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# KENYA PROMARA

LEGAL ANALYSIS OF KENYA'S LAND BILL  
AND LAND REGISTRATION BILL

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January 2012

### **DISCLAIMER**

The authors' views expressed in this publication do not necessarily reflect the views of the United States Agency for International Development or the United States Government.

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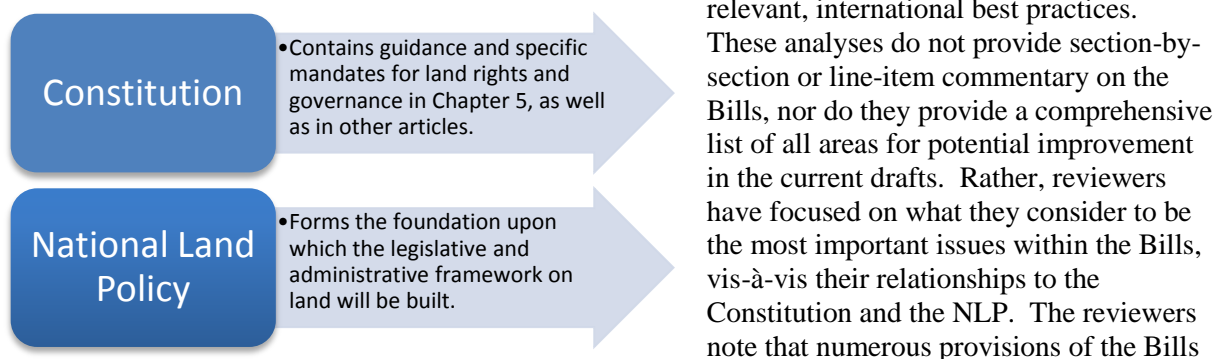
# ACRONYMS AND ABBREVIATIONS

ARD	TetraTech-ARD
CIC	Commission for the Implementation of the Constitution
CLB	Community Land Board
DLB	District Land Board
GoK	Government of the Republic of Kenya
LRTU	Land Reform Transformation Unit
MoL	Ministry of Lands
NLC	National Land Commission
NLP	National Land Policy
PRRG	Property Rights and Resource Governance Program
USAID	United States Agency for International Development

# EXECUTIVE SUMMARY

This legal review of the Land Bill (5 Dec. 2011) and the Land Registration Bill (12 Dec. 2011) has been conducted by a team of legal specialists of Landesa, a sub-contractor to the USAID ProMara project. The USAID ProMara project financed this review following discussions with the Ministry of Lands (MoL) and the Land Reform Transformation Unit, which requested the technical assistance of USAID/Kenya for the review of these two draft bills prior to parliamentary discussions. The ProMara project is a sub-component of the USAID Property Rights and Resource Governance Program (Contract No. EPP-I-00-06-00008-00). Landesa is a U.S.-based international NGO that partners with governments of developing countries to improve the legal framework governing land with the primary goal of improving land tenure security. Landesa specialists have land and property rights experience in over 40 nations throughout Africa, Asia, the former Soviet Union, Eastern Europe, the Mid-East, and Latin America.

The reviewers have analyzed the Land Bill and the Land Registration Bill from the perspective of key principles set forth in the Kenyan Constitution, the National Land Policy (NLP), and to the extent



either directly contravene the Constitution and NLP or do not adequately incorporate the mandates of these seminal documents.

In light of the changes that would be required to conform the Bills to the Constitution and the NLP, the Government of the Republic of Kenya (GoK) appears to be faced with the difficult choice of either adopting bills that contravene key principles articulated in these documents, or missing the constitutional deadline (February 2012) for adopting land legislation.

The Landesa reviewers respectfully submit these comments and suggestions in the spirit of assisting the MoL and the broader GoK in achieving their goal to reform the land sector, as outlined in the Constitution and the NLP. In this collaborative vein, reviewers offer the following comments and recommendations on both Bills.

## LAND BILL: SUMMARY OF ISSUES AND RECOMMENDATIONS

While the Land Bill contains many thorough, well-drafted sections, it also contains numerous provisions that directly contravene the letter and spirit of the Constitution and NLP, and/or do not adequately incorporate the mandates of these seminal documents. Given the short time frame under which the GoK must operate to meet the deadline for adopting land legislation, the reviewers have focused comments on those priority areas of the Land Bill they perceive to be most pressing given the goal of aligning the Land Bill with the Constitution, NLP, and/or international best practices.

A theme referenced throughout the Land Bill analysis is that it does not adequately incorporate the full range of rights and authorities that would be expected in national framework legislation on land.

While the Land Bill need not address every issue in detail – that can be left to supporting legislation – it offers the GoK the opportunity to address the NLP’s repeated call for the harmonization and clarification of the institutional framework governing land ownership, management, and administration.

The following legal commentary focuses on ten issues:

Issue 1: Land Policy/Tenure System Framework
<ul style="list-style-type: none"> <li>• <b>Summary:</b> The Land Bill omits fundamental information on the nature of land rights and tenure regimes, including the principles for land governance.</li> <li>• <b>Recommendation:</b> Add a preliminary section to the Bill that describes the types of land rights and tenure regimes in Kenya and a definitive list of land governance principles.</li> </ul>
Issue 2: Authority of Institutions Responsible for Land Governance
<ul style="list-style-type: none"> <li>• <b>Summary:</b> The powers and functions of land governance, administration, and management institutions are unclear and not consistent with the Constitution and the NLP.</li> <li>• <b>Recommendation:</b> Revise the Land Bill so that the powers and functions granted to national, regional, and local institutions responsible for land governance are: (1) consistent with the Constitution and the NLP; and (2) clear and unambiguous in their assignment of roles and responsibilities.</li> </ul>
Issue 3: Devolved Government
<ul style="list-style-type: none"> <li>• <b>Summary:</b> The Land Bill does not reflect the constitutional principle of devolved government.</li> <li>• <b>Recommendation:</b> To implement the principle of devolved government articulated in the Constitution and the NLP, the Land Bill could be modified to clearly delineate the powers and functions that will be devolved to county and community authorities.</li> </ul>
Issue 4: Community Land
<ul style="list-style-type: none"> <li>• <b>Summary:</b> The Land Bill does not make adequate reference to the framework and principles governing community lands.</li> <li>• <b>Recommendation:</b> Include community lands within the Land Bill. At the very least, include a governance and rights framework for community lands within the Land Bill, with clear reference to the forthcoming Community Land Act.</li> </ul>
Issue 5: Public Lands
<ul style="list-style-type: none"> <li>• <b>Summary:</b> The Land Bill neither clearly articulates the governance structure for public lands nor contains public participation and accountability provisions for the allocation, development, and disposal of public lands.</li> <li>• <b>Recommendation:</b> Clarifying the governance structure over public lands and incorporating public participation and accountability provisions into the sections discussing the allocation, use, development, and disposal of public lands will harmonize the Land Bill with the goals of the NLP.</li> </ul>

#### Issue 6: Compulsory Acquisition

- **Summary:** The Land Bill does not fully guarantee the rights and safeguards established in the Constitution and NLP related to compulsory acquisition.
- **Recommendation:** To ensure compliance with the Constitution and NLP, the Land Bill could: (1) clarify that spouses are interested parties for purposes of notice to the parties involved; opportunity for a hearing; and payment of compensation; (2) clarify that “reasonable notice” shall require personal delivery of both written notice (at a minimum in Kiswahili and English, preferably also in a language most likely to be understood by the intended recipient) and oral notice where possible. The Bill could allow for other methods of service (to non-corporate parties) only if the server can show that personal service is not possible; (3) set forth acceptable valuation methods in determining full and just compensation; (4) establish a fixed deadline for compensation in full by the state, prior to the time of occupation; and (5) clearly define “cases of urgency.”

#### Issue 7: Gender Equity

- **Summary:** The Land Bill does not sufficiently incorporate constitutional and NLP guarantees pertaining to gender-equitable land rights and governance.
- **Recommendations:** To ensure that the Constitution and NLP's mandates related to gender-equity are fulfilled, the Land Bill should: (1) incorporate the full list of land policy principles articulated in Article 60 of the Constitution; (2) add a section recognizing and defining co-ownership rights to land, including joint ownership rights; (3) incorporate gender equity provisions in sections on public lands, and in sections on private land rights that address transfers or contracts; and (4) include within its scope on community lands, clear instruction on the interplay between customary and formal law and institutions in land governance, including what recourse those living within customary regimes have to formal law.

#### Issue 8: Land Use Planning/Development Control

- **Summary:** The Land Bill does not articulate the governance framework and national priorities for development control and land use planning despite the emphasis placed on these issues in the NLP.
- **Recommendation:** Include provisions in the Land Bill that clearly articulate the governance framework for development control and land use planning and the key principles that should govern the development of national, regional, and community land use strategies.

#### Issue 9: Controlled Transactions

- **Summary:** The “controlled transactions” provisions of the Land Bill raise constitutional issues and may stifle land transactions, particularly among smallholders and the poor.
- **Recommendation:** Reconsider the use and/or reach of the local Land Control Boards in their capacity to void transactions because of apparent constitutional conflicts.

#### Issue 10: Environmental Easements

- **Summary:** The Land Bill does not allow for the creation of environmental easements, creating a conflict with easement provisions previously adopted into law by the GoK.
- **Recommendation:** Revise the section on easements in the Land Bill so that it is consistent with the Environmental Management and Co-ordination Act (EMCA) and allows for the creation of environmental easements that can be created voluntarily between parties and that can exist in perpetuity for conservation purposes.

## LAND REGISTRATION BILL: SUMMARY OF ISSUES AND RECOMMENDATIONS

The analysis of the Land Registration Bill discusses and provides recommendations on eleven key issues of concern as well as specific comments on more technical issues of note. The Bill sets forth a framework for the registration of private interests in land that is, for the most part, well considered



and, to some extent, reflects language in the Registered Land Act (Cap 300), which is in effect until a Registration Law repeals it. Although the Registration Bill contains many thorough, well-drafted sections, when viewed in light of the new Constitution and the NLP, some sections of the Bill either directly contravene the Constitution and NLP or do not adequately incorporate the mandates of these seminal documents, including those related to the devolution of government. Other sections would benefit from greater clarity so as to ensure achievement of constitutional and policy objectives in the delivery of land administration services. Given the impending constitutional deadline of 27 February 2012, this analysis focuses on what appear to the reviewers as priority issues.

The following legal commentary focuses on eleven issues:

<b>Issue 1: Guiding Principles for Land Administration</b>
<ul style="list-style-type: none"> <li>• <b>Summary:</b> The Registration Bill omits reference to the constitutional and policy principles governing land registration.</li> <li>• <b>Recommendation:</b> Add a preliminary section to the Bill that reflects and reinforces those principles.</li> </ul>
<b>Issue 2: National Land Commission's Role in Delivering Land Registration Services</b>
<ul style="list-style-type: none"> <li>• <b>Summary:</b> The Registration Bill makes limited reference to the role of the National Land Commission (NLC) in delivering land registration services, despite the constitutional and policy mandates requiring significant NLC engagement.</li> <li>• <b>Recommendation:</b> Recognize the NLC's mandated roles related to land registration.</li> </ul>
<b>Issue 3: Devolved Land Administration</b>
<ul style="list-style-type: none"> <li>• <b>Summary:</b> The Land Registration Bill does not reflect the constitutional and policy principles and mandate of devolved government.</li> <li>• <b>Recommendation:</b> Recognize the devolution of authority for land registration, including recognition of the NLC's authorities and decentralized structure.</li> </ul>
<b>Issue 4: Scope of Land Registration Bill</b>
<ul style="list-style-type: none"> <li>• <b>Summary:</b> The Registration Bill limits its scope to only certain community lands rather than all community land, makes no provision for the unique circumstances related to the registration of rights to public and community lands, and includes extensive substantive law governing particular property interests, legislating well beyond registration-related subjects.</li> <li>• <b>Recommendation:</b> (1) Broaden the scope of the Bill to apply to all community land; (2) address the particular needs related to the registration of community and public lands; and (3) address only registration-related subjects; shift substantive land law to the Land Bill.</li> </ul>
<b>Issue 5: Registration of Public Lands</b>
<ul style="list-style-type: none"> <li>• <b>Summary:</b> The Registration Bill requires the Registrar to register all public lands in the name of the NLC.</li> <li>• <b>Recommendation:</b> Revise registration requirement to be consistent with the Constitution, which identifies either counties or the national government as holding specific types of public land.</li> </ul>
<b>Issue 6: Registration of Community Lands</b>
<ul style="list-style-type: none"> <li>• <b>Summary:</b> The Registration Bill requires the Registrar to register all community land and trust land in the name of the NLC, with a few exceptions.</li> <li>• <b>Recommendation:</b> Revise the registration requirement to be consistent with the Constitution, which identifies either communities or counties to hold community lands.</li> </ul>

#### Issue 7: Transition of Registered Documents from Repealed Acts to the Registration Bill

- **Summary:** Because the Registration Bill repeals several land acts, the Bill provides for the transition of documents registered under those acts to be valid under the Land Registration Bill. But without explanation, the Bill requires the Registrar to “examine” documents registered under only certain acts while requiring no such examination for documents registered under other acts.
- **Recommendation:** Provide principled reasons, processes, and protections for the transition of all existing registered documents under repealed acts to the Land Registration Bill.

#### Issue 8: Gender Equity in Land Matters

- **Summary:** The Registration Bill advances the constitutional objective of gender equity in land matters but specific terms and provisions need further clarification to ensure full realization of rights.
- **Recommendations:** (a) Define the term “spouse,” using the definition from the Marriage Bill; (b) clarify that persons able to lodge cautions include persons holding unregistered rights; (c) clarify consequences of spousal non-consent; and (d) clarify the registration process for registering co-ownership rights based on spousal contribution of labor.

#### Issue 9: Public Access to the Land Registry

- **Summary:** The Registration Bill includes provisions granting discretion to the Registrar that could result in violation of Kenyans' constitutional rights to easy access to the land registry.
- **Recommendation:** Revise certain provisions to ensure public access to the registry.

#### Issue 10: Registration Implications of Conversion of Foreign Freehold Interests to Leaseholds

- **Summary:** The Registration Bill does not address the registration-related implications of the Constitution's conversion of non-citizen freeholds to leaseholds.
- **Recommendation:** Address registration-related implications of conversion of non-citizen freehold interests to leaseholds.

#### Issue 11: Environmental Easement as an Overriding Interest

- **Summary:** Environmental easements are included within the list of “overriding interests,” to which all registered land is subject regardless of registration of the encumbrance. Environmental easements should not rise to the level of an overriding interest because, other than through disclosure by the owner, there is virtually no other way for a potential buyer to be on notice that the land is subject to that easement.
- **Recommendation:** Omit environmental easement as an “overriding interest.”

In addition to these key issues, the last part of the Registration Bill analysis briefly discusses specific sections of the Registration Bill that, if revised, would improve implementation of the Bill. Examples of comments under that part are below.

#### Additional Comments and Suggestions on Land Registration Bill Provisions

- Add definitions for the following terms: “charge,” “community land,” “person,” and “spouse” as well as clarify definitions of “caution” and “instrument,” among others.
- Omit sections that would allow an unsecured creditor to void a transfer of land without having previously registered a charge or a caution on that land.
- Withhold discretion from the Registrar to require additional information for the register, thereby limiting information that is essential for the functioning of the system.
- Add a requirement for prominently posting in the registration office, within view of the public, time limits by which the Registrar must register instruments presented for registration, and a commitment to refund fees in case time limits are not observed.
- Clarify that dealings in land of a deceased person by his or her personal representative or beneficiary are subject to both registered and unregistered rights, including those of the surviving spouse(s).
- Ensure that provisions related to a co-tenant’s consent to transfer an interest in land require that such consent be in writing.

# 1.0 INTRODUCTION

This legal review of the Land Bill (5 Dec. 2011) and the Land Registration Bill (12 Dec. 2011) has been conducted by a team of legal specialists of Landesa, a sub-contractor to the USAID ProMara project. The USAID ProMara project financed this review following discussions with the Ministry of Lands (MoL) and the Land Reform Transformation Unit, which requested the technical assistance of USAID/Kenya for the review of these two draft bills prior to parliamentary discussions. The ProMara project is a sub-component of the USAID Property Rights and Resource Governance Program (Contract No. EPP-I-00-06-00008-00). Landesa is a U.S.-based international NGO that partners with governments of developing countries to improve the legal framework governing land with the primary goal of improving land tenure security. Landesa specialists have land and property rights experience in over 40 nations throughout Africa, Asia, the former Soviet Union, Eastern Europe, the Mid-East, and Latin America.

The reviewers have analyzed the Land Bill and the Land Registration Bill from the perspective of key principles set forth in the Kenyan Constitution,<sup>1</sup> the National Land Policy<sup>2</sup> (NLP) and, to the extent relevant, international best practices.<sup>3</sup> These analyses do not provide section-by-section or line-item commentary on the Bills, nor do they provide a comprehensive list of all areas for potential improvement in the current drafts. Rather, reviewers have focused on what they consider to be the most important issues within the Bills, vis-à-vis their relationships to the Constitution and NLP. The reviewers note that numerous provisions of the Bills either directly contravene the Constitution and NLP or do not adequately incorporate the mandates of these seminal documents.

In light of the changes that would be required to conform the Bills to the Constitution and the NLP, the GoK appears to be faced with the difficult choice of either adopting bills that contravene key principles articulated in these documents, or missing the constitutional deadline (February 2012) for adopting land legislation.

The Landesa reviewers respectfully submit these comments and suggestions in the spirit of assisting the MoL and the broader GoK in achieving their goal to reform the land sector, as outlined in the Constitution and the NLP. In this collaborative vein, reviewers offer the following comments and recommendations on both Bills.

## **The Constitution and National Land Policy**

Political and legal authority for the Land Bill and Land Registration Bill lies in the Constitution and the NLP, which, operating together, establish a new regime for land governance in Kenya based on equitable access to land, security of land rights, and other founding principles contained in Article 60 of the Constitution. The Constitution provides guidance and specific mandates for land rights and

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<sup>1</sup> The Constitution of Kenya, 2010.

<sup>2</sup> Rep. of Kenya, Ministry of Lands, Sessional Paper No. 3 of 2009 on National Land Policy (Aug. 2009).

<sup>3</sup> The Constitution at Article 2(5) incorporates into the law of Kenya “the general rules of international law.” Given time restraints, reviewers were not able to conduct an exhaustive inquiry into the two Bills’ consistency with relevant international conventions and other legal instruments. Limited review, however, confirms that the Constitution and NLP align closely with international law concerning land governance. The reviewers’ operating assumption is therefore that, in bringing the Bills into compliance with these two Kenyan documents, the GoK would also be establishing a framework for institutional land governance that complies with the relevant corpus of international jurisprudence on this subject.

governance in Chapter 5, as well as in a number of other articles, such as Article 40, which sets forth the right of any Kenyan to acquire and own property.

In promulgating the NLP, the Ministry of Lands intended to “form the foundation upon which the administrative and legislative framework [on land] will be built.” (NLP para. vii.) The Ministry further stated, “This is the framework that will drive the critically required land reforms” in Kenya (NLP para. vii). As such, the NLP provides thorough, detailed guidance for land legislation, including a great number of provisions describing what exactly should be contained in a “Land Act.”

It is thus these two founding documents, the Constitution and the NLP, that provide authoritative guidance in analyzing the Land Bill and Land Registration Bill.

In light of such intention, this review applies the basic rule of statutory construction that two laws shall be interpreted together so as to give effect to both, to the extent possible. That is, the Constitution and NLP are interpreted here so as to achieve the mandates and requirements of each, to the extent possible. Only in the event of a direct conflict between the two texts shall NLP provisions be disregarded.

## 2.0 ANALYSIS OF KENYA'S LAND BILL (DRAFT 5 DECEMBER 2011)

This analysis provides comments on and recommendations for Kenya's Land Bill (5 Dec. 2011) (Land Bill or Bill). While the Land Bill contains many thorough, well-drafted sections,<sup>4</sup> it also contains numerous provisions that directly contravene the letter and spirit of the Constitution and NLP, and/or do not adequately incorporate the mandates of these seminal documents. Given the short time frame under which the GoK must operate to meet the deadline for adopting land legislation, the reviewers have focused comments on those priority areas of the Land Bill they perceive to be most pressing given the goal of aligning the Land Bill with the Constitution, NLP, and/or international best practices.

A theme referenced throughout the Land Bill analysis is that it does not adequately incorporate the full range of rights and authorities that would be expected in national framework legislation on land. While the Land Bill need not address every issue in detail – that is left to supporting legislation<sup>5</sup> – it offers the GoK the opportunity to address the NLP's repeated call for the harmonization and clarification of the institutional framework governing land ownership, management, and administration.

The following legal commentary focuses on ten issues:

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|--|
| 1) <b>Land Policy/Tenure System Framework.</b> The Land Bill omits fundamental information on the nature of land rights and tenure regimes, including the principles for land governance.  |
| 2) <b>Authority of Institutions Responsible for Land Governance.</b> The powers and functions of land governance, administration, and management institutions are unclear and not consistent with the Constitution and the NLP.            |
| 3) <b>Devolved Government.</b> The Land Bill does not reflect the constitutional principle of devolved government.   |
| 4) <b>Community Lands.</b> The Land Bill does not make adequate reference to the framework and principles governing Community Lands.   |
| 5) <b>Public Lands.</b> The Land Bill neither clearly articulates the governance structure for public lands nor contains public participation and accountability provisions for the allocation, development, and disposal of public lands. |
| 6) <b>Compulsory Acquisition.</b> The Land Bill does not fully guarantee the rights and safeguards established in the Constitution and NLP related to compulsory acquisition.  |

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<sup>4</sup> For example, the transactional issues, specifically the sections on leases and charges, are addressed in a detailed and thorough manner, reflecting the voluminous time and energy that undoubtedly went into drafting the Bill.

<sup>5</sup> Including, but not limited to, the Land Registration Bill, the Community Lands Bill, the Matrimonial Property Bill, the National Lands Commission Bill, the Devolved Government Bill, and the Succession Act. Landesa has conducted an analysis of the Land Registration Bill and the Matrimonial Property Bill, and reviewers understand that USAID has engaged other consultants to analyze the Community Lands Bill.

7) <b>Gender Equity.</b> The Land Bill does not sufficiently incorporate constitutional and NLP guarantees pertaining to gender-equitable land rights and governance.
8) <b>Land Use Planning/Development Control.</b> The Land Bill does not articulate the governance framework and national priorities for development control and land use planning despite the emphasis placed on these issues in the NLP.
9) <b>Controlled Transactions.</b> The “controlled transactions” provisions raise constitutional issues and may stifle land transactions, particularly among smallholders and the poor.
10) <b>Environmental Easements.</b> The Bill does not allow for the creation of environmental easements, creating a conflict with easement provisions previously adopted into law by the GoK.

## COMMENTS AND RECOMMENDATIONS BY ISSUE AREA

### Issue 1: Land Policy/Tenure System Framework

- **Summary:** The Land Bill omits fundamental information on the nature of land rights and tenure regimes, including the principles for land governance.
- **Recommendation:** Add a preliminary section to the Bill that describes the types of land rights and tenure regimes in Kenya and a definitive list of land governance principles.

As the framework legislation governing land in Kenya, it is important for the Land Bill to thoroughly describe the nature of land rights and tenure regimes available in Kenya, and to set forth a definitive list of land governance principles. Adding such a section to the Land Bill would provide a stronger foundation upon which the remainder of the Bill could be built and thereby set the stage for improved land governance following passage of the Bill.

At a minimum, this section might describe the types of land rights and tenure regimes in Kenya, and where, how, and in whom land rights vest. This section could incorporate language on fundamental land rights from the Constitution, the NLP, and other land-related legislative drafts, such as the Land Registration Bill. For example, the Bill could adopt the Constitutional definition of the term “land.” (Const. art. 260.) The Constitution also defines public, private, and community lands, and describes the fundamental nature of rights to such lands (see Const. art 62, 63, and 64, respectively). The NLP describes the rights of ownership, freehold tenure, and leasehold tenure in Parts 3.3.3, 3.3.3.1, and 3.3.3.2, respectively. This type of foundational information is missing from the Land Bill.

This preliminary section ought to encompass all land-related rights referenced directly in the Constitution and the NLP, but that receives little if any mention in the Land Bill. Examples include customary rights, co-ownership rights (including joint ownership rights), pastoral rights, and land use rights pertaining to spouses. Defining primary categories and types of land rights as broadly as possible will allow for the future development of important secondary rights, such as conservation easements.

Although Section 3 of the Land Bill sets forth a list of guiding principles for land administration and management, this list is incongruous with the principles set forth in both the Constitution and the NLP. The Bill’s list omits the majority of land policy principles contained in Article 60(1) of the Constitution, including subsections: (a) equitable access to land; (b) security of land rights; (d) transparent and cost effective administration of land; (e) sound conservation and protection of

ecologically sensitive areas; (f) elimination of gender discrimination in law, customs, and practices related to land and property in land; and (g) encouragement of communities to settle land disputes through recognized local community initiatives consistent with this Constitution. Section 3 of the Land Bill ought to be replaced by the full list of land policy principles set forth in Article 60(1) of the Constitution.

Also, the definition section could be bolstered in order to further clarify the nature of land rights and responsibilities under the Bill; the section as currently drafted does not define a number of essential terms, such as: “community,” “fee simple,” and “matrimonial home.”

## Issue 2: Authority of Institutions Responsible for Land Governance

- **Summary:** The powers and functions of land governance, administration, and management institutions are unclear and not consistent with the Constitution and the NLP.
- **Recommendation:** The Land Bill could be improved by providing clear and unambiguous information on the roles, responsibilities, and functions that the numerous land administration and management institutions are intended to serve, and ensuring that the authorities are consistent with the Constitution and the NLP.

Like most national land framework legislation, the Land Bill endeavors to identify the powers and functions of the state institutions responsible for implementing land policy. In doing so, however, the Land Bill often contravenes both the Constitution and the NLP by assigning powers and functions to the Cabinet Secretary for land matters that have been expressly reserved for other state institutions. As a result, the Bill does not appear to embody the constitutional mandates and policy guidance for land administration and management.

The new Constitution and the NLP are fairly explicit in identifying the institutional framework for land management and administration. The Constitution establishes a National Land Commission (NLC) and grants it, among other powers, the authority to manage public lands on behalf of the national and county governments. The NLP further instructs that the NLC is one of the “three key land management institutions,” with the other two being regional and local entities, District Land Boards (DLBs)<sup>6</sup> and Community Land Boards (CLBs), respectively. Included among the powers that the NLP expressly grants to the NLC are: holding title to and management of public lands on behalf of the state, establishment and maintenance of a register of all public, private, and community land, exercising the powers of compulsory acquisition and development control on behalf of the State and local authorities, and levying, collecting, and managing all land tax revenues except rates collected by local authorities (NLP para. 232 *et seq.*).

In contrast to the broad powers that the NLP grants to the NLC, the Ministry in Charge of Lands is viewed as a “supporting” agency with respect to land policy, and charged with undertaking to “devolve land administration and management functions to the NLC, DLBs, and CLBs.” (NLP para. 252.) It is certainly the case that the Ministry retains important powers and functions under the NLP, including “giving policy direction to the NLC” and “making policies on land and coordinating their implementation.” (NLP para. 252.) While in some cases these authorities overlap with those of the NLC and the devolved agencies, in other cases the Constitution and NLP have explicitly separated the

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<sup>6</sup> With the Constitutional transition from District-level governance to County-level governance, the functions of the DLBs would also most likely be transferred to the County level.



functions and authorities of the NLC, DLBs, and CLBs from those of the Ministry. As currently drafted, the Land Bill does not reflect this reconfiguration of the powers and authorities of land governance institutions.<sup>7</sup> Table 1 below highlights some of these discrepancies:

<b>Power/Function</b>	<b>Institution Granted Authority Under Constitution or NLP</b>	<b>Institution Granted Authority Under Land Bill</b>
<b>Compulsory acquisition (CA)</b>	NLC (NLP para. 233(d))	Cabinet Secretary (sec. 6(3)(b), secs. 106-137, sec. 173)
<b>Development control</b>	NLC (NLP para. 233(d))	Cabinet Secretary (secs. 6(1)(i) & 6(3)(c))
<b>Ascertain and register land rights</b>	NLC (NLP para. 233(b))	Cabinet Secretary (sec. 6(1)(f))
<b>Management of public lands</b>	NLC (Const. art. 67(2)(a))	Cabinet Secretary (sec. 6(1)(j)) (granted power to regulate benefit sharing and management of land-based resources on public lands)
<b>Prescription of minimum and maximum land holdings</b>	Required to be enacted in legislation (Const. art. 68(c)(i))	Cabinet Secretary (sec. 189) (CS to prescribe rules on minimum and maximum acreages)
<b>Regulation of the manner in which land may be converted from one category to another</b>	Required to be enacted in legislation (Const. art. 68(c)(ii))	Cabinet Secretary (sec. 6(1)(h))

In addition to the granting of specific authorities to the Cabinet Secretary that appear to pertain to the NLC and sub-national agencies, the Bill also provides for ambiguous and/or overlapping powers and functions between land governance institutions. Examples include:

- Section 5 broadly ascribes the power to manage public lands to the NLC. At the same time, however, Section 6 grants numerous powers to the Cabinet Secretary that ostensibly are “management” functions specific to public land, including: (a) regulating the manner in which public lands may be converted from one category to another, (b) regulating the use and development of land, (c) regulating benefit sharing and management of land-based resources, and (d) formulating general principles of land planning and coordinating by the counties. This apparent overlap in authority creates confusion around which institution is responsible for key aspects of management of public lands.
- Sections 5 and 6, which are included under a part entitled “Management of Public Lands,” describe an expansive list of powers and functions assigned to the NLC and the Cabinet Secretary. Some of the powers and functions identified, however, are clearly applicable to lands other than public lands. This creates confusion over what powers and functions these institutions have over private and community lands.

This lack of clarity in the law will cause a chilling effect on effective and efficient implementation of the law. Government actors will lack the clarity needed to carry out their roles and responsibilities

<sup>7</sup> The reviewers recognize that independent legislation on the National Land Commission is being drafted. Nevertheless, for purposes of harmonizing institutional authorities, it is imperative that the framework land legislation (the Land Bill) clearly lay out the powers and functions of the NLC vis-à-vis other state institutions.

under the law, in particular the sub-national land administration and management institutions. Likewise, citizen compliance and confidence in the law will be jeopardized without some certainty around the framework governing the laws implementation.

### Issue 3: Devolved Government

- **Summary:** The Land Bill does not reflect the constitutional principle of devolved government.
- **Recommendation:** To implement the principle of devolved government articulated in the Constitution and the NLP, the Land Bill could be modified to clearly delineate the powers and functions that will be devolved to county and community authorities.

A fundamental principle articulated in the new Constitution that has critical implications for the administration and management of land is the introduction of devolved government. The Constitution identifies devolution of power as a national value that should guide governance, and further identifies the decentralization of functions and powers of State organs as an objective of devolved government (Const. arts. 10 & 174). To that end, the Constitution grants counties the authority to hold certain public lands and community lands in trust (Const. arts. 62(2) & 63(3)). Despite the constitutional emphasis on devolved government, however, the Land Bill does not reflect this priority, but rather confirms centralization of authority over land matters.<sup>8</sup>

The NLP also calls for the national government to “ensure devolution of land administration and management” functions (NLP para. 229). To facilitate devolution, the NLP provides that one of the primary functions of the Ministry of Lands is to “undertake to devolve land administration and management functions” to regional and local entities (NLP para. 252). Towards this end, the NLP endorses a land governance framework that would grant important land administration powers and functions to subnational entities at the regional and local level. Under the NLP, District Land Offices (DLOs), District Land Boards (DLBs), and Community Land Boards (CLBs) would be created to administer public and private lands on behalf of the NLC. At the regional level, these sub-national entities would be responsible for “administering public and private land on behalf of the NLC” and would act as “agents of the NLC.” (NLP para. 241.) Likewise, at the local level, CLBs would constitute the “third tier of devolved land administration and management” responsible for administration and management of community lands (NLP paras. 247, 250). With the constitutional transition from district-level governance to county-level governance, the DLOs and DLBs would logically be county-level entities. Finally, lest the community-level land functions of the NLC be forgotten, there is nothing in the Constitution or NLP that prohibits the statutory creation (via the Land Bill) of community-level land boards.

Despite the clear directives in the Constitution and the NLP to devolve land administration and management functions to sub-national entities, the Land Bill provides little to no direction as to how devolution will occur, or more importantly, the specific powers and authorities assigned to county or community land management institutions. For example, in Section 5, which assigns powers and authorities to the NLC, there is no mention of the delegation of some of its functions to counties and

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<sup>8</sup> The reviewers recognize that the GoK contemplates adopting independent legislation on devolved government. Nevertheless, for purposes of harmonizing institutional authorities and developing a clear land governance framework, it is imperative that the Land Bill clearly lay out the powers and functions of county and community institutions with respect to land.

communities. Yet presumably, under the framework created by the NLP, many of the functions of the NLC will be carried out by sub-national entities at the county level. Likewise, the Cabinet Secretary is charged with undertaking “to devolve land administration and management functions” to regional and local entities, yet the only directive provided in the Land Bill on this point is granting the Cabinet Secretary the authority to formulate “general principles of land planning and coordinating by the Counties.” (Land Bill sec. 6(1)(k).) While the Bill contains the occasional reference to counties, it does not advance the constitutional prerogative of devolving land administration and management from the central government.

The success of devolution depends on the design of a legislative framework that clearly delineates the functions of each level of government. This is especially true given that the NLP specifically calls for the harmonization and clarification of the institutional framework governing land ownership, management, and administration. Absent this, the centralization of the land sector will continue. The Land Bill, as the framework legislation governing land administration and management, is the logical and necessary place for articulating this new framework.

#### Issue 4: Community Land

- **Summary:** The Land Bill does not make adequate reference to the framework and principles governing Community Lands.
- **Recommendations:** Include community lands within the Land Bill. At the very least, include a governance and rights framework for community lands within the Land Bill, with clear reference to the forthcoming Community Land Act.

The Constitution sets forth three classifications of land: public, community, and private (Const. art. 61(2)). The NLP indicates clearly that the national “Land Act” shall address “all categories of land.” (NLP at sec. 58.) The only indication in either the NLP or the Constitution that community lands should be addressed in separate legislation comes in Schedule 5 of the Constitution, which lists “legislation on land” on an 18-month implementation track, and “community land” on a 5-year track. However, given the Constitutional directive that Parliament “revise, consolidate and rationalise existing land laws” (Const. art. 68(a)), and the NLP’s support for consolidating legislation pertaining to all categories of land into one “Land Act,” a strong case can be made for an institutional directive to include community lands within the scope of the Land Bill.

The current Land Bill does not address community lands in any systematic way, however, nor does it reference a Community Lands Act.<sup>9</sup> The most significant reference to community lands is in Section 3(c), stating that “This Act shall apply to...such parts of community land as the Cabinet Secretary shall specify.” The Bill does not give further detail about what this means, dropping mention of community land almost completely from this point.

Separating community land legislation from public and private land legislation in Kenya is problematic for several reasons.

First, postponing inclusion of provisions governing community lands has the likely *unintended* effect of preventing continued use of and transactions in community lands. Per the Constitution, Article

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<sup>9</sup> Again, the reviewers recognize that independent legislation on Community Lands is contemplated. Nevertheless, for purposes of harmonizing institutional authorities and developing a clear land governance framework, and for the reasons identified in this section, it is imperative that the Land Bill include a governance and rights framework for community lands.

63(3), community lands may not be “disposed of or otherwise used” outside of “legislation specifying the nature and extent of the rights of members of each community individually and collectively.” Thus according to the Constitution, community land rights may not be exercised – even in use – until Parliament enacts legislation governing such rights.

Second, legislating for public and private land allocations and transactions, without doing so for community lands at the same time, creates the risk that yet-undefined community land rights will not withstand pressure from recognized and more clearly defined public and private land rights. This danger increases with the amount of time between the passage of the Land Bill and future potential legislation on community land rights.

The Land Bill’s provisions on unlawful occupation of public land (Section 185) underscore the importance of defining and acknowledging community land rights at the same time that public land rights are so defined and acknowledged. If this section is enacted before communities have the chance to vet their land claims or register their rights under appropriate legislation, it could be used to indict entire communities enjoying traditional use of certain lands.

Third, the Constitution mandates that Parliament “regulate the manner in which any land may be converted from one category to another.” (Art. 68(c)(ii).) The Land Bill currently does not provide comprehensive direction for such conversion. Including a clear framework for conversion in the Land Bill will help to avoid loopholes and contradictions, and will help to protect community lands against diminution vis-à-vis other tenure regimes.

Fourth, separating community land from public and private lands in legislation obfuscates land management and governance responsibilities, especially at the local level. For example, the Constitution vests certain types of public land, as well as unregistered community land, in the county government (Const. art. 62(1) & art. 63(3), respectively). Thus two important categories of land rights—public and community—vest in the county government. However county authority over governance matters for each category may be quite different, as public lands are to be held by the county but administered by the National Land Commission, which is not the case with community lands,<sup>10</sup> and community lands are to be held in trust specifically for the benefit of local communities. To avoid confusion and mismanagement, it will be important to spell out clearly the institutional authority over each category of land right vis-à-vis the others, at both the national and county level. The Land Bill is the logical place to do this.

#### Issue 5: Public Lands

- **Summary:** The Land Bill neither clearly articulates the governance structure for public lands nor contains public participation and accountability provisions for the allocation, development, and disposal of public lands.
- **Recommendation:** To harmonize the Land Bill with the goals of the NLP, clarify the governance structure over public lands and incorporate public participation and accountability provisions into the sections discussing the allocation, use, development, and disposal of public lands.

<sup>10</sup> Note that the Land Bill as currently drafted does not address issues of county-level governance for either type of land, as discussed *infra*.

The Constitution envisions significant reforms to the manner in which public lands are managed and administered. Chief among these reforms is that public lands shall be held by the national and county governments in trust for the people of Kenya and shall be managed on the peoples' behalf by the newly created NLC. While the Land Bill is to be commended for transferring many public land management functions to the newly created NLC, the Bill does not clearly articulate key provisions related to the governance of public lands and does not include public participation and accountability provisions that could jeopardize the successful implementation of the reforms envisioned by the Constitution and the NLP. These issues include:

**1. The need to clarify the governance framework for public lands.**

- The Bill does not clarify: (1) the definition of public lands, (2) that public lands are to be held by counties and the national government in trust for the people, (3) that the NLC is to manage all matters related to public lands, (4) the values and principles guiding the management and use of public lands, (5) the role that counties or other local institutions play in managing public lands, and (6) the role and authority of natural resource and conservation agencies within the Kenyan government, such as the Kenyan Forest Service (KFS) and the Kenyan Wildlife Service (KWS), in continuing to manage certain public lands. In particular, the Land Bill should clarify and harmonize the authority and management responsibilities of the KFS and KWS contemplated for these agencies under the Forests Bill and the Wildlife Bill.
- As noted above, the delineation of powers and functions between the NLC and the Cabinet Secretary is unclear. Given that the NLC is responsible for the management of public lands under the Constitution and the NLP, it is unclear why Section 6 identifying the powers and functions of the Cabinet Secretary is included in the public lands provisions.
- The list of express powers granted to the NLC in the Land Bill matches neither the list in the Constitution nor the list identified in Paragraph 233 of the NLP.

**2. The need to incorporate public participation and accountability provisions into the Land Bill.** Public participation in decisions involving the disposal and use of public lands is a hallmark of land policy in most democratic societies. Likewise, the NLP recognizes the importance of the participation of the citizenry in the decision making process on land matters and requires that participation and accountability mechanisms be established for the allocation, development, and disposal of public lands (NLP para. 61(f).) Additional public participation, accountability, and transparency provisions are necessary to harmonize the bill with the ideals embraced in the new Constitution and NLP. Examples of provisions that could be included in the Bill in order to address the public participation and accountability requirements of the NLP include:

- A description of or mechanism for public involvement in Commission decisions on the allocation of public lands, including public notice and opportunity for comments prior to allocation.
- A description of or mechanism for public involvement in Commission decisions on the use of public lands pursuant to a lease, license or other agreement.
- Provisions related to the receipt and use of funds received from the allocation and use of public lands, including where funds are to be deposited, what the funds can be used for, and an annual audit of funds.
- Oversight and reporting requirements to Parliament. Many public land laws require annual reporting to legislative bodies. These reports often include identification and evaluation of programs and a summary of accounts and budgetary information.

## Issue 6: Compulsory Acquisition

- **Summary:** The Land Bill does not fully guarantee the rights and safeguards established in the Constitution and NLP related to compulsory acquisition.
- **Recommendations:** To ensure compliance with the Constitution and NLP in assigning rights and authorities related to compulsory acquisition, the Land Bill could:
  - Clarify that spouses are interested parties in the contexts of: (1) notice to the parties involved; (2) opportunity for a hearing; and (3) payment of compensation.
  - Clarify that “reasonable notice” shall require personal delivery of both written notice (at a minimum in Kiswahili and English, preferably also in a language most likely to be understood by the intended recipient) and oral notice where possible. The Bill could allow for other methods of service (to non-corporate parties) only if the server can show that personal service is not possible.
  - Set forth acceptable valuation methods in determining full and just compensation.
  - Establish a fixed deadline for compensation in full by the state, prior to the time of occupation.
  - Clearly define “cases of urgency.”

Article 40 of the Constitution sets forth strong protection for property rights, especially vis-à-vis deprivation of these rights by the state. Under the Article, the state may only deprive a person of property if: (a) it acts pursuant to chapter 5 of the Constitution in acquiring land; or (b) acts for a “public purpose or in the public interest,” promptly compensates the person(s) fully and justly, and allows any person who has interests in the property access to a court of law. Importantly, the article also allows for the government to make provision for compensating occupants who have, in good faith, acquired land but who might not be title holders to that land.

The Land Bill does not fully incorporate the constitutional and NLP protections in a number of ways. Given the significance that both documents accord to the power of compulsory acquisition, and to the abuse of that power,<sup>11</sup> reviewers have set forth eight distinct issues in some degree of detail below.

1) The Land Bill grants authority over compulsory acquisition to the Cabinet Secretary, while the NLP vests this authority with the NLC.

2) The Bill could better clarify that interested parties in land subject to compulsory acquisition include spouses and children. The NLP requires the Government to “[e]nsure that the alienation of private rights to land takes into account legitimate rights, such as the right of spouses and children.”

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<sup>11</sup> The NLP provides, for example, “In the regulation of property rights, two particular powers of Government raise fundamental constitutional issues, and have neither been exercised effectively nor accountably. These are the powers of compulsory acquisition and development control.” (NLP para. 42.)

(NLP para. 68(b).) The Land Bill's compulsory acquisition section refers to interested parties in the contexts of: (1) notice to the parties involved; (2) opportunity for a hearing; and (3) payment of compensation. (See, for example, Sections 109(1)(c), 112(1)(b), 125(1)(b) and 126(1).) However the Bill does not clarify that spouses and children are interested parties, risking non-compliance with the NLP and with the Constitutional land governance principles of equitable access to land, security of land rights, and elimination of gender discrimination in land matters (Const. art. 60(1)).

3) The Bill allows for government certification of compulsory acquisition without clearly providing rights of the interested party to a fair hearing based on the merits of the acquisition, including inquiry into the purpose and necessity of the acquisition. According to Section 109(2), the Cabinet Secretary must not issue a certificate for compulsory acquisition until the proprietor<sup>12</sup> of the land "has been afforded an opportunity to interrogate and test the genuineness and objectivity of the compulsory acquisition within the prescribed time." While this provision potentially establishes a critical safeguard for the owners of land subject to compulsory acquisition, it does not adequately describe how the proprietor may in fact "interrogate and test the genuineness and objectivity" of the acquisition, and therefore falls short of meeting the Constitutional requirement that subjects to compulsory acquisition have access to a court of law (Const. art. 40(3)(b)(ii)).

4) The Land Bill does not define—or give guidance to a regulatory framework for defining—full compensation. Determination of full compensation, however, is critical to compliance with the Constitutional mandate that payment be "in full" and "just." To better incorporate Constitution Article 40(3), the Bill could set forth acceptable valuation methods, while referring to regulations that would provide the detailed calculations involved in these methods.

5) The Bill does not establish a specific time requirement by which the government must pay full compensation. Instead the Bill allows the government to take possession of the land prior to full payment, paying six percent annual interest on the land until such point in time that compensation is paid.

6) The term "cases of urgency" lacks definition in the Bill. Section 120 of the Bill gives the Cabinet Secretary the right to implement shortcut procedures that diminish the rights of the land holder. To justify this broad use of authority and to better protect the rights of interested parties, the Bill could define "cases of urgency," perhaps offering a list of examples.

7) Notice requirements for compulsory acquisition do not provide sufficient protection for interested parties in the land subject to acquisition. Under Section 134, sufficient notice may be served through: personal delivery; mail through the post; leaving notice with the occupier or affixing it to some prominent part of the land; serving notice to the appropriate corporate representative; or placing an advertisement in a nationally circulated newspaper. Personal delivery would provide the most assurance that rural people—particularly women—would receive the notice, whereas methods such as placing an advertisement in the national newspaper would be less effective.

8) Drafters of the Bill may consider adding environmental protection and conservation purposes to the list of causes considered to be in the "public interest" per Section 109(1)(a).

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<sup>12</sup> Note that the word "proprietor" may not adequately encompass all of those who may be considered interested parties under the Land Bill, nor does encompass the spirit of Constitutional Article 40(4), allowing for compensation to those who occupy but do not formally own land. This could be especially important in the absence of legislation defining community land rights.



## Issue 7: Gender Equity

- **Summary:** The Land Bill does not sufficiently incorporate constitutional and NLP guarantees pertaining to gender-equitable land rights and governance.
- **Recommendation:** To ensure that the Constitution and NLP's mandates related to gender-equity are fulfilled, the Land Bill should:
  - Incorporate the full list of land policy principles articulated in Article 60 of the Constitution.
  - Add a section recognizing and defining co-ownership rights to land, including joint ownership rights.
  - Incorporate gender equity provisions in sections on public lands, and in sections on private land rights that address transfers or contracts.
  - Include within its scope community lands, and clear instruction on the interplay between customary and formal law and institutions in land governance, including what recourse those living within customary regimes have to formal law.

The Constitution and the NLP provide progressive and far-reaching guarantees for gender equity in land matters in Kenya. In Article 60, the Constitution establishes equitable access to land and elimination of gender discrimination as independent land governance principles. These principles mirror those in the NLP, and provide the framework for specific mandates on gender-equitable land rights found in both documents. The Constitution thus directs Parliament to enact legislation protecting the rights of both spouses to the matrimonial home (during and upon termination of the divorce) (Const. art. 68(c)(3)), and protecting the rights of dependents (including the right of the spouse in actual occupation) in the event of the death of one spouse (Const. art. 68(c)(vi)). In addition, the NLP contains a host of specific instructions to Parliament on legislating for gender equitable land rights. These include a mandate to outlaw discriminatory customs and repeal discriminatory legislation, as well as mandates to adopt key safeguards for spouses and dependents in the context of land transfer and alienation, provision for joint spousal registration, and provision for equal inheritance of land rights by both sexes.

While the Land Bill includes some important reference to the constitutional and NLP framework for gender equitable land relations,<sup>13</sup> it does not go far enough to incorporate key mandates.

First, unlike the Constitution and NLP, the Bill (sec. 3) does not include the principles of equitable land access or elimination of gender discrimination in law, customs, and practices. Replacement of the Bill's current list of land policy principles in Section 3 with the full list of land policy principles set forth in Article 60 of the Constitution would better capture the constitutional guarantees related to gender equity in land relations.

Second, the Land Bill does not acknowledge or define co-ownership rights to land, including joint ownership rights. The draft Land Registration Bill, on the other hand, addresses the registration mechanisms for these rights and includes substantive information on the nature of these rights as well (see Part IX of the Registration Bill, 12 December 2011). As the framework legislation on land rights

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<sup>13</sup> See, for example, paragraphs 72(1)(b) and 74 on leases, as well as paragraphs 78(3), 92(5)(b) and 104-105 on charges.



and interests, the Land Bill is the appropriate repository for substantive information on the nature of co-ownership rights.

Third, the Bill could more fully incorporate gender equity in several other key sections. The Bill does not reference gender equity in the sections on public lands, nor in the sections on private land rights that address transfers or contracts. These omissions do not appear consistent with the constitutional guarantees of gender equity in land matters, nor with the specific mandates on protection of spouses in the context of land transfers, and of women's rights to pastoral lands.

Fourth, the Land Bill does not incorporate constitutional and NLP guarantees of greater protection of women in land rights inheritance and in protection of the matrimonial home and land in the event of divorce or death of the husband. While Parliament may address these issues in separate legislation, the Land Bill should recognize them through establishment of an initial rights framework or, at a minimum, reference such rights in other relevant laws. Omission of these key points in the Land Bill risks the diminishment of constitutional mandates on gender equity in future legislation.

Fifth, the omission in the Bill of a community land rights regime, which is the only tenure regime applicable to a vast number of women in rural Kenya, appears to infringe on those women's constitutional rights to gender equity in land matters. In addition, the NLP requires Parliament to address community lands in the Land Act, and specifically to set forth a clear framework and procedures for "[t]he recognition, protection and registration of community rights to land and land based resources *taking into account multiple interests of all land users, including women...*" (emphasis added). The exclusive focus on public and private rights and transactions in the Land Bill, without parallel focus on community lands, could render the latter more vulnerable to encroachment by public or private land rights. This could in turn compromise the security of land rights and access for women living within customary and community tenure regimes.

#### Issue 8: Land Use Planning/Development Control

- **Summary:** The Land Bill does not articulate the governance framework and national priorities for development control and land use planning despite the emphasis placed on these issues in the NLP.
- **Recommendation:** Include provisions in the Land Bill that clearly articulate the governance framework for development control and land use planning and the key principles that should govern the development of national, regional, and community land use strategies.

Despite the prominent focus placed on development control and land use issues in the NLP, the Land Bill contains little information that would inform and facilitate a more coherent and harmonized land use planning strategy. The NLP identifies "development control" as a government power that has been exercised ineffectively and without accountability under the existing land management system (NLP art. 42). The NLP further states that the regulatory framework governing development control is "largely ineffective" due to uncoordinated activities of the various government actors involved (NLP art. 50). The NLP goes on to provide a rather lengthy list of actions that the government should take to improve development and implementation of development control and land use policies (see NLP arts. 51, 105- 107, and 117).

While many of the recommendations provided in the NLP to improve land use and development control function are most appropriately addressed in separate land use legislation, the Land Bill offers an important opportunity to implement several key NLP provisions that will greatly facilitate future efforts to develop and implement land use and development control strategies. These include: (1)

clarifying the power of the state to regulate property rights in urban and rural land; (2) clarifying and harmonizing the institutional framework governing development control and land use, specifically including identifying the institutions responsible for key actions; and (3) identifying the key principles that should govern the development of national, regional, and community planning strategies (e.g. devolution, transparency, public participation, etc. (NLP para. 51(a) and (c) & para. 105(c)).

It is important that the Land Bill address these key issues ahead of future legislation on land use for several reasons. First, as the NLP distinctly points out, the fundamental flaw of the existing land use framework is the lack of coordination and harmonization among statutes and public sector actors. The Land Bill, as the foundational land law in Kenya, can lay the cornerstone for harmonizing and coordinating future actions. Second, land use legislation is not required to be enacted by Parliament until August 2015 pursuant to the Constitution's Fifth Schedule. Between now and then there are critical issues related to land use and development control that require a coordinating framework among public sector agencies, not least of which include the drafting of future legislation, and facilitating capacity building at the national, regional, and local levels. Finally, because land use and development control issues affect all categories and types of land – public, community, and private – it is appropriate and indeed highly beneficial to lay out the governance framework, including applicable principles for development control and land use planning within the broad context of the Land Bill so the application to each of these categories of land is made clear.

#### Issue 9: Controlled Transactions

- **Summary:** The “controlled transactions” provisions of the Land Bill raise constitutional issues and may stifle land transactions, particularly among smallholders and the poor.
- **Recommendation:** Reconsider the use and/or reach of the local Land Control Boards in their capacity to void transactions because of the apparent constitutional conflicts.

The Land Bill identifies certain transactions of agricultural lands (sale, transfer lease, charge, exchange, partition or disposal), situated within a land control area, as “controlled transactions.” (Land Bill sec. 151.) Under the Bill, any “controlled transaction” must be approved by a local land control board to be valid. If the local land control board does not approve the transaction, it is considered void (Land Bill sec. 151). The effect of these provisions is that citizens cannot freely acquire and sell property in land control areas without the consent of the local land board. While well-intentioned as a tool to promote agricultural productivity and economic development, such control of transactions in agricultural lands raise a number of issues worthy of additional consideration.

First, it is highly questionable whether it is even constitutional for land boards to void otherwise legitimate transactions in agricultural land. Under the Bill of Rights, Article 40 of the Constitution provides that “Subject to Article 65, every person has the right, either individually or in association with others, *to acquire* and own property (a) of any description; and (b) in any part of Kenya.”<sup>14</sup> While the State possesses the authority pursuant to Article 66 to regulate the *use* of any land (e.g., in the interest of defense, public safety, public order, public morality, public health or land use planning), disallowing Kenyan citizens the right to acquire land via otherwise legitimate transactions likely violates the right and fundamental freedom of Kenyans to acquire property.

<sup>14</sup> Article 65 of the Constitution deals with landholding by non-citizens and places certain conditions on the ability of non-citizens to acquire interests in land.

Second, Section 158 of the Bill would prohibit citizens who have had a transaction voided by a Land Control Board from accessing the courts to appeal the decision. While Section 158 provides an appeal to a Central Land Control Appeals Board (an administrative body) it provides that the decision of the board is “final and conclusive and shall not be questioned in any court.” This restriction on access to the courts arguably runs afoul of Article 22 of the Constitution, which provides that “[e]very person has the right to institute court proceedings claiming that a right or fundamental freedom in the Bill of Rights has been denied, violated, or infringed, or is threatened.” As mentioned above, the right to acquire and own property is a fundamental right under Article 40 of the Constitution.

Third, even if the provisions related to controlled transactions are constitutional, they may have the effect of stifling transactions among small farmers, women or landless people trying to acquire land. Section 154 of the Land Bill provides that in deciding whether to grant or refuse consent with respect to a controlled transaction, the Land Control Board may consider whether the person to whom the land is to be disposed of:

- (a) is unlikely to farm the land well or to develop it adequately;
- (b) is unlikely to be able to use the land profitably for the intended purpose owing to its nature.

Inherent in these subjective criteria is a bias against the poor, smallholders, and women who may lack agricultural knowledge and experience and/or sufficient capital when compared to other investors.

Finally, the process required to obtain approval for a transaction from the local land control board imposes burdens and costs on the deal which may have the effect of: (a) pushing the transaction underground, or (b) stifling transactions altogether. An application to a local land board will require completing an application, presumably in English, and travelling to the offices of the board to file the application. In addition, once the application is filed, the Board can require the applicant to attend the hearing and produce “any document or evidence relating to the land.” (Land Bill sec. 160.) While these additional burdens and costs are onerous for all parties, it is likely that smallholders and the poor will be disproportionately impacted by these transaction costs.

#### Issue 10: Environmental Easements

- **Summary:** The Bill does not allow for the creation of environmental easements creating a conflict with easement provisions previously adopted into law by the GoK.
- **Recommendation:** Revise the section on easements in the Land Bill so that it is consistent with Environmental Management and Co-ordination Act (EMCA) and allows for the creation of environmental easements that can be created voluntarily between parties and that can exist in perpetuity for conservation purposes.

The Land Bill would codify the concept of appurtenant easements<sup>15</sup> without recognizing easements in gross, which are necessary to facilitate the creation of environmental easements. Easements are

<sup>15</sup> The use of easements, like other land-related laws in Kenya, can be traced to the English legal system. Easements over land in England evolved to legalize the possibility of the owner of one piece of land enjoying certain rights over adjacent land owned by someone else. The parcel of land burdened with the easement constituted the “servient tenement” and the land enjoying the benefit of the easement was known as the “dominant tenement.” Such easements were then passed on to subsequent owners during the transfer

basically of two types, referred to as either “appurtenant” or “in gross.” Appurtenant easements have as a fundamental component the requirement that an easement over one parcel of land can only operate to benefit an adjacent parcel. An easement may also exist in gross; that is to say, the validity and enforceability of the easement is not dependent on the existence of a plot of land in the vicinity of the burdened land that can be benefited or, of a person with an interest in that plot of land who can be benefited by the easement. Easements in gross significantly improve the utility of environmental easements by offering more options with respect to who can hold the benefit of an easement and who can enforce the easement.

The lack of express recognition of environmental easements in the Land Bill creates confusion and conflict with environmental easement provisions previously adopted into law by the GoK. In recognition of the constraints that appurtenant easements present for conservation purposes, the GoK previously created a statutory basis for environmental easements through the enactment of the Environmental Management and Co-ordination Act (EMCA) of 1999. EMCA did away with the requirements for a dominant and a servient tenement by expressly creating the environmental easement in gross. The GoK is also contemplating further incorporation of environmental easements into its statutory framework. In July 2011, the Kenyan Ministry of Forestry and Wildlife released a Draft Wildlife Bill (Wildlife Bill) that would establish a framework for creating conservation easements for purpose of wildlife conservation and management.

Taken together, the environmental easement language contained in EMCA and the Draft Wildlife Bill demonstrate a commitment by the Kenyan government to utilize easements in gross for the purpose of conservation and environmental protection. Clarifying the Land Bill to acknowledge the existence of easements in gross and their use for environmental and conservation purposes would facilitate the use of these innovative conservation tools and avoid confusion and/or direct conflict in Kenyan law. The concern over possible confusion and conflict between the Land Bill and other Kenyan law addressing easements is not simply academic. In fact, the Land Bill contains a conflict of law provision that elevate its provisions, to the exclusion of other laws, where a conflict or inconsistency exists. Thus, the Land Bill’s conflict of law provision could have the effect of repudiating the innovative environmental easement provisions of EMCA and the new Wildlife Bill.

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of either the servient tenement or the dominant tenement and are registered against title. Such easements are known as “appurtenant easements.”

## 3.0 ANALYSIS OF THE LAND REGISTRATION BILL (12 DECEMBER 2011)

This analysis provides comments on and recommendations for Kenya's Land Registration Bill (12 Dec. 2011) (Registration Bill or Bill). As with the analysis of the Land Bill, this analysis considers the extent to which the Bill is consistent with the Constitution, the NLP, and international best practices. The review discusses and provides recommendations on eleven key issues of concern as well as specific comments on more technical issues of note.

The Bill sets forth a framework for the registration of private interests in land that is, for the most part, well considered and, to some extent, reflects language in the Registered Land Act (Cap 300), which is in effect until a Registration Law repeals it. Although the Registration Bill contains many thorough, well-drafted sections,<sup>16</sup> when viewed in light of the new Constitution and the NLP, some sections of the Bill either directly contravene the Constitution and NLP or do not adequately incorporate the mandates of these seminal documents, including those related to the devolution of government. Other sections would benefit from greater clarity so as to ensure achievement of constitutional and policy objectives in the delivery of land administration services. Given the impending constitutional deadline of 27 February 2012, this analysis focuses on what appear to the reviewers as priority issues.

### COMMENTS AND RECOMMENDATIONS BY ISSUE AREA

As a preliminary matter, in addition to the Constitution's provision of mandates and principles regarding the land sector, Chapter 3.5 of the NLP addresses "Land Administration Issues." It defines "land administration" as "the process of determining, recording and disseminating information about ownership, value and use of land." (NLP para. 144.) The NLP also clarifies the purpose and functions of a land administration system:

An efficient land administration system guarantees the recording of land rights, promotes tenure security, and guides land transactions. Further, it provides land users with appropriate forms of documentation to guarantee land rights, and supports the processes of land allocation, land dispute resolution and fiscal management of land (NLP para. 144).

The NLP notes, however, that in Kenya "the existing land administration system has not performed these functions adequately. It is bureaucratic, expensive, undemocratic and prone to abuse, resulting in inordinate delays and injustice in the administration of land." (NLP para. 147.) The NLP maintains, "[t]his unsatisfactory land rights delivery system is caused by, among others, multiple registration regimes, land speculation, corruption, political interference, poor record keeping and the abuse of power by the public agencies mandated to manage land." (NLP para. 147.)

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<sup>16</sup> For example, the Bill provides for a functional registry, clarifying the requisite contents of the registry, including maps, parcel files, a presentation book, alphabetical index, and a file of powers of attorney. See e.g., Bill, sec. 7.

To address these issues, the NLP provides that the Government shall: “(a) Align land rights delivery procedures and processes with this Policy; (b) Consolidate, harmonize and streamline all land registration statutes to ensure clarity and reduce bureaucratic bottlenecks; (c) Ensure that land records are authenticated, documented, and their custody and sanctity secured; and (d) Computerize land records and facilitate access to land information.” (NLP para. 147.)

### Issue 1: Guiding Principles for Land Registration

- **Summary:** The Registration Bill omits reference to the constitutional and policy principles governing land registration.
- **Recommendation:** Add a preliminary section to the Bill that reflects and reinforces those principles.

The Registration Bill identifies the objectives of “efficiency, transparency and good governance” in providing for the registration process but those objectives are buried deep in Section 35(4). Given that the Constitution and the NLP place heavy emphasis on the principles guiding land use, management, and administration (*see e.g.*, Article 60 and Chapter 3.5, respectively), the Registration Bill must reflect and reinforce those constitutional and policy principles. Also, it is more appropriate to set forth those principles prominently in their own section at the beginning of the Bill.

### Issue 2: National Land Commission's Role in Delivering Land Registration Services

- **Summary:** The Registration Bill makes limited reference to the role of the National Land Commission (NLC) in delivering land registration services, despite the constitutional and policy mandates requiring significant NLC engagement.
- **Recommendation:** Recognize the NLC's mandated role related to land registration.

The Constitution and NLP require a restructuring of land administration roles whereby the Ministry of Lands facilitates implementation of the land policy reforms, gives policy direction to NLC, and otherwise makes land policies and coordinates their implementation. The NLC assumes an advisory role to the government and responsibility for implementation of land administration. But the Registration Bill does not reflect this restructuring.

Article 67(c) of the Constitution grants the NLC authority “to advise the national government on a comprehensive programme for the registration of title in land throughout Kenya.” The NLP further provides that the NLC shall “establish and maintain a register of all public, private and community land in the country” as well as “[e]nsure the development and operation of effective digital Land Information Management Systems at all levels.” (NLP para. 233(b) & (h).) The NLP provides that the Ministry in charge of Land “shall undertake to devolve land administration and management

functions to the NLC . . .,” while “[g]iving policy direction to the NLC” as well as “making policies on land and coordinating their implementation.” (NLP para. 252-53.) Other significant responsibilities of the Ministry include mobilizing additional resources for the land sector, undertaking policy advocacy and providing political leadership, coordinating the management of the National Spatial Data Infrastructure, and assuming monitoring and evaluation of land sector performance in collaboration with civil society, the private sector, and other stakeholders (NLP para. 253(a)-(j) (listing 10 distinct functions of the Ministry)).

Despite these provisions, however, the Bill contains only limited references to the NLC, few of which reflect the significant level of responsibility for implementation of land registration functions, envisioned under the NLP. Although Section 7(1)(a) provides that the Cabinet Secretary shall determine the form of the land register, “in consultation with the Commission,” Section 7(2) requires that the Registrar make the land registry “easily accessible to every citizen and to the National Land Commission.” Section 38(1) provides that the Registrar shall not register a disposition of land if monies are owed to the NLC (*see also* sec. 55(2)). The Bill ought to be revised to implement the NLC’s constitutional and policy mandates. References to “Cabinet Secretary” in the Bill need to be reconsidered and, in many instances, changed to the NLC, depending on whether the provision is more of a policymaking function or the implementation of policy.

### Issue 3: Devolved Land Administration

- **Summary:** The Land Registration Bill does not reflect the constitutional and policy principles and mandate of devolved government.
- **Recommendation:** Recognize the devolution of authority for land registration, including recognition of the National Land Commission's authorities and decentralized structure.

Article 1 of the Constitution recognizes a new structure of government for the Republic of Kenya, delegating executive power to national and county governments and omitting reference to provincial and district levels (Const. art. 1(3)(b)). The Constitution declares “devolution of power” as a national value and provides an entire chapter on the objectives, principles, and structure of a “devolved government.” (Const. art. 10, ch. 11.) The Fourth Schedule of the Constitution provides further guidance, allocating government functions between national and county governments. As mentioned above, with respect to land registration, the Constitution provides that one of the NLC’s functions is “...to advise the national government on a comprehensive programme for the registration of title in land throughout Kenya.” (Const. art. 67(2)(c).)

Consistent with those constitutional devolution objectives, the NLP envisions a three-tiered structure for land administration: the NLC, the NLC District Offices, including the District Land Boards (DLBs), and the Community Land Boards (NLP, ch. 4). The NLP explains, “The Ministry in charge of Lands shall, within its rationalized roles and reorganized structures undertake to devolve land administration and management functions to the NLC, DLB’s CLB, and local authorities.” (NLP para. 252.)

Under the NLP, the DLBs would act as the NLC’s agent at the district level, responsible for administering public and private land on the NLC’s behalf (NLP paras. 241-46). The CLBs would, among other things, hold, manage, and document community land rights, regulate transactions in the



same, and facilitate the recording and issuance of title for community land (NLP paras. 247-50). Implicit in this structure is the transfer of the every-day land registration functions from the Ministry of Lands and current ministerial district registration offices to the NLC and sub-national offices and boards under the NLC. As discussed under Issue 2 above, the Ministry maintains responsibility for giving policy direction to the NLC, among other responsibilities.

Despite the mandate to decentralize government functions, however, the Registration Bill omits critical provisions for the decentralized structure of land administration. The Bill maintains the same structure (even much of the same text) currently provided in the Registered Land Act (Cap 300), i.e., instead of the “Minister” in the Registered Land Act, the “Cabinet Secretary” in the Registration Bill is granted authorities over land registration, implemented by the Registrar for Titles.

Because the Constitution recognizes counties rather than districts, it is likely that the counties, in the form of County Land Boards, will assume the land administration functions over public and private lands in what are currently the district registration offices. The lack of a constitutional provision for a community level of government need not hinder implementation of the NLP’s contemplation of Community Land Boards.

The National Land Commission Bill ought to provide for the creation of NLC County Offices as well as County and Community Land Boards to assume the land registration functions that the NLP delegates to them. Sub-county land management bodies are directly consistent with the spirit of devolution; the constitutional objective to recognize the rights of communities to manage their own affairs; as well as the constitutional requirements for easy access to public services and for fair administrative action (Const. arts. 47 & 174(d),(f)).<sup>17</sup>

Note that, as of this writing, the National Land Commission Bill before the Commission for the Implementation of the Constitution (CIC) is not available on the CIC’s website.<sup>18</sup> An early, undated version of the Bill, however, identifies as one of the NLC’s functions to “establish and maintain a register of all public land, private land and community land in Kenya and the transactions thereof.” (NLC Bill sec. 13(d).) The draft also provides at Section 20(2), “[t]he Commission shall, for purposes of ensuring access to its services in all parts of the country, establish such offices or registries in the counties, and may establish such offices or registries in such other locations as it may deem necessary.”

Assuming the statutory creation of County District Offices and County and Community Land Boards under the NLC, the Registration Bill ought to reference such delegated authority in place of “district registration offices,” as currently in the Bill.

For more discussion of the need to recognize the constitutional and policy mandate for a devolved government within the land sector, see Section 2.0 above.

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<sup>17</sup> Note that the Devolved Government Bill (1 Aug. 2011) omits reference to land administration functions.

<sup>18</sup> See [http://www.cickenya.org/bill\\_tracker](http://www.cickenya.org/bill_tracker) (last visited 8 Jan. 2012).



#### Issue 4: Scope of Land Registration Bill

- **Summary:** The Registration Bill limits its scope to only certain community lands rather than all community land, makes no provision for the unique circumstances related to the registration of rights to public and community lands, and includes extensive substantive law governing particular property interests, legislating well beyond registration-related subjects.
- **Recommendation:** (1) Broaden the scope of the Bill to apply to all community land; (2) address the particular needs related to the registration of community and public lands; and (3) address only registration-related subjects; shift substantive land law to the Land Bill.

There are three significant issues in the Registration Bill related to its scope. The Registration Bill limits its scope to only certain community lands rather than all community land, makes no provision for the unique circumstances related to the registration of rights to public and community lands, and includes extensive substantive law governing particular property interests, legislating well beyond registration-related subjects.

**1. Broaden the scope of the Bill to apply to all community land.** Section 3 of the Bill provides that the law applies to registration of interests in all public land and private land, but with respect to community land, it limits its scope to only “any area of community land to which the Cabinet Secretary shall by order apply.”

The Constitution provides for three classifications of land: public, community, and private and describes the interests related to each classification (Const. arts. 61, 62, & 63). As mentioned above, the Constitution and NLP seek to address the fragmentation of land laws and consolidate and harmonize those laws. The NLP explains:

There are too many statutes dealing with the registration of land rights. No attempt has been made to harmonize these statutes to ease the process of registration of land rights and facilitate speedy access to land registration information. There is a need to harmonize the registration statutes to enhance the efficiency, transparency and accountability of the process of land registration (NLP para. 149).

As discussed more fully in the analysis of the Land Bill, lack of provisions addressing interests in community land risks creating tenure insecurity among community rights holders and implying such interests are unequal and even inferior to public and private interests; a result that contradicts the Constitution and NLP. The scope of the Registration Bill needs to include interests in all community land.

**2. Address particular needs related to the registration of public and community lands.** The NLP’s vision is to establish a land registry that encompasses all private, public, and community land in the country (NLP para. 233(b)). As currently drafted, however, the Bill sets up a system for registering interests in private lands but does not address the unique needs for registration of interests in public and community lands, other than declaring in whose name such lands shall be registered. All technical aspects of the registration process need to be reconsidered to make provision for aspects unique to community and public lands.

**3. Address only registration-related subjects in the Registration Bill; shift substantive land law to the Land Bill.** In its title, the Registration Bill appropriately provides that its goals are “to give effect to Article 68 of the Constitution to revise, consolidate and rationalize the law governing the registration of title to land,” but it also notes its intention “to regulate dealings in registered land, and for connected purposes.” Consistent with this latter language, the Registration Bill often addresses not only registration issues but also substantive law governing particular property interests, including leases, charges, co-ownership, and easements, among others. Other existing land laws also provide both substantive law and registration provisions.

The Constitution and the NLP provide for a new legal structure governing land as mentioned in the Bill’s title. Article 68(a) of the Constitution requires Parliament to “revise, consolidate, and rationalize existing land laws.” And the NLP charges the Government with enacting a “Land Act” that governs all categories of land and “harmonizing the existing modes of statutory tenure.” (NLP paras. 58, 68.) Further, the NLP provides that “the Government shall: . . . (b) [c]onsolidate, harmonize and streamline all land registration statutes to ensure clarity and reduce bureaucratic bottlenecks.” (NLP para 147.) Read together, these two seminal texts reflect an intention to consolidate the legal framework governing land. The former legal structure (with both substantive and registration provisions within the Registered Land Act, the Government Land Act, the Registered Titles Act, etc.) is no longer necessary or appropriate.

Under the new Constitution and the NLP, the Land Bill (and additional implementing legislation and regulations) governs the creation and expiration of rights in public, community, and private land as well as transactions in the same, while the Registration Bill addresses the requisite registration for each event. The repeal of a total of nine land laws under the Land Bill and Registration Bill implicitly recognizes this new structure. To maintain substantive provisions governing property interests in the Registration Bill, while those are also addressed in the Land Bill (and possibly a Community Land Bill), risks creating inconsistencies, ambiguities, and conflicts in the law, all of which undermine land tenure security.

#### Issue 5: Registration of Public Lands

- **Summary:** The Registration Bill requires the Registrar to register all public lands in the name of the NLC.
- **Recommendation:** Revise registration requirement to be consistent with the Constitution, which identifies either counties or the national government as holding specific types of public land.

According to the NLP, there has been no system for registering public institutional land. So, “[t]o safeguard such land, a practice emerged under which it was registered in the name of the Permanent Secretary in the Ministry of Finance.” (NLP para. 60.) Both the Constitution and the NLP appear to address this gap, assuming that when land is “vested in and held by” someone, that means that they are the registered owner.

The Constitution grants the NLC the authority to manage public land on behalf of the national and county governments (art. 67(a)), but it provides that public land vests in and is held by either counties or the national government, depending on the type of public land (Const. art. 62). In contrast, the NLP calls for an inventory of all public lands and to “place [public lands] under the National Land

Commission (NLC) to hold and manage in trust for the people of Kenya.” (NLP para. 61(b).) In a direct conflict between the two texts, the constitutional requirements prevail.

But Section 105(2)(a) of the Registration Bill would follow the NLP, requiring the Registrar to register “the Commission as the proprietor of all public land in the area.”

Article 62(2) of the Constitution identifies the five categories of public land that “shall vest in and be held by county governments in trust for the people resident in that county, and shall be administered on their behalf” by the NLC. Article 62(3) governs the other eight categories of public land, providing that those lands “shall vest in and be held by the national government in trust for the people of Kenya and shall be administered on their behalf” by the NLC. Registration of the different categories of lands ought to reflect the constitutional requirements that counties and the national government, rather than the NLC, hold such lands. The difference between registering land in the name of the NLC versus the national government is that, although a constitutional body, the NLC is still an impermanent government agency. Many years from now if the people of Kenya decide to shift land management responsibilities to another agency, the registry would not have to be updated if now public land is registered in the name of the Government of Kenya.

#### Issue 6: Registration of Community Lands

- **Summary:** The Registration Bill requires the Registrar to register all community land and trust land in the name of the NLC, with a few exceptions.
- **Recommendation:** Revise the registration requirement to be consistent with the Constitution, which identifies either communities or counties to hold community lands.

Similar to registration of rights in public land discussed above, the Registration Bill requires the Registrar to register community lands in the name of the NLC, with a few exceptions. Here again, the Constitution and NLP require a different result: most community lands must be registered in the name of the community, with a few exceptions, again assuming that when land is “vested in and held by” someone, they are the registered owner.

Article 63(1) of the Constitution mandates that, “[c]ommunity land shall vest in and be held by communities identified on the basis of ethnicity, culture, or similar community of interest.” Subsection (2) of that article then proceeds to identify six categories of community lands based on their unique history and/or treatment in law. Article 63(3) provides, “[a]ny unregistered community land shall be held in trust by county governments on behalf of the communities for which it is held.” In addition, the NLP provides that a Land Act shall “vest ownership of community land in the community.” (NLP para. 66(c).) The NLP further notes that, “Community Land Boards shall be established to hold, manage and document community lands,” among other authorities.

However, Subsection 105(2)(b) of the Registration Bill provides that the Registrar shall register “the Commission as the proprietor of all trust land and community land in the area, subject in each case to any grant or lease affecting the land,” and also “subject to the Land Adjudication Act and the Land Consolidation Act.” Thus, the Registration Bill’s blanket requirement to register community land and

trust land in the name of the NLC (with exceptions for what appears to be community land subject to adjudication) must be revised to reflect constitutional and policy directives.<sup>19</sup>

#### Issue 7: Transition of Registered Documents from Repealed Acts to the Registration Bill

- **Summary:** Because the Land Registration Bill repeals several land acts, the Bill provides for the transition of documents registered under those acts to be valid under the Land Registration Bill. But without explanation, the Bill requires the Registrar to "examine" documents registered under only certain acts while requiring no such examination for documents registered under other acts.
- **Recommendation:** Provide principled reasons, processes, and protections for the transition of all existing registered documents under repealed acts to the Land Registration Bill.

Section 105 addresses the transitional issues that arise due to the Registration Bill's repeal of several land laws under which documents are registered. Section 105(1) appropriately provides for transition of titles and leases issued under repealed acts and the recognition of their validity under the new Registration Act. For documents registered under both the Registered Land Act and Registered Titles Act, no action need be taken other than that the Registrar may "at any time" prepare the register and substitute the folio in the prescribed form. *See* Section 105(1)(a)-(b). In contrast, Section 105(1)(c) requires a different process for documents registered under the Government Lands Act and the Land Titles Act. For documents under those acts, "the Registrar shall – (1) as soon as conveniently possible, cause the title to be examined," prepare the register, serve notice on the proprietor of the Registrar's intention to register, and issue certificates of title or lease, upon request. This subsection is problematic for three reasons: (1) no principled reason is provided for "examining" titles under some acts and not others; (2) the Bill provides no criteria to apply to such an examination; and (3) an examination implies a decision point by the Registrar, at worst providing arbitrary and unfettered discretion to refuse to register the documents under the new Registration Bill. Given that the right to own land is a fundamental freedom guaranteed to all Kenyans under the Constitution's Bill of Rights, the Bill ought to protect all owners and lessors from arbitrary administrative decisions.

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<sup>19</sup> In addition, note that because the Constitution does not recognize "trust land," reference to its registration is inappropriate. The constitutional definition of "community lands" includes trust lands (Const. art. 63(2)).

## Issue 8: Gender Equity in Land Matters

- **Summary:** The Registration Bill advances the constitutional objective of gender equity in land matters but specific terms and provisions need further clarification to ensure full realization of rights.
- **Recommendations:** (a) Define the term “spouse,” using the definition from the Marriage Bill; (b) clarify that persons able to lodge cautions include persons holding unregistered rights; (c) clarify consequences of spousal non-consent; and (d) clarify the registration process for registering co-ownership rights based on spousal contribution of labor.

The Constitution and NLP establish a strong, clear framework for gender equity in land governance, with several sections directly applicable to land registration. Article 60 of the Constitution establishes equitable access to land and elimination of gender discrimination as independent land governance principles. The Constitution also calls for legislation protecting the rights of all spouses to the matrimonial home (Const. art. 68(c)(3)), and protecting the rights of dependents (including the right of the spouse in actual occupation) in the event of the death of one spouse (Const. art. 68(c)(vi)). The NLP requires legislators to adopt key safeguards for spouses and dependents in the context of land alienation, as well as provisions for joint spousal registration (NLP para. 225). Specifically, the NLP directs the Government to “establish mechanisms to curb selling and mortgaging of family land without the involvement of spouses.” (NLP para. 225(e).)

Part IX of the Registration Bill governs co-tenancy and partition and, in doing so, goes well beyond registration-related requirements, as mentioned in Issue 3 above. Much of this material would be better addressed only in the Land Bill. That being said, the Registration Bill advances the constitutional objective of gender equity in land matters in four important ways:

- (i) It identifies as an “overriding interest,” to which all registered land is subject regardless of whether the interest is registered, the rights of possessors or occupiers, such as a spouse not listed on the title (sec. 27(g));
- (ii) It creates a presumption of co-ownership with a spouse or spouse(s) upon acquisition, requiring registration of the land in all spouses’ names as tenants in common (sec. 93(1));
- (iii) It requires spousal consent to a disposition of both land and the dwelling house (secs. 93(3-4)); and
- (iv) It reinforces the spousal consent requirement by allowing placement of a “caution” on the land by any person with an interest, providing some degree of safeguard against a unilateral decision by the other spouse to transfer the land (sec. 71).

The Bill could be improved, however, to give full effect to the gender equity guarantees by making the following revisions and clarifications.

- a) **Define the term “spouse.”** The definition of the term “spouse” should include a person in any form of marriage, whether civil, religious, customary or informal. Such a definition would ensure consistency with the Marriage Bill.
- b) **Clarify that persons able to lodge cautions include persons holding unregistered rights.** The Bill provides for the lodging of cautions<sup>20</sup> and restrictions with the Registrar by “any

<sup>20</sup> Once registered, a “caution” forbids the registration of land dispositions. Bill, sec. 71.

person who . . . claims the right . . . to obtain any interest in land, lease or charge . . .” to prevent the disposition of the land without court order (secs. 71-78). These provisions appear to allow a spouse, as a holder of an interest in the family’s land and dwelling house, some degree of safeguard against a unilateral decision by the other spouse to transfer such property. The provisions could be strengthened, however, by clarifying that they include unregistered—but legally valid—interests of spouses, such as matrimonial property rights earned through labor contributions and spousal rights to occupancy and possession of family land.

- c) **Clarify consequences of spousal non-consent.** In Section 93(4) requiring spousal consent of dispositions, the Bill provides that a disposition shall be voidable where the titled spouse “deliberately misleads the lender. . . , assignee or transferee” as to whether the other spouse(s) have consented to the disposition. The Bill omits, however, the remedy where the non-titled spouse simply objects to the disposition in the absence of fraudulent circumstances. The Bill’s implication, through subsections 93(3)-(4), that the disposition cannot be registered without the consent of the spouse(s), ought to be clearly stated in this section.
- d) **Clarify registration process for registering co-ownership rights based on spousal contribution of labor.** Section 93(2) specifies that spouses may become co-owners of land through contributions of labor “to the productivity, upkeep and improvement of the land.” To give effect to this provision, the Bill ought to state the process for spouses to register their co-ownership rights based on their contribution of labor or, in the alternative, clarify that the right to matrimonial property gained through labor is recognized in all cases as if it were registered.

#### Issue 9: Public Access to the Registry

- **Summary:** The Registration Bill includes provisions granting discretion to the Registrar that could result in violation of all Kenyans' constitutional rights to easy access to the land registry.
- **Recommendation:** Revise certain provisions to ensure public access to the registry.

Among other land policy principles, Article 60 of the Constitution sets forth the principle of “transparent and effective administration of land.” The Constitution also identifies as an objective of devolved government, “to promote . . . the provision of proximate, easily accessible services throughout Kenya.” (Const. art. 174(f).) To ensure that such principle and objective are met, the Registration Bill must guarantee public access to the land registry. Three provisions address the issue of public access. Section 6(3) provides, “The land registration districts shall be established at such places to ensure *reasonable access* of land administration and registration services to the people of Kenya” [emphasis added]. Section 7(2) provides that the registers must be “easily accessible to every citizen,” echoing the constitutional standard, but Section 10(1) requires that “the Registrar shall make information in the register accessible to the public by electronic means and on conditions satisfactory to the Registrar.” It is certain that such electronic means will not ensure that the registers are easily accessible to all Kenyans unless assistance by the Registrar’s office is provided. It might be better to provide that the Registrar shall ensure the registers are available to the public by electronic and other means.



Section 10(2) also is problematic in that it allows the Registrar to suspend “one or more services provided in relation to the register” if the Registrar determines that it is “not practicable to provide those services.” It is unlikely that it was the intent of the drafters of the Constitution that the Registrar could abandon efforts to meet the mandates of transparency and easy access if he or she concludes that it is not practicable to do so. Because Section 10(2) could be interpreted to allow suspension of public access to the register, the section should either be removed or modified to clarify that public access cannot be suspended given its constitutional foundation.

#### Issue 10: Registration Implications of Conversion of Foreign Freehold Interests to Leaseholds

- **Summary:** The Registration Bill does not address the registration-related implications of the Constitution's conversion of non-citizen freeholds to leaseholds.
- **Recommendation:** Address registration-related implications of conversion of non-citizen freehold interests to leaseholds.

For the first time, Kenya’s Constitution allows non-citizens to enjoy only leasehold tenure up to 99 years, limiting freehold tenure to Kenyan citizens (Art. 65). Section 8(1) of the Sixth Schedule of the Constitution further provides that any freehold interest held by a non-citizen on the effective date of the Constitution shall revert to the Republic of Kenya and a 99-year lease be granted instead. There are significant registration-related implications of these provisions, which the Registration Bill omits. In addition, the details of the 99-year leasehold interests should be provided in the Land Bill.

#### Issue 11: Environmental Easement as an Overriding Interest

- **Summary:** Environmental easements are included within the list of "overriding interests," to which all registered land is subject regardless of registration of the encumbrance. Environmental easements should not rise to the level of an overriding interest because, other than through disclosure by the owner, there is virtually no other way for a potential buyer to be on notice that the land is subject to that easement.
- **Recommendation:** Omit environmental easement as an “overriding interest.”

Section 27 identifies the “overriding interests” that all registered land is subject to regardless of inclusion as an encumbrance on the register, including environmental easements (sec. 27(i)). Overriding interests are best considered as those interests that function by operation of law; they are those that can apply to all land by function of a statute, such as rights of way for utilities, land taxes, and land use regulations. Environmental easements should not rise to the level of an unregistered, overriding interest because other than through disclosure by the owner, there is virtually no other way for a potential buyer to be on notice that the land is subject to an environmental easement. Under the Environmental Management and Coordination Act, private parties may hold environmental easements over private land, making the transaction invisible to third parties but for registration of the easement

as an encumbrance. Section 27(i) ought to be deleted. (The Registration Bill also includes important, substantive provisions related to environmental easements. See the related recommendations below.)

## **ADDITIONAL COMMENTS AND SUGGESTIONS**

In addition to the key issues raised above, this section provides comments on specific sections of the Registration Bill. Its organization follows the same Part headings used in the Registration Bill.

### **Part I – Preliminary provisions**

**Section 2** contains definitions, of which the following are of concern:

- The definition of "instrument" is confusing because it uses the same term in the definition.
- The term "caution" is defined contrary to Section 71, the section that provides for the lodging of cautions. Section 2 defines the term "caution" as "(a) a notice in the form of an[sic] on a register to the effect that no action of a specified nature in relation to the land in respect of which the notice has been entered may be taken without first informing the person who gave the notice; or a caveat." Section 71(1), however, provides that a person may lodge a caution "forbidding the registration of dispositions of the land, lease or charge concerned and the making of entries affecting the same." Section 71(2) further explains that a caution may either: (a) forbid the registration of dispositions and the making of entries altogether" or just to the extent expressed in the caution. The definition needs to be revised to reflect Section 71.
- "Charge" is defined in the Registration Bill here but not in the Land Bill.
- "Community land" is not defined, although both "private land" and "public land" are defined with reference to their respective definitions under the Constitution. This land classification also must be defined with reference to Article 63 of the Constitution.
- The term "person" needs to be defined or a definition needs to be incorporated by reference to another law.
- "Proprietor" is not defined. That term was first introduced under the Registered Land Act ("absolute proprietorship"). The NLP rejects the use of "absolute proprietorship," preferring instead "freehold tenure" because using both terms to refer to the same quantum of rights causes confusion. Because the Constitution refers only to freehold, ownership, and leasehold and it makes no reference to "proprietorship," it is more appropriate to use the term "owner" or "holder" throughout the Bill.
- "Public purpose" is defined within this Bill, although it should only be defined in the Land Bill. If the definition of public purpose remains in the Registration Bill, the definition must be consistent with the Land Bill definition for two reasons: (1) the current definition within the Registration Bill omits as a public purpose "conservation of the environment;" and (2) the included definition grants unfettered and excessive discretion to the Commission to prescribe other "facilities" that constitute a "public purpose."
- The definition of "registry" appears to inadvertently refer to Section 15 when it likely means to refer to Section 7. It would also be useful to define "register" (the noun) given that, in the context of the Bill, it differs from a registry.



## Part II – Organization and administration

**Section 7(1)(d)** usefully provides for the presentation book. The law should also state that the Registrar may not refuse acceptance of applications and must provide a receipt noting the application number and time. Even if the Registrar later decides not to register the interest described in the application (including for reasons of nonpayment of fees, etc.), the applicant should have proof of submitting the application, along with an explanation of the reason that the application was rejected and information about the method to appeal the rejection.

**Section 8** lists the necessary contents of the register, but adds a catchall in Section 8(2)(d), which allows the register to contain “any other particulars as the Register may from time to time determine.” It might be better to not provide the Registrar with such discretion, and instead rely upon the legislature to amend the law to expand the types of information required in the register. If the Registrar requires applicants to submit a single additional piece of data, this requirement will be repeated millions of times over the course of only a few years, and the cumulative burden upon both the public and registration system is large. The Bill should not allow for the collection of information that is marginally useful, and should limit the registry to information that is essential for the functioning of the system.

**Section 9** provides that information in the register does not constitute express, constructive or implied notice of the information to the public. That section, however, should refer to the exception in Section 28, which provides that one acquiring an interest in land is deemed to have notice of all entries in the register relating to the land as of the time of acquisition.

**Section 12(e)** provides that the Registrar may require members of the public to pay expenses that the Registrar incurs “in connection with any investigation or hearing held by the Registrar.” Basic tenets of due process prohibit directing related administrative costs toward claimants or appellants. Otherwise, justice only tends to be available to those with resources. In any event, this provision is an overly broad power that could be capriciously administered.

**Section 14(4)** should perhaps make clear that the parcel number shall be a unique number within each registration section. If each registration district and each section are also assigned their own unique numbers rather than just names, then the combination of district, section and parcel numbers would create a parcel number that is unique within the territory of the country. That might be preferable to having similar numbers in different districts, especially if the registry data is eventually consolidated in a national archive.

**Section 14(5)** could be problematic. It would allow “the body responsible for land surveys” to combine or divide registration sections or blocks, or change their boundaries. This combination would throw the parcel numbering scheme into confusion because the parcel numbers are tied to specific sections and blocks. All documents referring to the old numbers would have to be discovered and changed, and the resulting errors and missed changes would cause problems. Land surveyors should not change the numbering scheme, once devised.

**Section 15(2)** provides that if a parcel boundary is altered on the registry map, that the parcel number must be cancelled and replaced with a new number. This seems unnecessary in many cases and likely to cause confusion because documents will refer to the old number. If the point is to provide notice that the boundaries have been changed, notice could be accomplished simply by placing a note in the register for that document, indicating the change, the date and the reasons for the change.

**Section 15(3)** authorizes the body responsible for land surveys to make new cadastral maps and “omit from the new map any matter which it considers obsolete.” Since the cadastral map has legal

evidentiary significance as a required part of the land registry, which is the responsibility of the Registrar, the provision should simply and explicitly identify what matters can be deleted, such as parcel numbers and parcel boundaries that have been removed or changed.

**Section 17(2)** provides that courts may not entertain actions “unless the boundaries have been determined as provided in this section”; however, Section 17 does not provide for determination of boundaries. But perhaps the thrust of Section 17(2) is to prevent parties from bringing court actions where the parcel boundaries have not been “fixed” according to section 18 (fixed boundaries). This prohibition could have the unintended and undesirable effect of preventing courts from hearing legitimate disputes regarding boundaries, such as boundaries defined by pathways or fences, which have not been fixed by survey.

**Section 17(3)** may be problematic. Although it provides that the Registrar may receive all necessary evidence regarding boundaries, it makes an exception for situations where “it is noted in the register that the boundaries of a parcel have been fixed.” The fact that boundaries have been fixed according to Section 18 should not deprive the Registrar of jurisdiction to consider evidence that would challenge the procedure used to fix the boundaries. Mistakes will doubtless be made in the fixing of boundaries, and the Registrar should have the opportunity to correct such mistakes.

**Section 18** should provide for correction of fixed boundaries where they have been fixed in error, whether the error is attributable to measurement or mistakes committed by witnesses who provided evidence during the fixing of the boundaries. The Bill should also perhaps provide that where the cadastral map purports to describe a boundary marked by a pre-existing permanent (or longstanding) physical boundary—such as a wall, permanent fence, hedge, ditch, roadway, etc.—that such physical boundary shall be deemed to control in case of any discrepancy between the actual location of the physical boundary and the boundary described in the map. In other words, where the cadastral map does not correctly describe the longstanding physical boundary, the law should give preference to the actual location of the physical boundary. This preference is warranted because people, in their normal dealings, are much more likely to rely upon physical boundaries than lines drawn on a map.

**Section 25**, despite the title of the section, does not actually state that the certificate of title establishes “conclusive evidence” of a proprietorship, but that it establishes “prima facie evidence” of the proprietorship that may be challenged in cases related to fraud, misrepresentation, or where acquisition was illegal, unprocedural, or attained “through a corrupt scheme.” Unless a definition of the phrase, “corrupt scheme” is included in the Bill or the Bill references a definition in another law, inclusion of “corrupt scheme” should be omitted. In addition, the term “unprocedural” should be omitted or revised to say, “inconsistent with regulatory procedures.”

### **Part III – Disposition affecting land**

**Section 35(4)** usefully provides that the Cabinet Secretary shall prescribe time limits by which the Registrar shall register instruments presented for registration. Such time limits are essential to efficient operation of the registry since backlogs create opportunities for rent seeking and invite confusion and misfeasance. This section could also provide that such time limits must be posted prominently in the registration offices within view of the public, and provide for waiver or refund of fees in case time limits are not observed.

**Sections 49 - 52** provide that an owner cannot transfer land if such transfer would defeat an unsecured creditor's “right of recourse to land or any interest in” the land transferred. These provisions are counterproductive. If a creditor can void a transfer of land without having previously registered a charge or a caution on the land, this could unfairly injure *bona fide* purchasers who have no reason to suspect that the creditor has an interest in the land. No transfer would be safe from the reach of creditors and purchasers could not be confident that the seller's creditors will not afterwards void their

purchase. Other sections of the law amply protect creditors by requiring them to register charges and cautions. Sections 49 thru 52 should be removed.

## **Part IV – Leases**

**Section 53(1)** provides that, where a registered lease provides that the lessee needs the owner's consent for any subsequent transfer or sublease, the Registrar shall note this restriction in the register. This places the burden on the Registrar to verify the owner's consent to any transfer or sublease later presented. If Kenyan lease practice overwhelmingly favors liberal transfers and subleases by lessees, then this provision is appropriate. However, if Kenyan lease practice does not favor transfers and subleases by lessees, then a safer rule, from the standpoint of both the Registrar and the owner, would be for the law to provide that lessees may transfer, sublease, etc. land only with the consent of the owner, unless the lessee can show that the lease agreement waives such consent. This would shift the burden of compliance from the Registrar to the lessee, requiring the lessee either to produce evidence of the owner's consent, or show the Registrar that the owner has waived such consent in the lease agreement. Note also that Section 54(2) appears to duplicate parts of section 53(1).

## **Part V – Charges**

**Section 56(5)** is complicated, and its application is not immediately apparent. It might be simpler to provide that charges cannot be used to secure the types of conditions and periodic payments described.

**Section 59** provides that where a registered charge provides that the lender's consent is needed for any subsequent transfer, assignment, etc. by the borrower, that the Registrar verify the lender's consent to any transfer, etc. of the land later presented by the borrower for registration. If Kenyan practice greatly favors liberal transfers of land subject to charge, then this provision is appropriate. However, if Kenyan practice does not favor transfers of land subject to charge, then a safer rule from the standpoint of the Registrar and the lender, would be for the law to provide that a borrower may transfer, etc. land subject to a charge only with the consent of the lender, unless the borrower can show that the charge agreement waives the lender's consent. This provision would shift the burden of compliance from the Registrar to the borrower, requiring the borrower either to produce evidence of the lender's consent, or show the Registrar that the lender has waived such consent in the charge agreement.

## **Part VI – Transmission and trusts**

**Section 62(1)** grants a deceased's personal representative or beneficiary the right to hold the land of the deceased, subject to "any liabilities, rights or interests that are unregistered but are nevertheless enforceable and subject to which the deceased proprietor held the same." The Bill further states that, for purposes of dealings in the land, the personal representative or beneficiary shall hold proprietary interests to the land holdings, as if such interests had been registered. As currently drafted, this section appears to lack adequate protection for the right of the deceased's spouse(s) to remain on family land. One way to strengthen this section would be to clarify that unregistered "rights or interests" include those of any surviving spouses and, in particular, that the right of the personal representative or beneficiary to deal in the land is subject to the rights—both registered and unregistered—of the surviving spouses.

## Part VII – Restraints on alienation

**Section 70(c)** provides that an inhibition shall be cancelled if a chargee sells the land, lease or charge. The purpose and application of this section are not clear.

**Section 75** allows a person injured as the result of a caution wrongfully filed to bring an action for damages against the person who filed the caution. In addition to paying compensation to the injured party, the person who wrongfully filed the caution should also be required to pay the reasonable attorney fees and other costs incurred by the injured party in removing the caution. This requirement would create additional disincentives against wrongfully filed cautions.

## Part VIII – Rectification and indemnity

**Section 81(1)** provides that the Government shall indemnify any person suffering damage as the result of rectification of the register or any error in a copy from the register. In addition to that provision, it may be necessary to indemnify proprietors who lose land as the result of fraud, where the bona fide purchaser for value is registered as the new proprietor. Sec. 80(2) protects the bona fide purchaser (whose rights have been registered without the fault of the purchaser) against rectification. But the former proprietor who has lost ownership as the result of third-party fraud should be able to seek indemnity since the proprietor cannot seek rectification. Amendment of this section to allow indemnification in such cases is consistent with section 82(a), which provides that indemnification may be paid where the register is not rectified.

**Section 85(1)** is welcome because it provides that a proprietor cannot claim indemnity where measurement of land discloses an area of measurement differing from that which appears in the register. Section 85(2) allows a proprietor six months in which to seek indemnity from the person who sold the land where measurement of the land reveals an inconsistency with data in the register. It is not clear why the proprietor should be able to maintain an action against the seller unless there is evidence that the seller conspired to commit fraud, especially since the cadastral map is certified by Government surveyors.

## Part IX – Co-tenancy and partition

**Section 91(6)** provides that a tenant in common cannot transfer an interest in land except with consent “in writing or in any other manner which signifies clearly that the consent is given freely and without undue pressure. . .” The reason that this provision allows for less than formal consent is not clear. Without requiring consent in writing, there is potential for abuse, particularly between spousal tenants. The emphasized portion should be omitted. If that phrase remains, however, “undue pressure” must be defined. The provision further provides that the consent of the remaining tenants “shall not be unreasonably withheld.” It is not clear why tenants in common should be compelled to allow one tenant to transfer that tenant's interest. If the tenants are not able to reach agreement, they can seek partition.

**Section 97(1)** contemplates that a tenant in common may secure a charge against the tenant's undivided share. It is not clear why a tenant in common should be permitted to charge the land without the consent of all tenants.

## **Part X – Creation of easements and analogous rights**

The Registration Bill appears to omit a requirement for registering easements. Section 98(3) only provides for the contents of the easement instrument. The Bill, at section 99, only sets forth the process that the Registrar shall go through for canceling the easement. Section 98 ought to be revised to include a requirement to register the easement instrument within a specific period of time after execution by both parties.

With respect to the substantive aspects of sections 98 through 100 of the Land Registration Bill, these provisions suffer from the same defects as identified in the analysis of Land Bill's easement provisions, i.e., failure to provide for easements in gross, which is necessary to facilitate the creation of environmental easements. For a discussion of the legal framework necessary to support environmental easements, see the analysis of the Land Bill at Issue 10.

## **Part XI – Miscellaneous**

Section 103(2) provides penalties for unlawful occupation of public land. That subject, however, is not appropriate for inclusion in a law governing the registration of rights to land.



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