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Legal Pluralism and Equity: Some Reflections on Land Reform in Cambodia

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The Challenge of Institutional Reform in Plural Legal Systems

What is J4P?

Justice for the Poor (J4P) is a global research and development program aimed at informing, designing and supporting pro-poor approaches to justice reform. It is an approach to justice reform which:

- *Sees justice from the perspective of the poor/marginalized*
- *Is grounded in social and cultural contexts*
- *Recognizes the importance of demand in building equitable justice systems*
- *Understands justice as a cross-sectoral issue*

Institutional reforms in contemporary Cambodia are being undertaken in an environment characterized by pervasive legal pluralism—the not uncommon situation in which numerous, contradictory and competing sets of rules and norms regulate social, economic and political relationships. The international development community has a long and unhappy history of engagement with such environments. This is not simply because the links between substantive policy and institutional arrangements in the ‘transition to democracy’ are many, uncertain and highly contingent. It is also the case because the formal precepts of liberal democracy as codified in new laws and regulations are often inconsistent with prevailing social norms and administrative practices. In fact, they may be fundamentally at odds with the interests of economic and political elites who have an interest in contesting, neutralizing or capturing institutions created under the new legal framework.

It is now common to describe Cambodia's governance arrangements as neo-patrimonial. A neo-patrimonial system is one in which the politics of patronage and protection are played out through modern governmental systems and procedures. Neo-patrimonial systems thwart the realization of the rule of law, with its requirement that a clear and accessible set of rules is applied in an impersonal manner. Rather, in a neo-patrimonial system the law is applied selectively, to bestow legitimacy on administrative transactions of dubious legality, and to protect well connected groups or individuals from prosecution. Thus, even when liberal institutional arrangements are formally adopted they tend to serve other purposes as they are

transformed in practice by the pre-existing norms and power relationships onto which they are transposed. The result: formal institutions that routinely fail to perform the functions that liberal theories of governance prescribe.

The above problem is reflected in the World Development Report 2006 which argues that institutions tend to evolve in vicious or virtuous cycles. Less equitable social structures lead to the “formation of institutions that perpetuate inequalities in power, status and wealth” (p. 8). Conversely, equitable institutions only emerge “in situations when the distribution of power is not highly unequal...” (p. 9). In these terms the dilemma of development is how to bump (or nudge) a society from the vicious cycle of self-reinforcing inequality to the virtuous cycle of self-reinforcing equity.

The post-Cold War confidence in the inevitability of democratic transitions supported a high degree of consensus about how to assist this process. The characteristics of the desired system are defined. Development assistance then provides a technical shortcut; it helps to import regulatory frameworks and corresponding institutional arrangements. Aid serves as a financial incentive to fuel their adoption and implementation. Various kinds of conditionality remind governments of their commitment to stay the course. More recently, support is also provided to civil society groups, to animate citizen demand and/or to undertake various watchdog functions to promote observance of the new rules and norms in practice.

The logic underlying this approach has been persuasive. The new laws and regulations

The Challenge of Institutional Reform , continued



will create an enabling environment. Citizens will be empowered to make political demands. Elected and administrative officials will respond positively to new patterns of incentives and sanctions, and this will lead to the desired change in how government and people behave. The problem is that “people and institutions alike are embedded in wider social contexts that structure their choices, behavior, and development”¹. Thus existing institutions can be highly resilient to changes in policies,

individual leaders or external circumstances and demands.

* Adapted from Adler, Daniel, Doug Porter and Michael Woolcock. (2007). Legal Pluralism and the Role of Interim Institutions: Challenges and Opportunities for Equity in Cambodia. Prepared as a background paper for World Bank. (2007). Cambodia – Sharing Growth: Equity and Development Report 2007.

¹ Bevir, M. (2005) *New Labour: A Critique*. London: Routledge. pg. 35

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Land in Cambodia: A Case of Multiple Competing Norms

Issues of legal pluralism in Cambodia are well illustrated in relation to land. Despite the fact that few households have formal title, tenure in Cambodia is more secure than is generally assumed. This may appear to be a strange claim in a country where land disputation is such a high profile issue, but assertions of general tenure insecurity are nevertheless difficult to substantiate.

Data from the 2004 Cambodian Socio-Economic Survey, a nationally representative household survey, indicates that only 1.8% of plots are reported as having ever been subject to a conflict. Of these disputes, two-thirds would appear to be minor, having been resolved (presumably at the local level) in three months or less. Another relevant statistic is that although only 49.3% of plots are reported as having any official certification of ownership, 77% are able to be used as collateral for a loan.

These findings are supported by a variety of qualitative and quantitative sources which suggest that tenure insecurity is concentrated among vulnerable groups, particularly poorer households who occupy lands outside of core residential or farming zones such as those which are or were forests, flood plains, seasonal lakes, marshes and informal urban settlements—that is, land contested by the state.¹ Through the lens of legal pluralism, it is suggested that one of the key characteristics of these vulnerable areas is that their use is subject to—and occurs in and through—multiple conflicting norms.

namely, the idea that vacant land can be occupied and that the act of farming land gives rise to ongoing usage rights—is deeply embedded (despite civil war and changes in state law); (ii) *Neo-patrimonial administrative conventions*: a competing set of norms deriving from both previous regulatory regimes and practices that empower government officials at various levels to authorize transactions over lands within their administrative jurisdiction; and (iii) *Formal statute*: norms derived from the 2001 Land Law and other regulations currently in force.² As Sokha *et al* point out each of these regimes is again subject to its own set of internal contradictions and inconsistencies creating an added order of plurality.³

Social norms of usufruct were both reaffirmed and limited by the 2001 Land Law, which converted possession rights into ownership in certain cases. At the same time, however, the 2001 law restricted legal possession of other lands, most notably ‘state public land’ and lands which entered into private possession after the promulgation of the law. But the 2001 Law is far from being implemented systematically. As such, it is unable to take on law’s ideal role, that of a meta-norm around which all other norms should harmonize. Instead, the Law becomes one of a number of competing norms and practices to which people may turn in their struggles to secure land rights. Where these different sets of norms—social, administrative and statutory—line up, there is little conflict and efforts at formalization run smoothly.

Case study research suggests at least three sets of norms at work: (i) *Social norms*: in particular the historical concept of usufruct—

However, where these sets of norms compete, conflict arises, with conflicting parties basing their claims on different normative orders.

Competing claims emerge even where none appear to be 'legal' in the narrow sense of the word. The problem with the emergence of these sorts of 'competing (il)legalities' is that elites are often better able to 'forum shop'—that is, select the normative framework which is most likely to legitimize their claims.

It is in this context—acknowledging the role of state law as a significant, though not exclusive reference point around which contests over land rights occur—that we move to consider the successes and limitations of current regulatory approaches.

¹ World Bank/CAS. (2006a). *Justice for the Poor? An Exploratory Study of Collective Grievances over Land and Local Governance in Cambodia*. Phnom Penh: The World Bank; World Bank/CAS. (2006b). *Towards Institutional Justice: A Review of the Work of the Cadastral Commission in Relation to Land Dispute Resolution*. Phnom Penh: GTZ; and O'Leary, Declan. (2005). *Pilot Independent Review of Systematic Land Titling Field Systems and Procedures* (Mimeo).

² WB/CAS 2006b

³ Pel Sokha et al. (2007). *Land Transactions in Rural Cambodia: A Synthesis of Findings from Research on Appropriation and Derived Rights to Land* (Mimeo).



Current Regulatory Approaches: Successes and Limitations

The Government acknowledges the problems described above and is attempting to deal with them by strengthening the role of state law in land management. This approach has proven successful in allowing the issuance of land titles on both a systematic and sporadic basis. Since 2005 around one million titles have been issued. This is a significant achievement by any standard.

Sporadic (applicant initiated) titling, a relatively expensive service attracting high levels of fees (both formal and informal), is unlikely to have a positive equity impact. Initial studies on systematic titling, where whole communes go through the titling process (and where fees are substantially lower), indicate that the titling process has a range of benefits, including improving access to credit, reducing disputes, and increasing land value. While these benefits do not exclude the poor, they have been observed to benefit the high and middle income households to a greater extent and thus to have an "inherently regressive element".¹

It has also been suggested that the systematic titling process is unable or failing to recognize the usage rights of particularly vulnerable groups, such as indigenous communities, urban slum dwellers and marginal settlements.² Thus Markussen³ notes that there are strong incentives for the systematic titling process to work in areas where there are "a large number of small, easy-to-measure plots", typically those which are characterized by "highly productive rice fields." However, these are precisely the areas in which pre-existing tenure systems are best embedded, where the least conflict occurs, and where the interests of the poorer majority are least at risk. Further, as systematic titling

progresses, the poor, who often live on or farm marginal areas, have been observed to be excluded from titling because they are deemed to be occupying state land or living in informal settlements.⁴

In short, it would appear that the titling process can currently be executed in two situations: firstly, if it is activated and financed by elites (in the case of sporadic titling); and secondly, if it represents the formalization of substantially pre-embedded local understandings about land use (in the case of systematic registration), in which case more modest per-plot incentives provided by donors are adequate to finance the process. The persistent strength of pre-existing norms is demonstrated by the fact that even post-titling most sales are carried out in the 'traditional' fashion by contract endorsed by the village chief and commune head rather than by registration with the cadastral authorities as required by the 2001 land law.⁵

The situation with regard to state land reflects similar patterns. Despite the restrictions placed on new occupations of state land put in place by the 2001 Law, other norms and incentives prevail. On the one hand, ordinary citizens assume the right to clear and occupy vacant lands for residential, agricultural and speculative purposes, while on the other, government representatives conduct discretionary transactions over what they see as state land.⁶ A set of new institutions for state land management established under the land law are geared towards the development of transparent bureaucratic processes for the administration of such lands. To date, however, these have been difficult to implement on a broad scale as they struggle to grapple with the competing normative frameworks and

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Current Regulatory Approaches, continued

systems of incentives which keep state land *de facto* outside of the formal regulatory system.

¹ Markussen, Thomas. (2007). Land Titling in Cambodia – Findings from a Field Trip (Mimeo) pg 25; Deutsch, Robert. (2006). Beneficiary Assessment of Land Title Recipients under the Land Management and Administration Project

(Mimeo); and O’Leary, Declan. (2005) *Pilot Independent Review of Systematic Land Titling Field Systems and Procedures* (Mimeo).

² O’Leary 2005 and WB/CAS 2006b

³ Markussen, pg. 9

⁴ Ibid, pg 25

⁵ NGO Forum. (2008). *Land Titling and Poverty Reduction: A Study of Two Sangkat in Prey Nup District, Sihanoukville Municipality*. Phnom Penh: NGO Forum.

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Conflict and Conflict Resolution

Tensions between multiple rule systems suggest multiple sources of legitimacy, and hence that existing systems of power are fractured, dynamic and susceptible to change. The land disputes which have characterized Cambodia’s development over the past 15 years mark the clashing of these rule systems and the variant ideas of what is fair or just which they produce.

Absent formal institutions which are able to deal with major conflict in a way which is perceived as fair, the poor use a variety of advocacy strategies to gain extra leverage in their negotiations with wealthier or more powerful parties. In the most successful cases the poor act collectively to approach powerful administrative officials, often district and provincial governors, to intervene on their behalf. Appeals to the media, local human rights NGOs and national level institutions have also proven useful. When formal law is drawn upon in these cases it is to legitimate multi-faceted

bargaining strategies rather than with any expectation that the state could be relied upon to enforce the law in an equitable fashion.

Such strategies clearly have the potential to shift decisions in favor of the poor in individual cases. There is, however, little in the way of institutional structure for this sort of bargaining. As such, collective action around land issues tends to be local, ephemeral and targeted at powerful individuals within the administration. Collective action is a crucial mechanism for improving the responsiveness of the state to the needs of the poor.¹ But while effective in the short term, this kind of sporadic political contest offers no direct way for political gains to create precedents and procedures which are then ‘fixed’ in administrative convention—such as is possible through the titling process.

¹ WB/CAS 2006a, p.36

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Conclusion

In examining the situation with regard to land we see that regulation has been most successful where it attempts largely to formalize, rather than radically transform, existing social norms and power relations. Areas in which the transformative power of the law is called upon have been those where progress has been most challenging. For this reason, the transformation, foreseen in the Land Law, of state land management from the patrimonial to the bureaucratic realm, has remained largely unrealized.

When the poor contest actions of the powerful, the discourse is more often political than legal. In this contest, the poor will mobilize to ‘forum shop’ to secure their interests in much the same manner as elites. As a consequence, political gains seldom find expression in formal regulation, but rather require further iterations of political mobilization, the support of patrons, and extra-legal action.