya. The functions of the CIC are to monitor, facilitate, coordinate, and oversee the development of the legislation and administrative procedures required to implement the Constitution. The Constitution and the Act require the CIC to submit quarterly reports to the President, the Prime Minister, and the Constitution Implementation Oversight Committee on the progress in the implementation of the Constitution.
7. The public statement was published by the CIC in response to the complaints: see *The Standard* (2012a).
8. Article 261 (2) stipulates that "the National Assembly may, by resolution supported by the votes of at least two-thirds of all the members . . . , extend the period prescribed in respect of any particular matter by clause (1), by a period not exceeding one year." It is understood that the draftsperson in charge of the legislation was a relatively inexperienced young lawyer based in the Ministry of Lands. Given little support and under pressure of time, this individual, not surprisingly, was not able to produce three workable drafts. The problems of lack of technical capacity in relation to new legislation mandated by the Constitution (in relation to land and more generally) is outside the scope of this article but needs to be considered. For a general discussion of the impact of inadequate resources being allocated to the implementation of new land laws, see McAuslan (2013).The most glaring example of this was the use of chunks of the 1998 Tanzania Land Act without sufficient attention to the Kenyan context. For example, in a section dealing with mortgages in the draft Kenyan Land Bill, the term "small charge" was imported from Tanzanian law without being defined and without due regard to its rather contentious history in Tanzania. For an account of the Tanzanian provisions on the protection of borrowers of small mortgages, see McAuslan (2003) and Manji (2006).
9. As Harbeson (2012) says, "How they are implemented is a fundamental test of process as well as outcomes."
10. A similar argument might also be made in relation to South Africa, where the redistributive promises enshrined in the Constitution have not been met. See Wegerif (2011). Brazil has also experienced resistance to the constitutional status of land, in particular those qualified to own property (see Valenta 2003).

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