

Law for State Land Management in Cambodia

Access to land empowered by law is a crucial issue for the sustainable development of a modern, prosperous Cambodia where the social and ecological responsibilities are well developed and embedded in a State Land Management. The State is the main actor in the land sector and has to guarantee state public property which cannot be transformed into private property.

Cambodia still shows a high rural poverty rate, land concentration and anarchy in illegal land possession, illegal claim of state land and protected areas as privately owned and unlawful logging (Royal Government of Cambodia, *Rectangular Strategy II*, 2008, p. 6.). State Land Management in Cambodia must give an answer to these problems. State Land Management is an interdisciplinary approach of land policy, land law, land economy and planning law for the use of public immovable properties. The recent Land Policy Declaration gives much hope that this policy will reflect the needs of all Cambodian people: “The vision of land policy in Cambodia is to administer, manage, utilise, and distribute land in an equitable, transparent, and sustainable manner in order to contribute to achieving national goals of poverty alleviation, ensuring food security, natural resources and environmental protection, and socio-economic development orienting towards market economy” (*Land Policy Declaration*, 2008, p. 1).

Constitutional Law and Land Law

The legal framework for property includes the Constitution from 1993,

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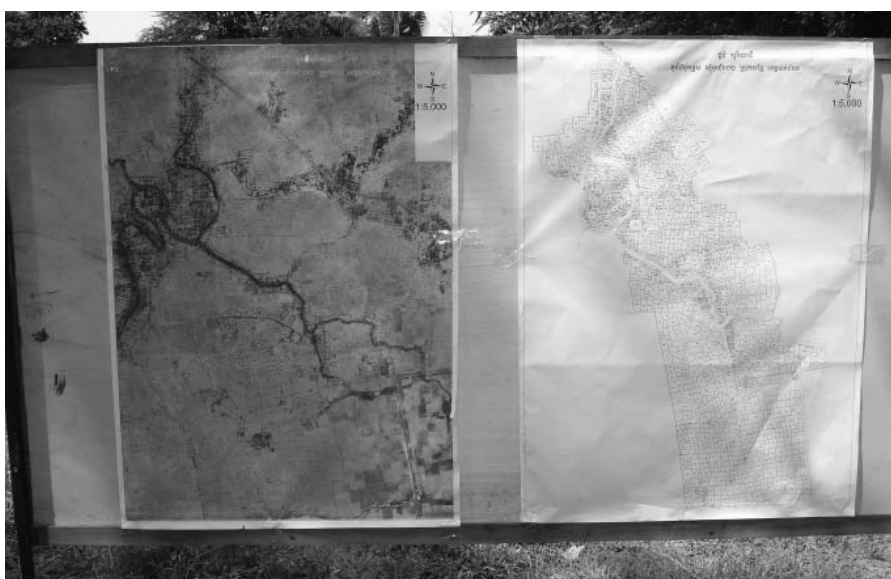


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the Land Law from 2001, and Sub-decrees. Five main categories of property on land (immovable property) can be named: Private property, state public property, state private property, common property, and indigenous property.

Private property is protected under the Constitution and the Land Law. Only natural persons or legal entities of Khmer nationality shall have the rights to own land (Article 44 Constitutional Law). Systematic or sporadic land registration transforms de facto use rights and ownership into de jure private property rights through land titles. Private property rights ensure “exclusive” interests like the right to exclude others, to enter, use or to dispose of the property (exclusivity).

Cambodia has adopted a market economy system (Article 56 Constitutional Law), with the rights for all Cam-

Public display of land registration.

bodians to own any amount and kind of land. The real estate bank system uses titled land, buildings and machinery as collaterals (property) for mortgaging. The owner gets a loan for the mortgage, but has to live with significant risks to ensure that the loan will be repaid in case of default. As a consequence, collaterals can easily lead into high debts, bankruptcy, and the loss of property if the market value of the collateralised land decreases and if the value does not cover the loan anymore.

Article 58 is an important one for State Land Management. According to Article 58 Constitutional Law, State property comprises “land and other properties”. State property has to be divided into two forms: State public property and state private property.

State private property can be sold to anyone private. The essential property form for State Land Management is State public property. This property must be interpreted in the future as the property of all Cambodian people that serves all human beings in the country. At present, state public property can also be sold like state private property, but has to be transformed into the category of state private property before (Article 15 Land Law) and then via the next transaction steps into private property. The legal instrument that opens the door for transforming it into state private property is a Sub-decree. Sub-decrees regulate the conditions and procedures for the land transfer into state private property for private purposes (Article 17 Land Law).

The only property that cannot be occupied or possessed by Privates is common property. Unfortunately, common property is not state public property. It refers only to Monastery Land like the land of the Pagodas. Indigenous property – the land where indigenous communities have established their homes – is collective property on state public land.

Private land use and security of tenure without private property rights

State Land Management needs a broader basis within the Constitution. One of the main purposes of public-oriented and constitutionally justified land management is to ensure access to land to all Cambodian people for their private use. Private land use under conditions of tenure security is more efficient than state land use. But that does not require per se private property. State public property with the guarantee for private use is absolutely sufficient, efficient and effective. The land use for all people must be a pub-

lic interest. Article 44 of the Cambodian Constitution says: “Expropriation of ownership from any person shall be exercised only in the public interest as provided for by law”. Article 58 declares: “State property comprises land (...)”. The term “public interest” should be integrated into Article 58 Constitutional Law in order to clarify that state public property is of essential public interest. Avoiding land speculation and combating illegal claim of state land must be a constitutionally demanded public interest within Article 58 to guarantee state public land. Social housing and sustainable use of forest, fishery, and other resources must also clearly be defined as a public interest of the Cambodian State.

The Constitution and the Land Law shall empower the Government to guarantee a market economy including a real competition with opportunities for all Cambodian people based on state public property that is not allowed to be sold to Privates. It must be interpreted as a public interest in the future that the (eternal) ground rent as the economic gain of the land use is skimmed off and, in the next step, is redistributed to all Cambodians in equal shares.

Land concessions

According to the Land Law, two forms of land concessions can be mentioned: Social Land Concessions (SLC) and Economic Land Concessions (ELC). The term “Concession” in the context of the Land Law is delusive, because concessions are legal rights to occupy land for possession and private ownership (Article 48-62 Land Law). They mostly result in private property in the end of the transaction processes instead of maintaining state public property.

Social Land Concessions are reserved for the landless and land poor citizens. SLC can achieve better allocation, but not always equal distribution. In particular, SLC cannot solve the problem of transaction costs for the access to land. However, SLC play a central role in projects for land allocation. Pilot projects contain the reclassification of former state public land to be registered as state private land for SLC which will after five years of latency be transformed into private ownership of the individual beneficiaries. SLC lead to private property with the right for the concessionaire



Photo: gtz

A land-use planning system enables the Cambodian authorities to guide the use of state public property for the benefit of the people and the environment.

Zusammenfassung

Das Verfassungsrecht und das Bodenrecht sind in Kambodscha bislang nur unzulänglich auf die Bedürfnisse einer Politik zugeschnitten, die Zugangschancen für alle Bürger in Bezug auf Land eröffnet. Optimierungsbedarf besteht in der Schaffung eines nicht auf Private übertragbaren öffentlichen Bodeneigentums sowie in der Implementierung eines zukunftsfähigen Raumplanungssystems.

Resumen

Hasta ahora, el derecho constitucional y el derecho de propiedad de la tierra en Camboya no han sido adaptados apropiadamente para los requerimientos de una política que ofrezca oportunidades de acceso a la tierra para todos los ciudadanos. La necesidad de optimización reside en la creación de un derecho público de acceso a la tierra que no sea transferible a personas privadas, así como en la implementación de un sistema de ordenamiento territorial sostenible.

to exclude others from the use of the concession land and therefore to the opposite intent of equal distribution and social purposes. Moreover, SLC lack effective implementation due to “skyrocketing” rising of land prices in the last years as a result of massive competition for land through private developers and a loss of concession land for other (sometimes highly speculative) purposes. The reasons for the deficits of the SLC can also be found in the land economy: The total supply of land is not elastic. Therefore the supply of land cannot be increased due to a high demand. The amount of land stays more or less the same. This economic diagnosis is valid all over the world. Only the land prices and the ground rent rise which is the basis for land speculation, land hoarding and land grabbing.

Economic Land Concessions (ELC) respond to an economic purpose allowing the beneficiaries to use the land for industrial purposes. ELC are

restricted to a maximum size of 10,000 hectares (Article 59 Land Law) and are time-restricted up to 99 years (Article 61 Land Law). Given the duration of 99 years, the right of an economic concessionaire is comparable to the right of a private owner. Economic concession land is de facto private property land. ELC can also be used as a legal instrument to convert state public land into state private land by Sub-decree. The maximum ELC duration of 99 years may be too long. Average durations of up to 20 years would be rational in order to have efficient control and the ability to determine alternative land use when the concession contract ends.

Land leasing

Without any doubt, private land use is more efficient than state land use. But that purpose does not automatically require full private ownership. More than that, the private property rights solution for the use of land which was found to be useful for the Western States is not a promising blueprint for Cambodia. Therefore State Land Management requires efficient land lease rights. Land leasing has excellent conditions in Cambodia, because it is already part of the Land Law (Article 106-113). Leasing rights ensure access to state public land for many Cambodians without high transaction costs. The reduction of transaction costs is a central task of the land policy in Cambodia as it is the case worldwide.

Land leasing is somehow “divided property”. It is divided into property of the State as a lessor for state public property for the land and into property of the private as a lessee for private building. State public property is a necessary precondition to set up land leasehold rights on non-transferable state public land for “public interest” (state land management). Under the leasehold, the Privates do not have to buy the land, because it remains as state public property. The lessees can save the money for a building of good

quality, e. g. with renewable energy supply or are able to achieve better (university and school) education for their children by investing the money saved in books, fees or courses.

Land use planning

State Land Management needs a sound land use planning system. “The State shall protect the environment and the balance of natural resources and establish a precise plan for the management of land” (Article 59 Constitutional Law). Having a land use planning system in the future, the Cambodian planning authorities are able to guide and restrict the use of state public property in order to protect and promote the public interest.

Land use plans at national, provincial, district and community level are necessary to avoid urbanisation, deforestation, underused land hoarding and speculation. They can achieve land use control thanks to the designated social and economic purposes. But even the best plans are totally useless when they are blocked by private land owners who sometimes do not accept the planning law determinations for their plots. The Privates hope to increase and bag the ground rent (rent seeking).

Land use planning safeguards are suitable legal instruments for residential, agricultural and unused land. Safeguards are commune statutory rights to buy land via pre-emption rights. Planning purposes for public interests are the conservation of the landscape for rural and urban biodiversity, for open space in the cities and for agricultural uses in order to achieve food security.

To sum up, State Land Management comprises constitutional law, land law, planning law, concessions and leasing on state land that cannot be transformed into private property. The Royal Government of Cambodia should generally not allow private, unrestricted property for non-renewable resources like land, soils, minerals and other natural commodities.

Farmers' Rights update

The right to save, use, exchange and sell farm-saved seed is essential for farmers, especially in developing countries. However, these rights are increasingly affected by regulations on plant breeders' rights, seed laws and seed certification, and there is little incentive to continue traditional plant breeding. Instead, unfavourable legislation often leads to farmers becoming increasingly dependent on the seed industry and plants that are adapted to the local conditions disappearing from the market. As a result, food production on marginal lands can decline, increasing poverty and hunger in rural areas. Furthermore, the conservation of biological diversity plays a vital role in ensuring global food security: it preserves plant genetic resources, which are essential for cultivating new varieties and for the adaptation of agriculture to climate change.

The International Treaty on Plant Genetic Resources for Food and Agriculture

(ITPGRFA) approved by the UN Food and Agriculture Organization (FAO) in 2001 is the first legally binding international agreement to recognise Farmers' Rights. The most important objectives of the Treaty are the protection of traditional knowledge, the right to equitably participate in sharing benefits arising from the utilisation of plant genetic resources for food and agriculture, and the right to participate in decision-making, at national level, on matters related to the conservation and sustainable use of these resources.

The realisation of Farmers' Rights

The Fridtjof Nansen Institute in Norway is observing the implementation of the ITPGRFA through the international Farmers' Rights Project. It is being supported by a number of institutions, including the Deutsche Gesellschaft für Technische Zusammenarbeit (GTZ), working on behalf of the German government.

This research project analyses the realisation of Farmers' Rights and thus contributes to the identification of options for implementing the Treaty.

One of the project's main activities is to collect 'success stories' by conducting an international survey. These best practices show that Farmers' Rights are already being implemented in some of the contracting states. Successes include India's Protection of Plant Varieties and Farmers' Rights Act, which establishes the right for farmers to save, use, exchange and sell farm-saved seeds,

and a South Asian NGO network, which convinced the Nepalese authorities not to join UPOV – despite strong pressure from the United States during Nepal's accession to WTO. This has mainly been achieved through capacity building, networking and advocacy work. Although selected countries have already considered benefit sharing in their legislation, so far there have been few examples of monetary benefit sharing put into practice. This, however, may partly be explained by the fact that monetary benefit sharing does not become effective until marketable products are developed from the shared resources, a process which takes around ten years if plant breeding is involved.

In spite of the progress made, concern remains about the slow pace of implementation of all the Treaty's components. Critics take issue with the fact that, while the Treaty is already facilitating access for users – including the seed industry – it still does not provide the level of legal and political support that farmers need to maintain their traditional breeding and plant-growing practices. Hence, farmers' organisations and NGOs working towards the implementation of the Treaty are focusing on articles 6 and 9 – the sustainable use of plant genetic resources for food and agriculture and Farmers' Rights.

What are the next steps?

The most important starting point in promoting Farmers' Rights is to provide extensive information about their existence in all contracting states and to build capacity at all levels. The long-term goals are the incorporation of the treaty's content in national legislation and the concrete implementation of the treaty, supported by development cooperation activities already in progress.

In June 2009, the third meeting of the governing body of the ITPGRFA will take place with Farmers' Rights on the agenda.

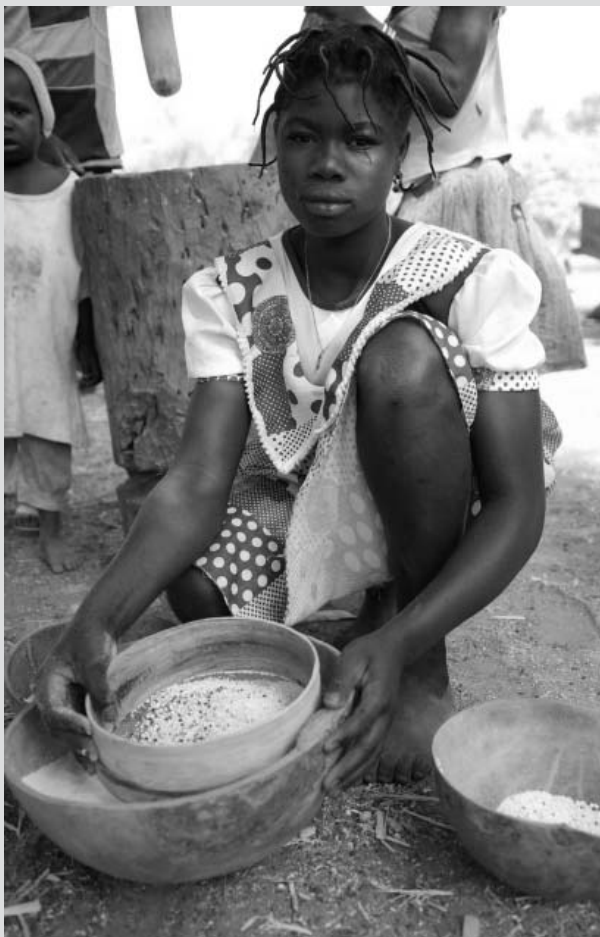


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Traditional knowledge of plant breeding and growing is important to maintain biological diversity.

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