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主 論 文 の 要 旨

論文題目

Political Economy of Institutional Reform to Restore Trust in Public institutions in Cambodia: Design of a Specialized Court to End Land Disputes

カンボジアにおける公的信頼回復のための制度改革：土地所有権紛争処理のための特別裁判所構想に向けて

氏 名

HEM Sras

論 文 内 容 の 要 旨

Abstract

Purpose of Study

This research focuses on the political economy of institutional reform to the overlapping hierarchy of institutions responsible for land claim dispute resolution in Cambodia, with special reference to government takings. The study concludes with a proposal to make the current administrative system more transparent, responsible, and to restore public trust through the introduction of a single institution with authority and responsibility to hear such claims. Competing land claims are a vexed issue in post-war Cambodia, which have plagued progress of

peace and development.

Land Tenure and Ownership

Competing claims arise from unclear tenure of land ownership in post-war Cambodia. Citizens came to occupy land and buildings on a first-come first-served basis without appropriate documentation of ownership recognition. The then-government started to re-privatize and redistribute land to local residents in 1989. Local authorities were principally responsible for redistributing land to local residents based on the number of families and the availability of land in the locality. Currently, Cambodia has achieved registration of around 3.6 million titles as of 2014. However, the total Cambodian unregistered land area is estimated at more than 10 million land parcels. Therefore, the ownership of much of Cambodia's land area is, in effect, in customary tenure.

Swift Changes of Property Laws

Competing claims also arise from swift changes in Cambodian post-war property laws. Cambodia has encountered a swift change of property laws, for example the 1992 Land Law, the 2001 Land Law, and the 2007 Civil Code. Such a swift change, we can say, is beyond the capacity of enforcing authorities and general legal practitioners to understand and control the concepts of these property laws.

“Ownership” in the Cambodian context does not only mean “registered properties,” but also “unregistered properties” with a completion of a 5-year statute of limitation. The 5-year statute of limitation transforms the status of land tenure from “possession” (*phou-gak*) into “ownership” (*kama-sith*). In principle, unregistered ownership offers stronger protection than possession, but

depends on proof of the requirements of the ownership claim. Registered ownership is other conclusive.

The 2001 Land Law authorizes and recognizes ownership over land possession subject to for the required period between 1989 and 2001. Any denial of land registration with respect to such land by the state authority is a “taking” of “legitimate unregistered ownership right” under the Cambodian property laws. However, pending unregistered land claims are vulnerable to denial on other grounds arising from a peculiarity of the Cambodian land system.

Cambodian property laws divide land into three major categories: (1) state public land, (2) state private land, and (3) individual private land. State public land is regulated for public use, while state private land is under normal business transaction as individual private land. State private land is authorized for possession leading to ownership acquisition, but state public land is not subject to private ownership acquisition regardless of the length of possession. However, state public land, when it loses its public use, can be reclassified as state private land by law. This context poses a challenge on the entitlement of private ownership acquisition on the lost public-use state public land.

Land dispute

The status of land tenure is overlapping among state public land, state private land, and individual private land, which results in competing claims. Post-war Cambodia has faced two kinds of land disputes caused by competing claims: (1) competing claims between private parties and (2) competing claims between state and individual private possessor. Competing claims between private parties arise from illegal land grabbing and double/overlapping titles.

Apart from these, Cambodia faces another type of land disputes between state and its citizens by state reclamation through land registration and by state expropriation for development. Land disputes caused by taking for development are an acute issue in Cambodia today. Land disputes affected 770,000 Cambodians as of 2014

Redress Mechanism

In a series of attempts to promote expeditious resolution of land disputes, the government has established multiple ADR institutions responsible for land dispute resolution. The government established the Land Dispute Resolution Commissions (LDRC) in 1999. However, the LDRC faced serious procedural issues and caused confusion with courts. Thus, the government established the Cadastral Commissions (CC) in 2002.

Like the LDRC, the CC mechanism is deployed through the regional administrative offices of the relevant ministry. There are three levels of the CC mechanism: Municipal/District/*Khan* CC, Capital/Provincial CC, and National CC. The members of the CC mechanism are territorial authorities and cadastral officials. In a sense, the LDRC is transformed into the CC under the enforceable legal framework of the 2001 Land Law and has a clear responsibility for resolving unregistered land disputes. This remedied the previous issue.

Although Cambodia has a clear institution for land dispute resolution, the challenge of efficiency and effectiveness is posed on the CC mechanism. The CC could mostly resolve small disputes between ordinary people; however, they were reluctant to deal with big land disputes involving parties of different social rank or status. Therefore, the government established the National Authority for Land

Dispute Resolution (NALDR) in 2006.

According to the 2006 Royal Decree, the NALDR is commissioned as an ombudsman located in the Cabinet office for receiving complaints, investigating and resolving land disputes that the National CC is unable to resolve. However, the NALDR does not have a clear legal foundation and procedure for resolving disputes

Resolution and Consequence

Post-war Cambodian ADR institutions have been established in reactive reforms without serious study of institutional procedure and jurisdiction. The resulting structures have been a cause of great confusion. These have impeded the efficiency and effectiveness of institutional responsibility for land dispute resolution. As a result, Cambodia has multiple institutions responsible for land disputes, but resolution is unable to keep pace with emerging disputes.

The CC receives many complaints, but resolution is relatively uncertain. The CC tends to dismiss cases based on the division of institutional jurisdiction. According to the report of the Land Ministry, the CC dismissed 1,725 cases out of 5,688 received cases as of 2011. The CC mechanism still faces 1,206 pending cases. Cases are often prolonged under the CC. As a result, a limited number of cases were forwarded to court.

The NALDR has also faced challenges due to its composition and legal status. Therefore, the NALDR, in practice, often delegates and orders lower authority to bear responsibility for resolving land disputes. From its establishment to 2010, the NALDR received a total number of 1,421 cases. However, the NALDR could resolve 225 cases, (15,85%), while 1,043 cases (73,39%)

were forwarded to other authorities.

Slow action makes affected citizens lose public trust in these existing redress institutions and often resort to *ultra vires* actions such as protest, road-blockading, tire burning, and political intervention when disputes happen. Disputes often gave rise to the eruption of violence among affected citizens, authorities, and companies. As a consequence, the government issued an order to make a temporary suspension of economic land concessions (ELC) to private companies in 2012. However, an estimated 700,000 Cambodians were affected by land disputes as of this moratorium.

The government, in order to relieve social tensions caused by ELC-affected land disputes, exercised an “Old Policy, New Action” policy by re-measuring land and clarifying boundaries of development projects. In this campaign, the Prime Minister appointed his son as the deputy of the NALDR and appealed for students to join the re-measurement mission. More than 2,000 voluntary students, together with cadastral officials, participated in the mission.

However, the vigorous action, which employed thousands of students and cadastral officials, did not last long. It was temporary and ended before the general election on July 28, 2013. Furthermore, these ad-hoc responses were not based on clear procedure or legal foundation. The action missed many land disputes, for instance the Boueng Kak and Borei Keila land disputes, which stayed outside of this mission. Various existing and new disputes erupted during the re-measurement process. As a result, the Prime Minister reiterated on the chronic issue of land disputes after affected citizens sought political intervention from Phnom Penh, while the authorities tried to prevent them from entering the capital

on August 18, 2014. The Prime Minister put a strong blame on responsible authorities, both local and national levels, for sluggishness (laziness) to resolve disputes.

After the end of political deadlock and the formation of the National Assembly on July 22, 2014, the “First Committee” of the National Assembly bears responsibility for receiving complaints and investigating land disputes. The First Committee acts as an ombudsman locating in the National Assembly for accepting complaints and making an intermittent investigation, but does not have right to make decision.

Currently, all top state institutions – legislative, executive, and judicial powers – deal with land disputes in Cambodia. Multiple institutions further cause confusion, complexity, and weaken accountability. Social consequences would be less severe if Cambodia has a clear single institution responsible for land dispute resolution.

Comparative Study of Redress Mechanisms

America and Japan each have a clear institution responsible for resolving disputes. Redress mechanisms are efficient and effective to resolve disputes and can guarantee due process of law and equal treatment for parties. America and Japan succeed in exercising land takings by mutual negotiation. If negotiation fails, both countries offer a clear processing channel ending in judicial relief.

America proceeds directly to judicial recourse. American courts handle both administrative and civil aspects of taking disputes. American courts use bright line rules of the constitution and law for deciding taking disputes. The court decides both administrative and civil disputes of the takings based on the

constitutional requirements. Japanese redress mechanism undergoes administrative disposition, with last resort to court.

Japanese has a well-ordered system of administrative agencies responsible for resolving land taking disputes. Japan has an independent, permanent ad-hoc land tribunal, so-called “expropriation committee” in each prefecture for facilitating and hearing taking disputes. If aggrieved party disagrees with the decision of the expropriation committee, they can appeal to the Minister of Land for administrative review. If the party is dissatisfied with the decision, they can appeal to court for judicial review.

In overall comparative aspect, both countries have a clear redress forum responsible for addressing land taking disputes. In eminent domain theory, judicial redress can provide stronger procedural protection for affected property owners than administrative redress because the court can conduct judicial review and stays far from the conflict of interest.

A taking proceeds with two mechanical administrative steps: (1) pre-dispute and post-dispute mechanism. The safeguard of the eminent domain is to provide due process of law and just compensation to affected citizens. To testify the above-mentioned argument, the Dissertation posits two propositions relating to institutional and procedural protection under the eminent domain theory for analyzing the achievement of the due process of law and market/just compensation.

The first proposition is that market/just compensation through negotiation can be achieved only if ownership is recognized and legal compliance is provided. The second proposition is that if the due process of law and market/just

compensation fails in the pre-dispute mechanism, both still can be achieved in the post-dispute mechanism only if the conflict of interest does not exist. Judiciary can provide more institutional and procedural steps for guaranteeing constitutional due process and just compensation.

Hierarchical Constraints and Failure of Redress Mechanism

Cambodian redress mechanism suffers from hierarchical constraints and adverse incentives, which impede efficiency and effectiveness of land dispute resolution. Conflict of interest dominates this mechanism. The redress mechanisms are afflicted by political influence and hierarchical constraints. These make institutional accountability weak.

Reform Proposal of Redress Mechanism

A review of the American and Japanese taking systems shows that both offer a single redress that achieves a high degree of institutional accountability. This contrasts with existing Cambodian redress, which lack transparency and therefore to demonstrate independence and gain enforcement leverage.

Thus, the Dissertation suggests the reform of complex, multiple institutions into a single, simple institution solely responsible for land dispute resolution. Experience has shown that imposition of redress institutions under the executive branch has faced higher risk of political hierarchical constraints and conflict of interest. Furthermore, as the Prime Minister himself has indicated in public statements, dispute resolution is the exclusive preserve of the judicial branch under the Cambodian Constitution. Thus, the Dissertation suggests a single expert institution be under judicial branch, which is called “specialized court.”

Feature of Specialized Court

The proposed specialized court would consist of two expert chambers – civil and administrative, to which jurisdiction would be transferred from the administrative ADR institutions currently responsible for receiving and resolving complaints from land dispute-affected citizens. The prospective specialized court would have an assisting attached body called “district court-annexed mediation,” which is combined from the existing administrative ADR institutions to conciliate disputes under the review of the specialized court as appropriate.

Innovative Methods of the Specialized Court

Trust is a core of institutional reform under this Dissertation proposal. In order to have and restore public trust, this Dissertation proposes two necessary features of such a prospective specialized court; namely, the public participatory judicial process and compulsory procedural hearing.

The public participatory judicial process can be made by either alternative method of judge under selection or exclusionary rule. The compulsory procedural hearing is bound by one-year limitation of complaint referral. These methods are based on theories of public trust, economic interest protection, and procedural justice for affected citizens in land taking disputes.

Expected Achievement of New Mechanism

The newly proposed mechanism would provide a clear and complete mechanism for the resolution of land disputes. Cambodia would have a clear distinction of duties and roles among local authorities, expropriating authorities, and the specialized court.

Under the proposal, the Cambodian justice system would have a complete

review function of constitutional requirements; namely, the constitutional review and judicial review in its legal and judicial system. The new mechanism would activate judicial review over administration. This would help achieve the principle of checks and balances to strengthen the rule of law in post-war young Cambodian democracy.

Thus, the specialized court would become an institutional protector of due process of law between the state and its citizens. The prospective specialized court, through its mission, would be expected to enhance and restore public trust in the whole justice system. In a word, this new mechanism makes a tender reform to legal and judicial reform of neo-patrimonial administration in post-war Cambodia.

