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Trzcinski, Leah M.

Upham, Frank K.

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The Integration of Conflicting Donor Approaches: Land Law Reform in Cambodia

Leah M.Trzcinski * and Frank K. Upham **

Abstract: Since 1990 successive waves of foreign experts have introduced into Cambodia legal transplants dealing with the possession, use, and ownership of land. Many of the laws were based on the perceptions of the particular foreign sponsor without meaningful participation by domestic actors or cooperation with other donors. Despite recent efforts to reconcile the laws, implementation remains inequitable and legal ambiguity persists. The Cambodian experience brings into question not only the wisdom of foreign intervention but also the desirability of any form of formal legal construction in a society without the necessary social, political, and institutional prerequisites.

I. Introduction

This paper uses the development of land law in Cambodia to investigate the nature, process, and effectiveness of foreign-led legal construction in countries without the robust social, political, and institutional structures that some would consider pre-requisites for an effective legal system. We chose land law because it is at the intellectual and institutional center of efforts to build legal systems in poor countries. Security in land tenure is generally assumed to be necessary for optimum levels of agricultural productivity, and the provision of formal legal title to land has been considered the best way to provide such security.¹ We chose Cambodia because

* JD Candidate, Class of 2013, New York University School of Law; M.I.A., Columbia University School of International and Public Affairs, 2010.

** Visiting Professor (September 2010–December 2010), Graduate School of International Cooperation Studies, Kobe University. Wilf Family professor of Property Law, New York University School of Law. The authors thank the many individuals in Cambodia and Japan who assisted in the preparation of this article. The authors gratefully acknowledge support from the Filomen D'Agostino and Max E. Greenberg Research Fund at New York University School of Law.

as an agricultural country whose economic future depends on the success of its rural sector, it provides an excellent case study for investigating this assumption. It has also been the recipient of sustained legal reform assistance from a variety of donors over the last three decades. Successive waves of foreign advisors have not only designed the relevant statutes, but have also funded and overseen the building of the bureaucracies charged with their implementation. The breadth, depth, and duration of foreign presence combine to make Cambodia an unusually apt and accessible site to investigate both the utility of foreign intervention in law reform and the interaction between legal rules and the public bureaucracies designed to enforce them.

The paper proceeds as follows. Section II summarizes Cambodian land use legislation focused on the conflict between the Land Law of 2001 and the Civil Code of 2007. The former was drafted by a development bank-sponsored team and introduced an Australian-based system that emphasizes clarity and simplicity in land titling by recognizing ownership exclusively on the basis of formal registration with a centralized cadastral agency. The Japanese-drafted Civil Code, on the other hand, treats registration as only establishing a presumption of ownership, which can then be rebutted by evidence of use, possession, or local custom in the case of a disputed transfer. These contrasting approaches not only reflect the national experiences of their drafters but also represent two opposing views of law and its role in social and economic development: Should legal rights – in this instance ownership of land – be made simple, clear, and universal so that assets can be easily exchanged in Coasian bargaining,² or should legal rights reflect and reinforce established local practice? Section III illustrates the competing approaches by focusing on land law implementation in the area of land registration. Throughout, the paper notes the ongoing tensions among Cambodia's various foreign patrons and the domestic ministries that have aligned themselves with one side or the other. The paper concludes in Section IV with a tentative assessment of foreign involvement including consideration of which model better suits Cambodia's situation and speculation on whether it might have been a better course of action for Cambodia to devise its own indigenous system of land law. We do so, however, without any pretense of offering failsafe prescriptions or best practices for legal reform in poor countries.

II . The Evolution of Cambodia's Land Law

The Land Laws of 1992 and 2001

After the disastrous socialist experiment of the Khmer Rouge from 1975–1979 and the subsequent Vietnamese-introduced socialist regime, Cambodia began to reconstitute its legal framework in the late 1980s as part of the establishment of a market-oriented democratic state. One product of this wave of legal reform was the Land Law of 1992. With elections scheduled for the next year there was a willingness to adapt “only the minimum provisions necessary to establish a sense of order.” Because of the urgency, the government promulgated the Law without much discussion, and many of the provisions were simply copied from the 1920 Civil Code.

A more consultative approach was adopted in drafting of the 2001 Land Law. The goals for the legislation were the integration of Cambodia into the world economy and the provision of greater tenure security to average Cambodians.³ To accomplish these goals, simplicity and transparency were considered of paramount importance. In keeping with this priority, the law not only disavowed any attempt to re-establish pre-1979 property rights, but also allowed people in lawful acquisitive possession of land as of 2001 to apply for ownership after five years of peaceful, continuous, unambiguous, and open possession in good faith. What the law emphatically did not allow is for possession initiated after the promulgation of the law to ripen into ownership.

Instead, title was to be determined after the transitional period exclusively by registration in a cadastral land registrar to be established under the Ministry of Land Management, Urban Planning, and Construction [MLMUPC or Land Ministry]. Three articles in the Land Law appear to create a system that relies almost exclusively on cadastral registration. Article 239 states that the official cadastral records “have legal value and precise effect,” which has been interpreted to mean that the registry prevails even when the registration was the result of mistake or fraud. Second and consistent with this interpretation, Article 226 states that “ownership of immovable property shall be guaranteed by the State,” which has been interpreted to mean

that instead of retaining ownership the original private owner would be entitled to state compensation in cases of registry inaccuracy causing loss of ownership. Third, Article 65 states:

The transfer of ownership can be enforceable as against third parties only if the contract of sale of immovable property is made in writing in the authentic form drawn up by the competent authority and registered with the Cadastral Registry Unit. The contract of sale itself is not a sufficient legal requirement for the transfer of the ownership of the subject matter.

This emphasis on registration to achieve legal effect is the essence of the Australian-inspired Torrens-style registration system established by the 2001 Law. The desire for a definitive cadastral registry led to the Land Management Administration Project (LMAP), funded primarily by the World Bank (with the support of GiZ, Finnmap, and CIDA), that would supply the technical expertise to do the mapping necessary for the quick, clear, and conclusive indication of ownership commune by commune throughout all of Cambodia.

While the 2001 Land Law was formally drafted by the MLMUPC, the origin was not Cambodian. One key (French) participant described the process as follows: “Every draft was discussed by local institutions and the Cambodians tried to make it theirs but the first draft always came from the international community.” Tellingly, the law’s official domestic sponsor admitted that he “didn’t understand the law” and that it was not “our law” but “the law of NGOs.” A longtime member of the NGO community, on the other hand, emphasized donor influence:

It depends how much noise the NGOs make about a particular issue and whether they are aware of the process before it is too late. Sometimes the donors require consultation with the community in promulgating the laws but there is still a lot of tokenism. The government just doesn’t have the political will to get input.

The precise lines of influence and causation are unimportant for our purposes. What is important is that the law is the epitome of top-down social engineering with the added dimension that it was based on foreign models and designed by foreign

experts with little or no knowledge of conditions in rural Cambodia where the law was to have the greatest effect. It does not purport to reflect or connect to existing social practice beyond its recognition of acquisitive possession begun prior to its promulgation. It is not, in other words, the government “mapping” of society of James Scott’s *Seeing Like a State* so much as it is the declaration of mapping to come. Unlike much such social engineering, however, it is directed not at increasing government power but the opposite: Its aim is the minimization of the governmental role through the realization of the decentralized power of market actors by creating a simple and transparent property rights regime that will facilitate Coasian bargaining. Doing so will also enable the direct foreign investment in Cambodian agricultural land that the drafters assumed would be difficult with a less centralized, less universal, and hence less transparent system.

Although quintessentially neo-liberal, these characteristics do not mean that the law ignores the weaker parts of the population. On the contrary, the creation of social land concessions (SLC)⁴ and the recognition of communal property are directed at these groups. It is true that the SCL process has no connection whatever to the social reality of the poor and that no communally possessed land had been registered in the Land Register with collective ownership title certificates issued as of June 2011 (and apparently only three indigenous minority communities have been formally recognized by the Ministry of Interior as eligible), but these provisions are intended to provide for these needs in precisely the simple, transparent, and orderly way that the registration system and economic land concessions⁵ are intended to facilitate the market process.

2007 Civil Code

At the same time that the discussions regarding the draft 2001 Land Law were taking place, a parallel process was underway to draft a new Civil Code. Driven by both domestic and external pressure, the Cambodian Ministry of Justice [MoJ] commissioned the Japanese International Cooperation Agency (JICA)⁶ in 1999 to coordinate drafting a code. Drawing on the expertise of Japanese legal scholars familiar with the Japanese Civil Code, the goal of the 2007 Cambodian Civil Code

was to unify the various statutes dealing with civil law, including the Land Laws of 1992 and 2001, be consistent with the Constitution of 1993, and facilitate Cambodia's entry into the World Trade Organization (WTO). JICA's efforts bore fruit with the December 2007 enactment of the Civil Code, but the need for transitional provisions exacerbated by bureaucratic competition between JICA and the Ministry of Justice on one side and the development banks and the MLMUPC on the other, meant that the Code would not become applicable until the effective date of the Law on Application of the Civil Code enacted in 2011.⁷

There are many areas of uncertainty in the interpretation of the Civil Code and its relationship with pre-existing statutes like the Land Law, but we will deal here only with the conflict between the two laws' approaches to ascertaining and awarding title to land.⁸ As discussed above, the 2001 Land Law is best interpreted to create a Torrens-style land registration system in which proof of registration constitutes ownership. In contrast, Article 137(1) of the Civil Code provides only that "where a right is registered [...], it is presumed that such right belongs to the person to whom it is registered."

An equally important issue is the respective treatments of informal possession and prescriptive acquisition. Articles 162 (1)-(2) of the Code allow for acquisition of ownership of private property after twenty years of peaceful and open possession (and after only ten years if the possession is in good faith and without negligence or fault) without reference to the pre- or post-2001 commencement of the possession. Although these provisions have been interpreted to require that the possessor must perfect ownership through registration, the Code itself does not specify as much.⁹ Thus private owners and third party purchasers relying only on the registry could face a dispute with the acquisitive owners who would have a presumption of good faith in their favor.¹⁰ The Code, therefore, would provide a means of determining ownership that is vastly more responsive to the informal facts on the ground, even if that responsiveness sacrifices the precision perceived to be needed to facilitate market transactions.¹¹

As with the Land Law, it is worth considering the institutional origin of the Code's rejection of the Torrens-style registration system. Japan's own land law is

closer to the American deed registration system than a Torrens-style system, and JICA experts were worried that the land registry would quickly be corrupted by local officials or become out of date as average Cambodians failed to register subsequent transfers as has been the case in titling programs elsewhere.¹² JICA personnel also felt that it was inequitable to favor the bona fide third party purchaser over the innocent original owner in the case of fraud.¹³ Nor did they give credence to the apparent state guarantee of compensation to owners victimized by registry inaccuracies. Fearing low state funds and a lack of political accountability, a state guarantee was not deemed realistic.

Reconciling the 2001 Land Law and the 2007 Civil Code

To appreciate the dynamics of resolving the conflicts of law between the Land Law and Civil Code, one must step back and consider the political and institutional context in the years leading up to the passage of the Code. Land was a central concern from the early years of the Hun Sen regime, and in 1992 a consortium of EU governments, the UN, and other international agencies commissioned Finnmap, a private Finnish company specializing in land management consulting, to complete an aerial photography project for resource mapping from 1992-1996.¹⁴ Finnmap next undertook a pilot land registration project in 1997 under the 1992 Land Law and is still engaged in related projects as of 2011.¹⁵ The German development agency GiZ¹⁶ entered the land registration field in 1995 collaborating with the MLMUPC and Finnmap. Both Finnmap and GiZ's style of technical advisory was to retain experts and to locate them in the country on a long-term basis. As a result these professionals developed close working relationships with their counterparts at the Ministry.

The World Bank became heavily involved in the land sector in 2002 following the promulgation of the Land Law. It invested \$33.9 million in the Land Management Administration Project (LMAP), which sponsored significant portions of MLMUPC initiatives in mapping and registering land. With substantial investment came policy influence, at the expense not so much of the Cambodian government but of their longtime resident Finnmap and GiZ technical advisors, who constituted an interest and repository of expertise distinct from the newcomers. Unlike many World Bank

initiatives, LMAP dedicated a significant effort to legal and policy issues, and the World Bank team strongly believed that a free market in land required the clear and definitive title system promised by a Torrens-style registration system. In the ensuing tension, the Cambodian government tended to favor the Finnmap and GiZ staff, perhaps because they had been in the country on permanent postings as opposed to the periodic evaluation missions of the World Bank. Or perhaps because the technical support from Finnmap and GiZ came in the form of a grant as compared to the World Bank's loans. Nonetheless, the World Bank view carried the day.

JICA's work with the Ministry of Justice on the Civil Code commenced in 1999 but their collaboration with MLMUPC (and its related technical advisers) effectively began in 2003. Regardless of the pre-existing differences between the Finnmap-GiZ staff and the Bank team, they found common ground in opposition to the arrival of JICA in the land policy arena. Therefore, when it came to negotiations over the reconciliation of the Civil Code and the Land Law, this group lined up squarely behind the Land Law and the registration system it had established and in which they had already invested millions of dollars. They argued that the Civil Code's recordation system would create uncertainty as to land ownership and thus require title insurance, which given the unpredictability of Cambodian courts would be very expensive and available only to the rich. Lacking a definitive registration system or title insurance, poor Cambodians would be disproportionately harmed and free market reforms would be undermined.

The conflicts between the external advisors were mirrored by those between the ministries. One participant described the situation as follows: "Each ministry is like a separate fortified island. They don't talk to each other and don't work well together even in areas where their responsibilities overlap." There was more at stake than simple pride in authorship. In a generally corrupt bureaucracy like Cambodia's, bribes and informal payments are commonplace. "Each signature is a tip, so if your ministry is required to sign a particular document to authenticate it, then you've just increased the budget of your ministry." Therefore, there was more at stake than just legal ideology in the debate over the Torrens-style registration vs. the recordation system. The latter would shift power from the MLMUPC to Justice and give the

courts the final word on whether a particular title maintained its presumption of authenticity or not. Since the framework in place since 2001 granted ultimate authority to the MLMUPC, the ministry had a lot to lose.

After prolonged working group discussions over the next seven years including some meetings in Washington DC with minimal domestic Cambodian involvement, the 2007 Civil Code was enacted. This did not, however, conclude the matter as several transitional issues and implementing provisions remained to be reconciled. A compromise was finally reached and codified in the Law on Application of the Civil Code in 2011 to take effect in early 2012. The 2001 registration system remains in place, but the conclusiveness of the registry has been substantially weakened with various forms of possession and use becoming relevant in the determination of ownership. The MLMUPC will continue to control the land registration process in terms of issuing certificates but the courts will have the final say as to the authenticity and effect of those certificates.

At first blush it seems that the 2007 Civil Code won out overall, though the continued existence of the registration system is a considerable concession to the 2001 Land Law. While Finnmap, GiZ, and CIDA continue to be involved in land registration on a smaller scale,¹⁷ the Cambodian Government terminated the World Bank funding for LMAP in 2009 following a World Bank Investigation Panel report on the Boeung Kak Lake evictions that severely criticized the corruption of the Cambodian government. It is also telling that most of the recent projects undertaken by Finnmap have been financed by JICA and individual Cambodian Ministries (e.g. Ministry of Agriculture, Ministry of Public Works and Transport, Ministry of Water Resource) or private companies and estate agents. Nevertheless, as one technical advisor close to these negotiations pointed out, “Both sides argued over this a lot, but at the end of the day the reality is that whatever is agreed on won’t matter – things will progress they way they always have.” Thus we are reminded that the real impact of the legal framework lies in its implementation and it is to this topic that we turn to next.

III . Cambodian Land Law in Application – Land Registration

While the building of the technical capacity and legal framework necessary for effective land administration have achieved considerable results, implementation of the land registration system critical to the reconciliation of the statutory conflict identified in section II has lagged. It cannot be said, however, that the procedures failed for lack of effort. As this section will explore, the land registration procedures reflect well-intentioned but problematic policies that have served to weaken tenure security for vulnerable parts of the population.

LMAP instituted a dual system of land registration procedures – systematic and sporadic. The former is conducted by LMAP teams in pre-selected areas and aims to map and provide ownership titles to the entire community. The latter responds to applications and targets only the individual applicant's land. Both are the responsibility of the Cadastral Administration as is the creation and maintenance of Land Register.¹⁸ As of 2010 these processes had reached Phnom Penh and 15 selected provinces, with registration in slightly less than half of the communes within these provinces now complete.¹⁹ The systematic titling process has collected data on 2,053,062 parcels, 80% of which are rural, and distributed 1,500,493 parcel titles to citizens. An additional 607,784 titles have been distributed through the sporadic process, bringing the total to 2,108,277. The process has yielded over 10 billion Riel [\$2,636,760] in cadastral fees, meaning that titling has become self-financing since the 2009 withdrawal of World Bank funding.

Unfortunately, these aggregate statistics mask considerable disparities within title registration. First, LMAP's strategy was to begin systematic titling in areas that were neither "likely to be disputed" nor of "unclear status." The rationale was to focus on areas where LMAP could be most successful, at once building capacity of the administrators and gaining legitimacy for the program through early successes.²⁰ The result was that households and communities that lie in the path of planned developments or concessions or whose lands have been targeted by well connected individuals or companies have been excluded from the process,²¹ especially since the categories "likely to be disputed" or "unclear" were not defined.²² Local authorities, therefore, had essentially unfettered power to remove land desired by powerful individuals from the cadastral process. Since sporadic registration was considered

too costly for most poor households,²³ areas left out of systematic land registration were resigned to a fate of tenure insecurity. This situation was exacerbated by the Land Law's limitation of cognizable forms of evidence of ownership granted by prior regimes, thus exposing these communities to accusations of being illegal "anarchic squatters."²⁴ Therefore, while the owners of the one and a half million parcels that have received formal land title through the systematic registration have undoubtedly benefited, those households left out of this initiative are relatively much worse off.

A second problem, one foreseen by the Japanese, is the common belief that holding the title certificate, as opposed to registration with the Cadastral Administration, constitutes ownership so that even in areas that have been successfully titled, transfers of land and certificates remain unregistered. The ensuing problem of outdated registries is exacerbated by bureaucratic practice and fraud because local land officials routinely rely on documentation rather than actual land use, which means that wealthy individuals with falsified documents can dispossess farmers who have peacefully possessed the land or have even registered it under now invalid systems.²⁵ Greater community knowledge of the law and the need for registering transfers may help some of these issues, but one study found "no evidence that any LMAP public awareness and community participation projects have been conducted in partnership with NGOs or other representatives of civil society."²⁶

Shortcomings notwithstanding, the registration process has had some notably positive effects. There is evidence that systematic titling has improved access to credit as most banks will accept a registration certificate as collateral for a mortgage or other loan,²⁷ and possession or ownership certificates have proven useful in local disputes between community members of relatively equal means.²⁸ Another consideration often overlooked by human rights activists is cost: the cost per title of Cambodia's systematic registration system is among the lowest in the world. Before one becomes too optimistic, however, the scale of the task should be kept in mind. The total number of land parcels in Cambodia is now estimated at upwards of ten million, so while 1.5 million systematically issued titles is impressive, to title the entire country would take another 45 years at the current rate.²⁹ Therefore a change in approach may be necessary to expedite the process, especially when it is

remembered that the least contentious areas were done first.³⁰

Connecting Legal Reform to Policy Implementation

Humility should be the watch word in making even a tentative evaluation of Cambodian land law reforms. Time has been short; reliable data are scarce; available reports often mirror the interests of their authors; and finding an appropriate metric may be impossible. Judging Cambodian bureaucrats and foreign donors by the often utopian rhetoric of proponents of land titling in general or a Torrens-style registration system in particular may be satisfying on one level, but it suffers from the unacknowledged assumption of a counter-factual that might very well have had additional negative unanticipated consequences. The analysis that follows is offered with these limitations in mind.

Although the titling and registration elements of LMAP have received some of the most virulent criticism,³¹ it is perhaps here that the most progress has been made. In response to a 2006 corruption scandal over LMAP's relocation of 4,250 families in the Boeung Kak Lake area of central Phnom Penh, the Centre for Housing Rights and Evictions filed a formal Request for Inspection with the World Bank. When the Bank's independent Inspection Panel discovered substantial grounds for concern,³² the political fallout led to the World Bank's withdrawal from LMAP in 2009.

It should be noted that the World Bank was not alone in devising the policy or guiding the implementation of LMAP, and activists criticized other donors including GiZ, Finnmap, ADB, and CIDA. The Bank was targeted because, unlike the other donors, it has transparent and user friendly mechanisms by which outsiders can challenge project integrity. The success of the advocacy community is a credit to the World Bank's responsiveness, and it may have consequences beyond the cessation of Bank funding and the momentary political embarrassment of the Hun Sen regime. Although initially dismissive of the NGOs' criticism and opposed to the Bank's withdrawal, LMAP's other patrons have become more conscious of social justice issues. GiZ's parent organization, for example, amended its terms of reference to include additional human rights protections.³³ There has also been discussion at the MLMUPC about instituting a 'one window' program wherein all the relevant

authorities (e.g. the Ministry of Interior, Ministry of Economy and Finance and MLMUPC) would be available in one place to simplify the process of obtaining an ownership certificate. Additionally, banking services would be provided at this office to avoid the need to pay cash and increase the transparency of the fee payments. While implementation of this idea would likely increase the formal cost of sporadic registration, it would likely result in savings to the individual applicant in fewer informal payments.

It should be noted, however, that new processes cannot be implemented in a vacuum but must be integrated into Cambodian society and politics. An obvious issue is the need for informal payment at every step. While perhaps normatively less objectionable in Cambodian culture – one observer noted that Cambodians “feel compelled” to reward a civil servant working on their behalf, partly for cultural reasons but also because bureaucratic salaries are so low, the result is increased cost and complexity, both of which work against effective administration and the enforcement of legal rights. Then there is politics. Local government leaders, even if honest, often acquiesce in large scale land grabs because they fear state reprisals if they oppose politically connected outsiders.³⁴ Nor do judges or cadastral officials offer much hope. They are appointed along party lines, and political affiliation and prestige are often determinative of an issue. One critic quipped that “legal representation for the poor doesn’t really matter because it is all about whether you can pay the judge off. It might be useful to have a lawyer to make noise and publicize your case outside of the courtroom but it has little effect on the outcome.”³⁵

Of course, “making noise” need not depend on a lawyer. Nor need the judicial result be the end of the story. Dispossessed Cambodians are willing to take matters into their own hands through protests to the ruling Cambodian People’s Party or symbolic marches to Hun Sen’s palace in Phnom Penh. “Noise” can work:

One community completely avoided the formal land resolution mechanisms and instead sent a complaint to the CPP party representative in their province asking him to resolve their land dispute. The Head of the CPP formed a team and met with the villagers. Following the

discussion the community was verbally allocated 1200 ha (approximately the land area they had requested). While the verbal grant has no legal power it at least provides temporary security for the community and they saw results much faster than if they had gone through the Cadastral Commission.³⁶

And politics is not simply a domestic matter. More than most, the Cambodian government must respond to an external audience, and the “court of international public opinion” is likely more powerful than any domestic one. High profile evictions and protests over resettlement find their way across the news wires and reflect poorly on the government, which is often frustrated by its inability to match the activists’ adroit manipulation of the international media. Since the government is dependent on foreign aid for the continued functioning of many core state services, the NGO and donor communities are powerful shadow players in domestic politics. “The Cambodian government should really employ a top notch public relations firm to manage its reputation on the international scene,” one private sector lawyer quipped. There are limitations, however, and they are not necessarily ones of diplomatic leverage. As this lawyer pointed out, “The Cambodian government knows that the foreign donors won’t ever really pull out since so many of the foreign advisers have such a nice life here. The NGOs will only push so hard until they realize that their country is actually considering withdrawing support.”

IV. Conclusion

Cambodia may be unique in the degree of foreign influence and presence, but it is not exceptional in terms of land law reform in the developing world. Indeed, as long as the universal approach is title formalization and registration with central cadastral authorities, it is unclear that any reform could proceed without massive foreign aid and technical assistance. The software used by professional surveyors may appear seamless as they use satellite data to design cadastral maps, but the software may not be as flawlessly responsive when the professional returns to Australia or Denmark and is replaced by a rural Cambodian who has never owned an iPhone. Similarly, a Torrens-style registration system may promise certainty in a

developed society with an honest bureaucracy and a legally savvy population, but in a society where a bureaucrat might easily be offered twice his monthly salary to misfile a document or a buyer of land from a relative faces spending two days of travel and paying six months worth of crops to register the transaction, human factors may quickly erode that certainty. Even if we posit a technically proficient cadastral staff, a well paid bureaucracy, and a conscientious populace, waiting 45 years for registration to be completed while meanwhile refusing to recognize informal possession seems a risky course of action.

As we stated at the outset, however, comparing the messy reality of a very poor country with a utopian dream of clear property rights readily exchanged in perfect markets seems unfair even to those in thrall to the dream. It might be more useful to ask what the alternatives might be. While the 2011 legislation attempts to resolve contradictions between the Civil Code and the Land Law with some acknowledgement of the social context, other effects of the law remain to be seen. Furthermore, even if JICA scored a clear win over the World Bank, team many of the same questions will persist. What might be heuristically useful, however, is some speculation on what might have happened had Cambodia chosen to do nothing. Or, more precisely, if it had chosen to reject, politely, offers of foreign technical and legal expertise and attempted, maybe with foreign money, to work with whatever social and normative systems were (and probably still are) maintaining whatever degree of order and stability existed in Cambodian land practice.

An initial question, which we will only mention, is whether Cambodia would have been allowed to make this choice. The “rule of law” is a prerequisite to some of the privileges of developing countries in today’s world, e.g., to favored access to the US market, and there are legal criteria for entry into the WTO. While a panel of legal anthropologists might welcome a land law based on local practice, international organizations and the US Congress may be less amenable. And even if “utilizing its own resources,” as the former dean of Beijing’s law school proposes for China when he opposes Western legal models, is a possible choice, it presumes that those resources exist and can be the foundation for law and specifically for a law that will facilitate the market economy and foreign investment that Cambodia has decided

it needs. Perhaps it could. It is clear from the Chinese example that clear property rights and an effective judiciary are not necessary for economic growth or foreign direct investment. China is growing faster than any other country and is a leading destination for FDI, but that too may be a false comparison. What is working for China may not exist in Cambodia: the Cambodian People's Party for better or worse is not the Chinese Communist Party, and the Chinese population at the beginning of reform, despite being abjectly poor in monetary terms, had what some have called the "social pre-requisites" for growth. A post-conflict society, especially when that conflict involved Khmer Rouge rule, may not possess those prerequisites.

As the reader may have guessed, we are not going to answer these questions. They are of course unanswerable, but some consideration of them may not be useless as we wait to see how the Cambodian land law story evolves.

Notes

- 1 See, e.g., HERNANDO DE SOTO, *THE OTHER PATH* (1989).
- 2 The ideological perspective behind this vision of market exchange can be traced to Ronald H. Coase's October 1960 article in the *Journal of Law and Economics*, *The Problem of Social Cost*. Coase famously argued that in a market without transaction costs (and other characteristics), clear and legally enforceable property rights would lead to an optimal allocation of economic resources. Coase himself acknowledged that such markets do not exist, but his ideological followers seem all too often to forget this limitation.
- 3 One government official noted that "We need land deals to attract foreign direct investment, provide employment, technology and human capacity, and infrastructure development, and as a way to properly manage national resources for the benefit of all Cambodians." Alison Elizabeth Schneider, *What shall we do without our land? Land Grabs and Resistance in Rural Cambodia*, paper presented at the International Conference on Global Land Grabbing (Apr. 6-8, 2011).
- 4 The SLC framework was seen as a more appropriate and orderly way to transfer land from the state to poor Cambodian households. SLC recipients who comply with the provisions of the concession agreement can apply to the MLMUPC for ownership after five years of land use.
- 5 Economic land concessions grant concessionaires all the rights of ownership, save alienation, for agricultural and agro-industrial purposes. Concessions are limited in size to 10,000 hectares and in duration to ninety-nine years.
- 6 Japan International Cooperation Agency, *Outline of Project*, <http://www.jica.go.jp/project/english/cambodia/0701047/outline/index.html>.
- 7 This law became effective in early 2012. Accordingly, the Civil Code will be applicable to new land transactions – and apply to existing land rights – from that time onward.
- 8 It should be noted that there are some Japanese scholars who interpret the Civil Code to apply only to transfers between private parties after a parcel has been registered, while the 2001 Land Law applies only to unregistered land. Arguments in favor of this interpretation stress the fact that the Land Law is a public law and therefore governs relationships between the state and the public, while the Civil Code as a private law only pertains to private transfers. However, the Civil Code contains other provisions that draw this interpretation into question. Article 132 of the Civil Code establishes the right of "ownership" and article 131 elaborates that "no real right may be created except as permitted by this Code." This seems to imply that the Civil Code intended to govern the recognition of all real property

- rights from the time that it came into force. While there is an exception for real rights created by special law, it is disputed whether the Land Law qualifies as a special law for article 131 purposes.
- 9 In fact article 134 of the Civil Code explicitly exempts possession from the default provision that “a real right pertaining to an immovable cannot be asserted against a third party unless the right is registered in accordance with the provisions of the laws and ordinances regarding registration.”
 - 10 Civil Code 2007, art. 234.
 - 11 Some scholars limit the Code’s provisions on prescriptive acquisition to buildings rather than land, which would avoid some of the conflict with the Land Law’s prohibition on new possession, but the wording is at best questionable. *See e.g.* Nhean So Munin, *Land Reforms and Registration in Cambodia* 5 (Mar. 6, 2010) (unpublished manuscript, on file with authors).
 - 12 *See* Haugerud, *Land Tenure and Agrarian Change in Kenya*, 59 AFRICA 61 (1989) (“Nowhere has the Kenyan state had the capacity to keep the land registers up to date since the reform.”) and Pinckney and Kimuyu, *Land Tenure Reform in East Africa: Good, Bad or Unimportant?* 3 J. AFR. ECON. 1, 22-24 (1994) (“Formal changes of title are lengthy and expensive. ... Title holding therefore does not necessarily imply ownership, and a significant number of titles are held by persons not owning the land. ... Thus land titling in Kenya has in many ways caused more problems than it has resolved. One response of local communities has been to ignore the titles, and revert to the indigenous system of land tenure.”)
 - 13 It should be noted, however, that in the contract law sections of the Civil Code there are protections for bona fide third parties. *See* Civil Code, article 347.
 - 14 *See* Finnmap FM-International Cambodia, *Major Reference Projects in Cambodia* (2010) <http://www.finnmap-cambodia.com/ProReffMC.pdf>.
 - 15 Note the 2011 projects mark the first time the Kingdom of Cambodia is itself a client as opposed to foreign countries or development banks.
 - 16 Formerly GtZ, GtZ stands for Deutsche Gesellschaft für Internationale Zusammenarbeit GmbH.
 - 17 This project now goes by the name Land Management, Administration and Distribution Program (LMADP).
 - 18 *See* 2001 Land Law art. 229.
 - 19 Statistics are from Cambodian Council of Land Policy, *Report On Achievements of Land Reform Implementation (2002- 2009) and Ways Forward through the Program Based Approach (2009- 2013)* 4 (June 2011).
 - 20 World Bank Media Statement, *Statement from the World Bank on Termination by Royal Government of Cambodia of the Land Management and Administration Project*, available at: <http://web.worldbank.org/WBSITE/EXTERNAL/COUNTRIES/EASTASIAPACIFICEXT/CAMBODIAEXTN/0,contentMDK:22303344menuPK:293861pagePK:1497618piPK:217954theSitePK:293856,00.html>.
 - 21 Mark Grimsditch & Nick Henderson, *Tenure Insecurity and Inequality in the Cambodia Land Sector*, 9 (2009).
 - 22 Similarly, the LMAP policy was that informal settlements will not be titled without agreement of the government. As informal settlements had no definition, in practice authorities often label urban poor communities as informal settlements, regardless of whether they have legal possessory rights under the law. *Id.* at 35.
 - 23 Although formal fees are reasonable, informal “fees” and the need to hire a broker to manage the process make the total cost much higher. Estimates for sporadic registration of a “small piece of land” were \$600-\$800. Another source estimated that sporadic registration cost \$2,500. Sources agreed that informal fees also vary based on size and location and thus roughly track land value.
 - 24 Grimsditch & Henderson, *supra* note 21.
 - 25 Interview with villagers involved in land dispute and Legal Aid lawyer in O’voi Preng. *See also* Munin, *supra* note 11, at 10. In addition to these particular issues, cadastral administration and implementation is generally plagued by the technical capacity deficiencies one would expect in any such complicated process in a poor society. *Id.*
 - 26 Grimsditch & Henderson, *supra* note 21, at 47. *But see* Ministry of Land Management, Urban Planning and Construction, *Annual Progress Report 2010: Achievements of the Implementation of National Strategic Development Plan and Way Forward for 2011*, 4-5 (2010) describing annual public awareness efforts.
 - 27 Interview with private real estate lawyer and former World Bank consultant.
 - 28 Interview with country director of international NGO.
 - 29 There have also been questions about the verifiability of these figures and a call for additional evidence of the number of titles actually distributed to individuals.
 - 30 As one would expect, the dispute resolution process also has its failings, *see* the annual reports of

NGO Forum, e. g., *Statistical Analysis of the Land Dispute Situation in Cambodia (for the year 2009)*, http://www.ngoforum.org.kh/eng/lic/land_ld.html.

- 31 See, e.g., Bridges Across Borders South East Asia and Centre on Housing Rights and Evictions reports.
- 32 World Bank, *Inspection Panel Investigation Report Cambodia: Land Management and Administration Project*, No. 58016-KH, v (Nov. 2010).
- 33 Interview.
- 34 One observer noted that “Commune councilors blame the system and feel that resolution of the land administration system must take place at the national level.” Schneider, *supra* note 3, at 19.
- 35 Interview with country director of international NGO.
- 36 Interview with representative from the International Labour Organization.