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Doctoral Dissertation

Political Economy of Institutional Reform

to Restore Trust in Public Institutions in Cambodia

Design of a Specialized Court to End Land Disputes

Dissertation Submitted in Fulfillment of the Requirement for the Doctoral Degree of Laws

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Table of Contents

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Abbreviation

A2J	=	Access to Justice
AC	=	Administration Commission
CC	=	Cadastral Commission
CPP	=	Cambodian People's Party
CNRP	=	Cambodia Nation Rescue Party
CDRC	=	Commune dispute resolution committee
FUNCINPEC	=	National United Front for an Independent, Neutral, Peaceful, and Cooperative Cambodia
LAC	=	Labor Arbitration Council
LDRC	=	Land Dispute Resolution Commission
LMAP	=	Land Management and Administration Project
LASSP	=	Land Administration Sub-sector Project
NALDR	=	National Authority for Land Dispute Resolution
NLDC	=	New London Development Corporation
UNTAC	=	United Nations Transitional Authority in Cambodia
UNDP	=	United Nations Development Program

List of Figures

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.

Introduction to Land Disputes and Redress Mechanism Challenge in Cambodia

> People accuse our justice institutions of working slowly and being corrupt. They change the Ministry of Justice into the Ministry of Injustice, and that affects the national justice system. Now we will conduct public forums in order to make citizens have confidence in our judicial institutions.
>
> Ang Vong Vathana, Minister of Justice, December 12, 2013.[1]

A. Background and Context of Research

1. Research Problem

Cambodia experienced severe political conflict and a devastating civil war in the last half of the twentieth century.[2] These situations ruined Cambodian human resources, law, and property system.[3] The property system fell in confusion and controversy in the post-war period.[4] After the collapse of the Khmer Rouge regime in 1979, people moved and occupied vacant lands and buildings on a "first-come, first-served" basis without appropriate documentation of ownership recognition.[5] People occupied lands and buildings in a customary manner without unclear proof o f ownership.[6]

Post-war government started to reform land tenure by allowing private ownership over land in order to have economic activity on land in 1989.[7] Land reform has sparked many land disputes. Reform has attracted

[1] David Sen, "Justice Ministry to Keep Track of Courts' Case Lists," *Phnom Penh Post*, December 13, 2013.
[2] David P. Chandler, "The Tragedy of Cambodian History," *Pacific Affairs* 52, no. 3 (October 1, 1979): 410–19; Simon Springer, "Violence, Democracy, and the Neoliberal 'Order': The Contestation of Public Space in Posttransitional Cambodia," *Annals of the Association of American Geographers* 99, no. 1 (2009): 143; Michael Leifer, *Dictionary of the Modern Politics of Southeast Asia* (Routledge, 2013), 11.
[3] Derick W. Brinkerhoff, "Rebuilding Governance in Failed States and Post-Conflict Societies: Core Concepts and Cross-Cutting Themes," *Public Admin. Dev.* 25, no. 1 (February 1, 2005): 11; Peter Blunt and Mark Turner, "Decentralisation, Democracy and Development in a Post-Conflict Society: Commune Councils in Cambodia," *Public Admin. Dev.* 25, no. 1 (February 1, 2005): 75–76; Elizabeth Nielsen, "Hybrid International Criminal Tribunals: Political Interference and Judicial Independence," *UCLA Journal of International Law & Foreign Affairs* 15 (Fall 2010): 301.
[4] Ian J. Mensher, "The Tonle Sap: Reconsideration of the Laws Governing Cambodia's Most Important Fishery," *Pac. Rim L. & Pol'y J* 15 (September 2006): 804 and 807.
[5]Beng Hong Socheat Khemro and Geoffrey Payne, "Improving Tenure Security for the Urban Poor in Phnom Penh, Cambodia: An Analytical Case Study," *Habitat International* 28, no. 2 (June 2004): 182; Blunt and Turner, "Decentralisation, Democracy and Development in a Post-Conflict Society," 76.
[6] Gary Feinberg, "The Epidemic of Petit Corruption in Contemporary Cambodia: Causes, Consequences and Solutions," *Crime Prev Community Saf* 11, no. 4 (2009): 283.
[7] Viviane Frings, "Cambodia after Decollectivization (1989-1992)," *Journal of Contemporary Asia* 24 (1994): 50; Caroline Hughes, "The Politics of Gifts: Tradition and Regimentation in Contemporary Cambodia," *Journal of*

many investors, who are interested in investment in land, to Cambodia. The Cambodian government has granted or conceded a large area of land to these investors for agro-industrial purpose.[8] According to the Ministry of Agriculture, Forestry, and Fishing, Cambodia had 117 registered companies receiving land concessions from the government, which covered 1,181,522 hectares as of June 8, 2012.[9]

Private land reform and land takings for development have created incentives for land grabbing and given rise to competing claims.[10] The status of the actors is important. Actors involved in land disputes are individuals, the rich, the powerful, authorities, individual soldier, the military, and the state.[11] Land disputes affected 770,000 Cambodians as of 2014.[12]

The post-war government has made an effort to deal with land disputes by the consecutive establishment of multiple institutions responsible for land dispute resolution. Initially, Cambodia had only one court responsible for dealing with all disputes. However, land disputes continued to rise; therefore, the government reacted by creating various administrative ADR institutions responsible for dealing with land disputes in parallel with the court. The government created the Land Dispute Resolution Commission in 1999, the Cadastral Commission in 2002, and the National Authority for Land Dispute Resolution in 2006.[13]

Southeast Asian Studies 37, no. 03 (2006): 469; Ronald Bruce St John, "New Economic Order in Indochina," *Asian Affairs, an American Review* 21, no. 4 (Winter 1995): 232.

[8] Sub-decree on Economic Land Concession [អនុក្រឹត្យស្តីពីសម្បទានដីសេដ្ឋកិច្ច], No. 146 ANK.BK art. 2 (2005); Andreas Neef, Siphat Touch, and Jamaree Chiengthong, "The Politics and Ethics of Land Concessions in Rural Cambodia," *Journal of Agricultural and Environmental Ethics* 26, no. 6 (2013): 1086.

[9] Ministry of Agriculture, Forestry, and Fishing, *Statistics of Registered Economic Land Concession Companies* [ស្ថិតិក្រុមហ៊ុនទិន្និយោគដីសម្បទានដែលបានចុះបញ្ជីនៅក្រសួងកសិកម្ម រុក្ខាប្រមាញ់ និង នេសាទ], June 8, 2012.

[10] Chi Mgbako et al., "Forced Eviction and Resettlement in Cambodia: Case Studies from Phnom Penh," *Wash. U. Global Stud. L. Rev.* 9 (2010): 40; Dirk Loehr, "External Costs as Driving Forces of Land Use Changes," *Sustainability* 2 (April 19, 2010): 1036 and 1045; Kheang Un and Sokbunthoeun So, "Land Rights in Cambodia: How Neopatrimonial Politics Restricts Land Policy Reform," *Pacific Affairs* 84, no. 2 (2011): 289.

[11] Caroline Hughes, "Cambodia in 2007: Development and Dispossession," *Asian Survey* 48, no. 1 (February 1, 2008): 70; Fabian Thiel, "Donor-Driven Land Reform in Cambodia—Property Rights, Planning, and Land Value Taxation," *Erdkunde* 64, no. 3 (2010): 227; Mensher, "The Tonle Sap: Reconsideration of the Laws Governing Cambodia's Most Important Fishery," 808; Simon Springer, "Illegal Evictions? Overwriting Possession and Orality with Law's Violence in Cambodia," *Journal of Agrarian Change* 13, no. 4 (October 1, 2013): 522.

[12] Kevin Ponniah, "British Lawyer Targets 'Ruling Elite' in ICC Complaint," *Phnom Penh Post*, October 7, 2014.

[13] Decision on Establishment of Land Dispute Commissions in Provinces/Municipalities throughout the Country, No. 47/SSR (1999); Sub-decree on Organization and Functioning of Cadastral Commissions [អនុក្រឹត្យស្តីពីការរៀបចំ និង ប្រព្រឹត្តទៅនៃតុលាការសុរិយោដី] (2002); Royal Decree on Establishment of National Authority for Land Dispute Resolution [ព្រះរាជក្រឹត្យស្តីពីការបង្កើតអាជ្ញាធរជាតិដោះស្រាយទំនាស់ដីធ្លី], N.S/RKT/0206/097 (2006).

In addition to these formal institutions, the government created various informal bodies such as Mobile Team sponsored by of the Deutsche Gesellschaft für Technische Zusammenarbeit (GTZ), and *Maison de la Justice* sponsored by the United Nations Development Program (UNDP), and ad-hoc commissions associated with development projects.[14]

Although Cambodia has multiple formal and informal institutions responsible for dealing with land disputes, these institutions are not efficient and effective to prevent or resolve land disputes.[15] Instead, multiple institutions have weakened accountability, which gives rise to a mutual push-and-pull movement of complaints without clear responsibility for resolution. [16] A number of sensitive cases, for instance, Borei Keila and Boeung Kak land disputes have persisted in the heart of the Phnom Penh capital, are often ignored or kept prolonged without appropriate processing.

Having seen the responsible institutions are not effective to resolve disputes, many affected citizens have resorted to political intervention from the Prime Minister and other state top institutions such as the Ministry of Justice, the Ministry of Land, the National Assembly, and a number of other institutions thought to have power to resolve disputes.[17] Moreover, in order to protect their land from arbitrary taking, affected citizens have used direct or collective actions such as protesting, road blocking, and tire burning, which frequently lead to clashes.[18] As a consequence, criminal charges are often filed against land protesters. More than 500 land activists were charged between 2008 and 2012.[19]

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[14] Decision on Establishment of Mobile Team [សេចក្តីសម្រេចស្តីពីការបង្កើតក្រុមការងារដោះស្រាយទំនាទចល័ត] (2008); Decision on Establishment of Mobile Team in O'raing Ov, Kampong Cham Province and Svay Tiep, Svay Rieng Province [សេចក្តីសម្រេចអំពីការបង្កើតក្រុមការងារដោះស្រាយទំនាទចល័តភូមិស្រុកអូរាំងអឺ ខេត្តកំពុងចាម និង ស្រុកស្វាយទាប ខេត្តស្វាយរៀង] (2010); Inter-ministerial Prakas on Establishment of Maison dela Justice at District Level in Pilot Project [ប្រកាសអន្តរក្រសួងស្តីពីការបង្កើតមណ្ឌលសេវាកម្មយុត្តិធម៌នៅថ្ងៃរាក់ស្រុកក្នុងតម្រោងសាកល្បង], No. 85/Pr.K.K.Y.M.P/06 (2006).

[15] Robin Biddulph, "Tenure Security Interventions in Cambodia: Testing Bebbington's Approach to Development Geography," *Geografiska Annaler. Series B, Human Geography* 93, no. 3 (September 1, 2011): 226; Thomas Markussen, "Property Rights, Productivity, and Common Property Resources: Insights from Rural Cambodia," *World Development* 36, no. 11 (November 2008): 2278.

[16] Feinberg, "The Epidemic of Petit Corruption in Contemporary Cambodia," 288.

[17] Including the Royal institution and other non-governmental organizations and embassies.

[18] Springer, "Violence, Democracy, and the Neoliberal 'Order,'" 139 and 142.

[19] "Analysis - When Will Cambodian Citizens Trust the Court?" [មតិវិភាគ៖ តើពេលណាទើបពលរដ្ឋទុកចិត្តប្រព័ន្ធតុលាការកម្ពុជា?], *Radio Free Asia (RFA)*, October 9, 2014, radio broadcast.

Such aspects are common in Cambodia today. They show that affected citizens have lost trust in the existing responsible redress institutions.[20] Even the Minister of Justice, on December 12, 2013, said that people had developed the habit of replacing the "Ministry of Justice" with the "Ministry of Injustice."[21] He further added that the loss of public trust in social justice institutions was due to these institutions working slowly and being corrupt.[22] In response, the Ministry of Justice started to control the court work by the reportage of the caseloads to the Ministry.[23]

2. Dissertation Argument

The Dissertation argues that the loss of public trust and political intervention are caused by the complexity of land dispute resolution institutions, which reduce accountability and resulted in prolongation and backlog of cases. Thus, institutional reform for a clear responsibility is a pre-requisite to end land disputes, on-street protest, political intervention and to restore public trust in the social justice system in Cambodia.

3. Dissertation Objective

Given that the majority of land is not registered and many land disputes occur, Cambodia should have a particular way and single institution responsible for dealing with land disputes and land takings. The objective of this Dissertation is to explore a possible means to reform existing multiple and complex redress institutions into a single simple institution in order to have a clear responsibility for dealing with land disputes and land takings in Cambodia.

The Dissertation proposal is in line with the current policy of the Cambodian government. Recently, the Cambodian government passed the new court law to transform Cambodian existing courts to be specialized

[20] Ellen Emilie Stensrud, "New Dilemmas in Transitional Justice: Lessons from the Mixed Courts in Sierra Leone and Cambodia," *Journal of Peace Research* 46, no. 1 (January 1, 2009): 10; Kheang Un, "The Judicial System and Democratization in Post-Conflict Cambodia," in *Beyond Democracy in Cambodia: Political Reconstruction in a Post-Conflict Society*, edited by Joakim Öjendal and Mona Lilja (NIAS Press, 2009), 90; Kheang Un and Sokbunthoeun So, "Cambodia's Judiciary: Heading for Political Judicialization," in *The Judicialization of Politics in Asia*, edited by Björn Dressel (Routledge, 2012), 184; Tessa Bialek, "Legacy at the Extraordinary Chambers in the Courts of Cambodia: Research Overview," *Documentation Center of Cambodia Legal Associate* 1 (2013): 2; Blunt and Turner, "Decentralisation, Democracy and Development in a Post-Conflict Society," 78; By Marie Montesano, "Current International Efforts in Cambodia: Developing a Court System to Protect Human Rights," *USF Journal of Law & Social Challenges* 11 (Spring 2009): 98.
[21] Sen, "Justice Ministry to Keep Track of Courts' Case Lists."
[22] Ibid.
[23] Ibid.

courts in 2014.[24] Under the new court law, four types of specialized courts – civil, criminal, commercial, and labor – will be arranged first, while other specialized courts will be established upon necessity.[25]

This new court law also suggests the establishment of an administrative court under the judicial system.[26] Such a suggestion conforms with the authorization of the 1993 Constitution that confers exclusive jurisdiction to decide disputes to the judiciary in all cases, including administrative cases.[27] No other institutions have judicial power.[28] However, the new court law suggests and directs, pending establishment of an administrative court, the civil chamber will bear responsibility for dealing with administrative disputes.[29]

The Dissertation views judicial control, and ultimately that the prospective establishment of an administrative court is necessary to reform existing administrative ADR institutions. If without doing so, Cambodia will further have multiple and overlapping redress institutions with complicated procedures. The Dissertation will examine the complexity of the existing administrative arrangements and explore a possible way to combine the existing redress institutions into a single judicial institution.

4. Dissertation Scope

Land taking disputes are a special category of dispute that involves in four main issues: property law, eminent domain law, due process of law, and institutional design and responsibility, and public trust. The Dissertation limits its scope of study in these four fields.

5. Dissertation Methodology

Land takings for development purposes are a leading cause of land disputes in Cambodia. To highlight the special features of land takings in Cambodia, the Dissertation makes a comparative study with similar arrangements in the American and Japanese jurisdictions. Despite this, the Dissertation does not cover the whole administration of America and Japan. The Dissertation limits its scopes to the post-colonial America and post-war Japan over land taking practice; especially, institutional arrangement and responsibility to deal

[24] Law on Court Organization [ច្បាប់ស្តីពីការរៀបចំអង្គការតុលាការ] (2014).

[25] Ibid., arts. 5 and 14.
[26] Ibid., arts. 4 and 87.
[27] Constitution of Kingdom of Cambodia [រដ្ឋធម្មនុញ្ញនៃព្រះរាជាណាចក្រកម្ពុជា], art. 128 (1993).

[28] Ibid., art. 130.
[29] Law on Court Organization, art. 87.

with taking disputes. Such a comparative study has purpose to learn and understand the concept and policy of both countries in arranging institutional mechanism, responsibility, protection, and procedure to deal with land taking, dispute resolution, and protection of human rights.

This study mainly covers the overall aspect of Cambodian legal and judicial system. The study focuses on judicial and ADR institutional responsibility of taking dispute resolution in Cambodia. Due to few academic articles talk of land takings in Cambodia; therefore, the analysis in this Dissertation largely depends the government's laws, regulations, policies and reports, decisions from courts and ADR institutions, media report, and other sources from non-governmental organization

Besides these, substantive information in this Dissertation arises from the interviews and critical discussions with legal practitioners. The author interviews a senior government official of the Ministry of Land for the general views of the ADR institutions and process of land dispute resolution. The author also interviews the arbitrator chief of Labor Arbitration Council for the process and resolution of the LAC. The author often makes critical discussions with a judge, lawyer, and clerk over their duties and judicial process in practice. Substantial components depend on the author's quantitative and qualitative analysis over those sources.

B. Interrelations of Property Law, Taking Law, and Due Process of Law in Review

Takings are the boundary of public law and private law. Public law consists of constitutional and administrative law. Constitutional law is the baseline norm for authorizing the taking power, while administrative law governs the due process of taking – taking decision and action. Private law consists of property law and its economic interest. The property law governs the substantial object of taking – land, house, construction, and ownership. The economic interest governs property interest, right to property development, loss and damage of property, and compensation.

In overall relations, public law governs the authorization of a taking over private property, while private law demands the balance of public interest and compensation of loss and damage incurred by such a taking. These laws become a fundamental subject for consideration and decision-making over a taking dispute. Thus, the Dissertation will review the interrelations of property law, taking law, and due process of law relevant to land taking disputes in general and Cambodian context.

1. Property Law

Property law is a private law governing property and its related rights, which is called "property rights." Property is a broad concept, which include tangible and intangible property, movable (personal) and immovable (real) property, and intellectual property. This Dissertation will cover only the immovable property and its related rights, which is referred to economic interest and development right of property

a). Means of Ownership Acquisition

In property law, ownership acquisition of immovable property is essential to receive various rights related to that property and protected by law. Immovable property refers to land, construction, and other improvements affixed to that land and construction. In property theory, there are three main means to acquire an ownership of an immovable property: (1) legal acquisition, (2) possession, and () adverse possession.

Ownership acquisition over an immovable property can be made by legal acquisition. Legal acquisition refers to the legal means of immovable transaction from one owner to another by purchase, gift, will, or exchange of property.[30] For instance, if one wants to acquire ownership of an occupied land, one must negotiate and buy it from the previous land occupant via a purchase agreement and register this land. Then, one will become the legal owner of that purchased land.

Possession is a primary principle to acquire ownership of an immovable property.[31] This principle can be applied to land not formally recognized under law as subject to ownership, which is regarded as the first possession.[32] This concept dated back to the seventeenth and eighteenth centuries, which were the era of

[30] Robert Nozick, *Anarchy, State, and Utopia* (Basic Books, 1974), 151; cited in Tessa Davis, "Note: Keeping the Welcome Mat Rolled-up: Social Justice Theorists' Failure to Embrace Adverse Possession as a Redistributive Tool," *Journal of Transnational Law and Policy* (2011 2010): 77; Richard A. Posner, "Essay: Savigny, Holmes, and the Law and Economics of Possession," *Va. L. Rev.* 86 (April 2000): 558; O. Lee Reed, "What Is 'Property'?," *Am. Bus. L.J.* 41 (Summer 2004): 498.

[31] Carol Necole Brown and Serena M. Williams, "Symposium: Law and the Financial Crisis: Economic Regulation During Turbulent Times: Rethinking Adverse Possession: An Essay on Ownership and Possession," *Syracuse L. Rev.* (2010): 584; John C. LaMaster, "Note: Property: Conflicting Constructive and Civil Possessions," *La. L. Rev.* 45 (March 1985): 981–82; Jill M. Fraley, "Finding Possession: Labor, Waste, and the Evolution of Property," *Cap. U. L. Rev*. 39 (Winter 2011): 51–53.

[32] Fraley, "Finding Possession," 51–53; Posner, "Essay," 552–53; Adam Mossoff, "What Is Property? Putting the Pieces Back Together," *Ariz. L. Rev*. 45 (Summer 2003): 375.

enlightenment, when John Locke raised this conception for discussion.[33] According to Locke's concept, a possessor could acquire ownership over an immovable property by occupation and labor.[34] In this context, if a man occupied an immovable property and worked on it, he would become owner of that occupied property within a fixed period determined by law. In this sense, occupation and labor on an immovable property led a man to ownership acquisition of such an occupied immovable property.[35]

Ownership acquisition of an immovable property can be made by the principle of adverse possession. Adverse possession has a similar means as possession; namely, the occupation over an immovable property.[36] However, adverse possession can affect registered immovable property and benefits a later possessor against the registered property owner.[37] Under a typical rule of adverse possession, if a landless man occupied a registered property in good faith within a fixed period by law, he would acquire ownership over such an occupied immovable property when the prescribed period was completed.[38]

A taking affects the legal title to land, and compensation for a taking is to be paid to the holder of the legal title. In Cambodia, the majority of land is unregistered (and therefore not covered by legal title), takings often trigger an immediate need to determine the legal title holder by reference to the rules on possession and

[33] Abraham Bell and Gideon Parchomovsky, "A Theory of Property," *Cornell L. Rev.* 90 (March 2005): 541–42; Anna di Robilant, "Property: A Bundle of Sticks or a Tree?," *Vano. L. Rev.* 66 (April 2013): 877; John Christman, "Can Ownership Be Justified by Natural Rights?," *Philosophy & Public Affairs* 15, no. 2 (April 1, 1986): 159; Bret Boyce, "Property as a Natural Right and as a Conventional Right in Constitutional Law," *Loy. L.A. Int'l & Comp. L. Rev.* 29 (Spring 2007): 223.

[34] Christman, "Can Ownership Be Justified by Natural Rights?," 160; Boyce, "Property as a Natural Right and as a Conventional Right in Constitutional Law," 223–24; Christopher A. Bauer, "Notes & Comments: Government Takings and Constitutional Guarantees: When Date of Valuation Statutes Deny Just Compensation," *B.Y.U.L. Rev.* 2003 (2003): 269.

[35] Mossoff, "What Is Property?," 386; Adam Mossoff, "The Use and Abuse of IP at the Birth of the Administrative State," *U. Pa. L. Rev.* 157 (June 2009): 2020.

[36] Grantland M. Clapacs, "Note: 'When in Nome....': Custom, Culture and the Objective Standard in Alaskan Adverse Possession Law," *Alaska L. Rev.* 11 (December 1994): 308.

[37] Jessica A. Clarke, "Adverse Possession of Identity: Radical Theory, Conventional Practice," *Or. L. Rev.* 84 (2005): 563; Charlotte C. Williams, "Reaching Back to Move Forward: Using Adverse Possession to Resolve Land Conflicts in Timor-Leste," *Pac. Rim L. & Pol'y J.* 18 (2009): 597; James Edward Hogg, "The Relation of Adverse Possession to Registration of Title," *Journal of the Society of Comparative Legislation* 15, no. 2, New Series (January 1, 1915): 84.

[38] Davis, "Note: Keeping the Welcome Mat Rolled-Up," 74 and 83; Williams, "Reaching Back to Move Forward," 597; Kristine S. Cherek, "From Trespasser to Homeowner: The Case Against Adverse Possession in the Post-Crash World," *Va. J. Soc. Pol'y & L.* 20 (Winter 2012): 227.

adverse possession.[39] As a result, these rules are exercised with much higher frequency than is the case in most developed countries.

Cambodia currently permits ownership acquisition through land possession within a fixed period of five years under the 2001 Land Law.[40] The 2001 Land Law does not authorize adverse possession over registered land.[41] However, this principle is authorized under the new Civil Code of 2007, which authorizes the adverse possession over registered immovable property to be made within ten or twenty years based on the integrity of land possessors.[42]

b). Right to Use Property

A possessor or owner of immovable property has a right to use property for economic purpose.[43] When one becomes a possessor or owner of an immovable property, one will receive a "bundle of rights" that is related to that property. [44] These rights include the right to management, the right to enjoyment, and the right to disposal of property.[45] Besides these, a possessor or owner can sell, rent, bequeath, and make other economic and developmental activities over such a property.[46]

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[39] The current land registration is achieved around 3,6 million parcels. Cambodia has more than 10 million parcels for registration. See: Ministry of Land Management, Urban Planning, and Construction, *Report on Total Result of August-2014 Activities and Ongoing Action Plan* [របាយការណ៍ចូរសរុបលទ្ធផលការងារប្រចាំខែសីហាឆ្នាំ២០១៤ និង ទិស ដៅការងារបន្ត], September 11, 2014, 3; Phalthy Hap, "The Implementation of Cambodia's Laws on Land Tenure" (Doctoral Thesis, Nagoya University, 2010), 83; Thiel, "Donor-Driven Land Reform in Cambodia—Property Rights, Planning, and Land Value Taxation," 228.

[40] 2001 Land Law, art. 30 (2001).

[41] Ibid., art. 35.

[42] Civil Code of Cambodia [ក្រមរដ្ឋប្បវេណីនៃព្រះរាជាណាចក្រកម្ពុជា], art. 162 (2007).

[43] Joseph L. Sax, "Takings, Private Property and Public Rights," *Yale L.J.* 81, no. 2 (December 1, 1971): 152.

[44] Michael Veseth, "The Economics of Property Rights and Human Rights," *American Journal of Economics and Sociology* 41, no. 2 (April 1, 1982): 171; Jane B. Baron, "Rescuing the Bundle-of-Rights Metaphor in Property Law," *U. Cin. L. Rev.* 82 (Fall 2013): 58; David Lametti, "The Concept of Property: Relations Through Objects of Social Wealth," *Univ. of Toronto L.J.* 53 (Fall 2003): 337; John M. Meyer, "The Concept of Private Property and the Limits of the Environmental Imagination," *Political Theory* 37, no. 1 (February 1, 2009): 119.

[45] J. E. Penner, "The 'Bundle of Rights' Picture of Property," *UCLA L. Rev.* 43 (February 1996): 714; Christman, "Can Ownership Be Justified by Natural Rights?," 160; Carol C. Gould, "Contemporary Legal Conceptions of Property and Their Implications for Democracy," *The Journal of Philosophy* 77, no. 11 (November 1, 1980): 717; Gordon L. Clark, "Rights, Property, and Community," *Economic Geography* 58, no. 2 (April 1, 1982): 120.

[46] Daniel H. Cole and Peter Z. Grossman, "The Meaning of Property Rights: Law versus Economics?," *Land Economics* 78, no. 3 (August 1, 2002): 318–19; Richard M. Frank, "Inverse Condemnation Litigation in the 1990s--The Uncertain Legacy of the Supreme Court's Lucas and Yee Decisions," *Wash. U. J. Urb. & Contemp. L.* 43 (1993): 108; Carol Kirk, "First Church Decides Compensation Is Remedy for Temporary Regulatory Takings-Local Governments Are Singing the Blues," *Ind. L. Rev.* 21 (1988): 903.

The right to use property for economic purpose is protected under Cambodian laws. The status of land tenure is divided into two forms – possession and ownership – under Cambodian property laws. Possession refers to an occupation of land less than five years with or without a possession certificate, while ownership refers to an occupation of land for more than five years with or without ownership title.[47] Even though the status of land tenure is different, the right to use property for economic purpose is guaranteed equally under the law. In this sense, both possessor and owner can transact their immovable property freely.[48]

In short, Cambodian property laws provide an adequate framework for ownership acquisition and the economic use of property.

2. Taking Law

In property law, a property owner oresumptively has an exclusive right over his or her property. However, property can typically be taken by the state when public interest requires.

a). Background of Taking Law

The practice of government takings has a long history.[49] Historically, the power to take property was in the hand of the sovereign.[50] The sovereign long enjoyed this privilege in appropriating property from citizens for its own use without the consent of property owners.[51]

Government takings attracted academic attention the work of Hugo Grotius, the Dutch jurist, in 1625.[52] Grotius wrote a treatise, *De Jure Belli et Pacis*, in which he named the exercise of land taking by the

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[47] Circular on Procedural Implementation of Establishing Cadastral Index Map and Land Register [សារាចរណែនាំអនុវត្តនីតិវិធីនៃការកសាងប្លង់សុរិយោដី និង សៀវភៅគោលបញ្ជីដីធ្លី] (2002); Circular on Procedural Implementation of Sporadic Land Registration [សារាចរណែនាំអនុវត្តនីតិវិធីនៃការចុះបញ្ជីដីមានលក្ខណៈដាច់ដោយដុំ] (2004); 2001 Land Law, art. 30 (2001).

[48] 2001 Land Law, art. 39.

[49] Janet Thompson Jackson, “What Is Property? Property Is Theft: The Lack of Social Justice in U.S. Eminent Domain Law,” *St. John’s L. Rev.* 84 (Winter 2010): 94–95; Glen H. Sturtevant, “Economic Development as Public Use: Why Justice Ryan’s Poletown Dissent Provides a Better Way to Decide Kelo and Future Public Use Cases,” *Fed. Cir. B.J.* 15 (2006 2005): 204; Bauer, “Notes & Comments: Government Takings and Constitutional Guarantees,” 265.

[50] James W. Ely, “‘That Due Satisfaction May Be Made:’ The Fifth Amendment and the Origins of the Compensation Principle,” *The American Journal of Legal History* 36, no. 1 (January 1992): 3; Bauer, “Notes & Comments: Government Takings and Constitutional Guarantees,” 268; Timothy Sandefur, “Backlash So Far: Will Americans Get Meaningful Eminent Domain Reform,” *Mich. St. L. Rev.* 2006 (2006): 712.

[51] Jackson, “What Is Property?,” 94–95; Sturtevant, “Note: Economic Development as Public Use,” 204; Bauer, “Notes & Comments: Government Takings and Constitutional Guarantees,” 269.

sovereign as the power of "eminent domain," (*dominium eminens*).[53] According to Grotius, the exercise of eminent domain was only for public benefit while affected property owner was entitled to compensation.[54]

Since the inception of eminent domain power, this concept has spread to various nation-states. Most nation-states have adopted this concept into their legislations, most often with constitutional backing.[55] Various terms are coined to refer to the power of eminent domain. Most popular terms are used in most jurisdictions such as expropriation, appropriation, compulsory purchase, compulsory acquisition, or condemnation, while the simple one is taking.[56]

Cambodia adopted the power of eminent domain in its post-war Constitution in 1993. Article 44 of the 1993 Constitution provides "[t]he expropriation of ownership from any individual shall be exercised only if the public interest as required as prescribed by law, and to pay fair and just compensation in advance."[57] This clause is fundamentally enshrined in the 1993 Constitution that confers power to the government to condemn private properties for public use. The 1993 Constitution is the supreme law of the nation, which subsidiary laws, regulations, and decisions of the state must comply with.[58]

b). Restriction of Taking Law

Although a variety of terms are used for the "eminent domain power" in various jurisdictions, the concept of eminent domain is relatively uniform. A constitution confers eminent domain power to government

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[52] Mossoff, "What Is Property?," 379; R. J. Tresolini, "Eminent Domain and the Requisition of Property during Emergencies," *The Western Political Quarterly* 7, no. 4 (December 1, 1954): 571; Boyce, "Property as a Natural Right and as a Conventional Right in Constitutional Law," 220.

[53] Joseph M. Cormack, "Legal Concepts in Cases of Eminent Domain," *Yale L.J.* 41, no. 2 (December 1, 1931): 222; Jackson, "What Is Property?," 94–95; Robert Hockett, "It Takes a Village: Municipal Condemnation Proceedings and Public/Private Partnerships for Mortgage Loan Modification, Value Preservation, and Local Economic Recovery," *Stan. J.L. Bus. & Fin.* (Fall 2012): 157; Michael R. Salvas, "A Structural Approach to Judicial Takings," *Lewis & Clark L. Rev.* 16, no. 4 (2012): 1399; Tresolini, "Eminent Domain and the Requisition of Property during Emergencies," 571; Boyce, "Property as a Natural Right and as a Conventional Right in Constitutional Law," 220.

[54] Shaun A. Goho, "Process-Oriented Review and the Original Understanding of the Public Use Requirement," *Southwestern Law Review* (2008): 72; Arthur Lenhoff, "Development of the Concept of Eminent Domain," *Colum. L. Rev.* 42, no. 4 (April 1, 1942): 596; Tresolini, "Eminent Domain and the Requisition of Property during Emergencies," 571; by Matthew P. Harrington, "'Public Use' and the Original Understanding of the So-Called 'Takings' Clause," *Hastings L.J.* 53 (August 2002): 1247; Robert F. Manfredo, "Comment: Public Use & Public Benefit: The Battle for Upstate New York," *Alb. L. Rev.* 71 (2008): 676.

[55] For examples of US Constitution, Japanese Constitution, and Cambodia.

[56] Jack L. Knetsch and Thomas E. Borcherding, "Expropriation of Private Property and the Basis for Compensation," *The University of Toronto Law Journal* 29, no. 3 (July 1, 1979): 237.

[57] Constitution of Kingdom of Cambodia, art. 44 (1993).

[58] Ibid., art. 150.

to take land for social interest and development. However, the constitution typically constrains government exercise of this power.[59] A constitution typically authorizes government to be able to take land only if it serves "public use," while affected property owners are provided with due process of law and paid with "just compensation."[60]

These restrictions are to protect the property owner from arbitrary takings and to control rent-seeking by developers and others.[61] Government, together with authorized private developers, if there are no such restrictions, could invade private property rights arbitrarily.[62] Therefore, the constitutional taking clauses are seen to protect private property rights from arbitrary takings rather than allowing government to exercise such a power with restraint.[63]

The 1993 Cambodian Constitution follows this pattern, and imposes restrictions on government in exercising the taking power. The 1993 Constitution grants the government the power of eminent domain to exercise land taking only if it serves public use and follows procedures stated by law, while property owner must be paid fair and just compensation in advance.[64]

3. Due Process of Taking Law

[59] Thomas W. Merrill, "The Landscape of Constitutional Property," *Va. L. Rev.* 86, no. 5 (August 1, 2000): 886; Geoffrey K. Turnbull, "Land Development under the Threat of Taking," *Southern Economic Journal* 69, no. 2 (October 1, 2002): 292; Janice Nadler and Shari Seidman Diamond, "Eminent Domain and the Psychology of Property Rights: Proposed Use, Subjective Attachment, and Taker Identity," *Journal of Empirical Legal Studies* 5, no. 4 (2008): 716.

[60] Nadler and Diamond, "Eminent Domain and the Psychology of Property Rights," 716; Stephen C. Werner Jr, "Note: To Compensate or Not to Compensate, That Is the Question: Misconstruing the Federal Regulatory Takings Analysis in Zealy v. City of Waukesha," *Wis. Envtl. L.J.* 3 (Summer 1996): 203; Lawrence Berger, "Public Use, Substantive Due Process and Takings: An Integration," *Neb. L. Rev.* 74 (1995): 844.

[61] Harry N. Scheiber, "Property Law, Expropriation, and Resource Allocation by Government: The United States, 1789-1910," *The Journal of Economic History* 33, no. 1 (March 1, 1973): 235; Roderick E. Walston, "Constitution and Property: Due Process, Regulatory Takings, and Judicial Takings," *Utah L. Rev.* 2001 (2001): 381; Ann Marie Cavazos, "Beware of Wooden Nickels: The Paradox of Florida's Legislative Overreaction in the Wake of Kelo," *University of Pennsylvania Journal of Business Law* 13 (Spring 2011): 688.

[62] Daniel B. Kelly, "The Public Use Requirement in Eminent Domain Law: A Rationale Based on Secret Purchases and Private Influence," *Cornell L. Rev.* 92 (2006): 9.

[63] David B. III Fawcett, "Eminent Domain, the Police Power, and the Fifth Amendment: Defining the Domain of the Takings Analysis," *U. Pitt. L. Rev.* 47 (1986 1985): 495; Joel Block, "Casenote: Takings Claims: Are the Federal Courts Truly Open?," *Mo. Envtl. L. & Pol'y Rev.* 8 (2001): 74; John F. Hart, "Land Use Law in the Early Republic and the Original Meaning of the Takings Clause," *Nw. UL Rev.* 94 (1999): 1100.

[64] The 1993 Constitution requires to have a separate procedural law governing land expropriation. See: Constitution of Kingdom of Cambodia, art. 44 (1993).

Apart from the constraints of public use and just compensation, the constitution obliges government to respect due process of law for affected property owners.[65] The constitutional due process clause provides that no taking of private rights is made without prior notice and hearing for affected citizen.[66]

The constitutional due process clause has minimal requirements that limit government's law, regulation, decision, or action must not be unnecessary, unreasonable, capricious, or arbitrary, which lead to the taking of private rights.[67] These requirements are the foundations for judiciary to review the governmental decision or action that does not comply with constitutional clauses of "due process," "just compensation," and "public use" requirement.[68]

Due process of taking law, in general, involves two administrative stages. The first stage is the procedure before dispute occurs, which is referred to in this Dissertation as the "pre-dispute mechanism." The second stage is the procedure for maintaining due process and fair treatment between parties when dispute occurs, which is ditto as the "post-dispute mechanism."

The due process of taking law, by its nature, requires government to guarantee and provide both administrative stages to affected property owners prior to the forced exercise of expropriation and relocation. The following section will demonstrate a number of procedural aspects and protections in each administrative stage.

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[65] Jeffrey T. Haley, "Balancing Private Loss against Public Gain to Test for a Violation of Due Process or a Taking without Just Compensation," *Wash. L. Rev.* 54 (1979 1978): 319.

[66] Kirk Emerson and Charles R. Wise, "Statutory Approaches to Regulatory Takings: State Property Rights Legislation Issues and Implications for Public Administration," *Public Administration Review* 57, no. 5 (September 1, 1997): 414; D. Zachary Hudson, "Eminent Domain Due Process," *Yale L.J.* 119, no. 6 (April 1, 2010): 1286.

[67] William B. Stoebuck, "Police Power, Takings, and Due Process," *Wash. & Lee L. Rev.* 37 (1980): 1058; C. Kevin Kelso, "Substantive Due Process as a Limit on Police Power Regulatory Takings," *Willamette L. Rev.* 20 (1984): 15; Roger A. Cunningham, "Inverse Condemnation as a Remedy for Regulatory Takings," *Hastings Const. L.Q.* 8 (1981 1980): 518; Frank H. Easterbrook, "Substance and Due Process," *The Supreme Court Review* 1982 (January 1, 1982): 844.

[68] Daniel R. Mandelker, "Property Rights: Entitlement to Substantive Due Process: Old Versus New Property in Land Use Regulation," *Wash. U. J.L. & Pol'y* 3 (2000): 66; Haley, "Balancing Private Loss against Public Gain to Test for a Violation of Due Process or a Taking without Just Compensation," 320; J. Peter Byrne, "Due Process Land Use Claims after Lingle," *Ecology L.Q.* 34 (2007): 476; Daniel R. Mandelker, "Entitlement to Substantive Due Process: Old Versus New Property in Land Use Regulation," *Wash. U. J.L. & Pol'y* 3 (2000): 66.

a). Pre-Dispute Mechanism

The first due process of taking law is pre-dispute mechanism. Pre-dispute mechanism is a procedure to prevent dispute from happening and appearing in later redress forum. Pre-dispute stage refers to implementing stage of expropriating authority or delegated developer. In this sense, the expropriating authority or delegated developer is the responsible body for maintaining the due process with the affected citizens in the pre-dispute stage.

Land taking results in relocation and loss of property right, leading to dissatisfaction and frequently to protest. Taking law requires the expropriating authority or delegated developer to provide some safeguard aspects to affected property owners that expropriators must follow to avert disputes.[69]

Pre-dispute safeguards in most jurisdictions are roughly as follows. First, government must announce and notify necessity and development project, which cause the taking of private property, to affected landowners in advance.[70] Second, expropriating authority or delegated developer must conduct social and environmental impact assessment of development project and affected citizens.[71] Third, expropriating authority or delegated developer must appraise the value of affected property on market price base.[72] Fourth, expropriating authority or delegated developer must negotiate the appraised price with affected landowners on market value between willing buyer and seller without duress.[73]

Such a procedural mechanism is to prevent dispute and treat parties equally under pre-dispute stage. However, if there is a protest against expropriation, violation of due process, or disagreement on compensation, dispute will appear in the redress forum. This will lead to the second stage of due process protection by redress institution under taking law framework.

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[69] Hudson, "Eminent Domain Due Process," 1291.
[70] Emerson and Wise, "Statutory Approaches to Regulatory Takings," 414; Hudson, "Eminent Domain Due Process," 1286.
[71] David A. Westbrook, "Administrative Takings: A Realist Perspective on the Practice and Theory of Regulatory Takings Cases," *Notre Dame L. Rev.* 74 (March 1999): 771.
[72] Jeffrey T. Powell, "The Psychological Cost of Eminent Domain Takings and Just Compensation," *Law & Psychol. Rev.* 30 (Spring 2006): 227; Turnbull Geoffrey, "Irreversible Development and Eminent Domain: Compensation Rules, Land Use and Efficiency," *Journal of Housing Economics* 19, no. 4 (December 2010): 243; Richard A. Epstein, "Physical and Regulatory Takings: One Distinction Too Many," *Stanford Law Review Online* 64 (March 1, 2012): 101.
[73] Yun-chien Chang, "An Empirical Study of Compensation Paid in Eminent Domain Settlements: New York City, 1990-2002," *J. Legal Stud.* 39 (January 2010): 211–15.

b). Post-Dispute Mechanism

Post-dispute stage refers to a hearing mechanism. Hearing mechanism is guaranteed for affected citizens. The due process at post-dispute mechanism requires to have a "meaningful hearing," which consists of the rudimentary requirements such as a timely and adequate notice, an opportunity to confrontation and cross-examination, right to have counsel, and right to an impartial decision-maker.[74]

Most jurisdictions arrange a hearing for land taking dispute in administrative or judicial redress mechanism. For instance, America arranges hearing mechanism in judicial redress, while Japan and Cambodia arrange a hearing in administrative redress first before proceeding with a judicial recourse, as the last resort.[75]

A taking dispute comprises two types of disputes. It could be either administrative dispute or civil dispute, or both.[76] If affected citizens challenge the constitutionality of taking, violation of due process of law, or administrative decision and action; in this context, court (administrative judges) will have jurisdiction to address the issue. However, if affected landowners disagree on ownership and compensation, a jury or committee of civil, property, financial experts will resolve this type of dispute.

Land taking is naturally sure that expropriating authority or delegated developer cannot receive consensus from affected property owners to give in their properties for development project. Some property owners will, inevitably, disagree and object expropriation project. Therefore, the constitution protects those property owners from arbitrary taking of life, liberty, or property. In this sense, the constitution requires to have appropriate hearing for objected citizens.[77] In this regards, a hearing must be made under an independent resolver, who stay far from conflict of interest. Such a doing is to maintain due process of law for both parties and make affected citizens able to accept the resolution.[78]

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[74] Marilyn J. Friedman, "Discovery and Administrative Due Process: A Balance Between an Accused's Right to Discovery and Administrative Efficiency," *Hastings Const. L.Q.* 8 (1981 1980): 653; Easterbrook, "Substance and Due Process," 89.
[75] The author will clarify this in later chapters in this Dissertation.
[76] Hudson, "Eminent Domain Due Process," 1287.
[77] Michael A. Lawrence, "Do 'Creatures of the State' Have Constitutional Rights?: Standing for Municipalities to Assert Procedural Due Process Claims against the State," *Vill. L. Rev.* 47 (2002): 112; Mandelker, "Entitlement to Substantive Due Process," 65–66.
[78] Eric R. Claeys, "That '70s Show: Eminent Domain Reform and the Administrative Law Revolution," *Santa Clara L. Rev.* 46 (2006): 882.

In the Cambodian context, due process of taking law is guaranteed under Cambodian 1993 Constitution and laws. The 1993 Constitution requires a taking be made only if it is followed by procedures prescribed by law.[79] In this sense, the constitution obliges the government to follow and provide protection for affected citizens before a forced exercise of land taking and eviction.

In addition to the constitutional requirement of due process protection, the 2001 Land Law further provides a strong protection for affected landowners from arbitrary forced eviction and relocation. Article 35 of the 2001 Land Law prohibits authority from exercising arbitrary forced eviction only if it receives an eviction order from court.[80] Forced eviction cannot be made without a judicial hearing and decision in Cambodian context. Moreover, Article 36 of the same law further protects would-be evictees that if the execution of judicial eviction order causes turbulence, such an execution must be suspended.[81] In this context, Cambodian laws provides safeguard protection to affected citizens from arbitrary taking and eviction.

Apart from the procedural safeguard, the 1993 Constitution confers on citizens a constitutional right to challenge against state or state authority over any breach of law and file a claim for remedy if they are suffered from unfair treatment from state authority or incumbent.[82] The 1993 Constitution obliges the government to thoroughly consider and resolve such a complaint.[83] Above all, the 1993 Constitution empowers only court to have jurisdiction to decide such a complaint.[84] Citizens are equally before the law and receive judicial defense through court recourse.[85]

The government further passed the Law on Expropriation (hereinafter "2010 Expropriation Law," which implements the procedural safeguards required under the 1993 Constitution and 2001 Land Law in 2010.[86] The 2010 Expropriation Law provides procedure and mechanism, for example, expropriation

[79] Constitution of Kingdom of Cambodia, art. 44 (1993).
[80] 2001 Land Law, art. 35 (2001).
[81] Ibid., art. 36.
[82] Constitution of Kingdom of Cambodia, art. 39.
[83] Ibid., art. 38.
[84] Ibid., art. 39.
[85] Ibid., arts. 31 and 38.
[86] Law on Expropriation [ច្បាប់ស្តីពីអស្សាមីករណ៍] (2010).

committees, compensation assessment, and grievance redress committee; however, none of these have been established yet.[87] The process of these mechanisms is under a separate sub-decree, which is so far in a draft.

In contrast to these formal requirements, the Cambodian government has, in practice, created ad-hoc commission to handle taking disputes on a case-by-case basis. There is no uniform practice in Cambodia. Current practice of land takings renders many forced evictions and relocations of local land occupants without undergoing appropriate redress and court order.[88] Such a practice violates the constitutional protection of human rights in Cambodia. In this context, David Chandler, an eminent historian of Cambodia, compared current forced eviction to the forced removal of people from the city by the Khmer Rouge forces in 1979 were the same.[89] Therefore, Cambodia needs, in such a challenge, an independent institution that could guarantee due process of law between parties, interpret and protect the constitutional and legal clause.

In short, Cambodia has constitutional provisions and laws for exercising taking powers; however, Cambodia does not have appropriate implementing and hearing mechanisms for affected citizens yet.

[87] Ibid.
[88] By 2011, the total evicted households reached to 30,009 families, around 150,045 persons were forcibly evicted from the Phnom Penh city. See: Sahmakum Teang Tnaut, *Displaced Families: Phnom Penh 1990-2011,* Facts and Figures, No. 19, May 2011.
[89] David Chandler, "Cambodia in 2009: Plus C'est La Même Chose," *Asian Survey* 50, no. 1 (February 1, 2010): 228–34.

Chapter I Legal and Judicial Reform Policy in Post-war Cambodia

Reform of existing land dispute resolution mechanism requires an understanding of past policy. The policy of legal and judicial reform has proceeded with two major courses in post-war Cambodia: (1) institutional reform of judicial institutions, and (2) institutional reform of alternative dispute resolution (ADR) institutions. The following section will illustrate the institutional policy of these reforms in post-war Cambodia.

A. Institutional Reform toward Judicial Institutions

Cambodia experienced many political turbulences and civil wars.[90] These have destroyed Cambodian human resources and legal and judicial system.[91] Human resources and the legal and judicial system were almost destroyed under the Khmer Rouge period between 1975 and 1979.[92] After the fall of Khmer Rouge regime, the then-Cambodian government endeavored to re-establish the legal and judicial system the court from scratch.[93]

So far, Cambodian government has succeeded in re-establishing a number of major legal and judicial institutions such as court, supreme council of magistracy, bar association of Cambodia, and constitutional council. These institutions have played an important role in preserving social justice in post-war Cambodia. This section will illustrate the background, development, and procedure of these institutions.

1. Institutional Background

After the civil war, the government began to re-establish the court first, and then continued to create consecutive institutions: the court, the supreme council of magistracy, the bar association, and he constitutional council, which were involved in justice preservation. This section will demonstrate the intuitional background of these institutions in brief.

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[90] Chandler, "The Tragedy of Cambodian History"; Springer, "Violence, Democracy, and the Neoliberal 'Order,'" 143.
[91] Brinkerhoff, "Rebuilding Governance in Failed States and Post-Conflict Societies," 11; Blunt and Turner, "Decentralisation, Democracy and Development in a Post-Conflict Society," 75–76.
[92] Terence Duffy, "Toward a Culture of Human Rights in Cambodia," *Hum. Rts. Q.* 16, no. 1 (February 1, 1994): 100–101.
[93] Dolores A. Donovan, "Cambodia: Building a Legal System from Scratch," *Int'l L.* 27 (1993): 445–54; Michael Kirby, "Judicial Independence and Accountability: An Asia-Pacific Perspective," *Lawasia J.* 2009 (2009): 7.

a). Court

The first institution to be re-established was the court. The Cambodian government established the court from scratch.[94] After the collapse of the Khmer Rouge era in 1979, the then-government, so-called the "Council of State," followed the communist regime.[95] The Council of State started to re-create the court system by issuing the Law on Organization of People's Revolutionary Provincial/Municipal Court in 1980.[96] Afterward, the Council of State decided to create the Municipal/Provincial People's Revolutionary Court as the court of first instance (hereinafter the "People's Court") in 1980.[97] A year later, the Council of State decided to establish the military court for hearing military offenses in 1981.[98] The Council of State promulgated the Law on Organization and Prosecution for establishing the prosecution unit attached to the court in 1982.[99]

The People's Court served as first and last instance for dispute resolution.[100] However, the People's Court was not an independent body, and was under the Ministry of Justice because Cambodia adhered to communist regime, in which one party controlled the country in that time.[101] Therefore, appeal for review could be made to the Ministry of Justice and in the last resort to the Council of State.[102] If the Council of State finds error in judgment, the Council of State will refer the case to the People's Court for re-hearing.[103]

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[94] Donovan, "Cambodia"; Kirby, "Judicial Independence and Accountability," 7.
[95] Brinkerhoff, "Rebuilding Governance in Failed States and Post-Conflict Societies," 11; Blunt and Turner, "Decentralisation, Democracy and Development in a Post-Conflict Society," 76.
[96] Law on Organization of Provincial/Municipal People's Revolutionary Court [ច្បាប់ស្តីពីការកំណត់អង្គការចាត់តាំងតុលាការប្រជាជនបដិវត្តន៍ថ្នាក់ខេត្ត ក្រុង] (1980).
[97] Loic Avillaneda et al., *Introduction to Cambodian Law* [សេចក្តីផ្តើមនៃនីតិកម្ពុជា] (Royal University of Law and Economics, 2005), 132; Law on Organization of Provincial/Municipal People's Revolutionary Court.
[98] Law on Organization of Military Court [ច្បាប់ស្តីពីការចាត់តាំងតុលាការយោធា] (1981); Law on Military Offense and Sanction [ច្បាប់ស្តីពីបទល្មើសមានលក្ខណៈយោធា និង ទណ្ឌកម្ម] (1981).
[99] Law on Organization of Court and Prosecution [ច្បាប់ស្តីពីការចាត់តាំងតុលាការ និង អយ្យការ] (1982); Koy Neam (នាម កុយ), *Introduction to the Cambodian Judicial Process* [ដំណើរការក្តីនៅក្នុងតុលាការកម្ពុជា] (The Asia Foundation, 1998), 5.
[100] Law on Organization of Court and Prosecution; Neam, *Introduction to the Cambodian Judicial Process*, 5.
[101] Donovan, "Cambodia," 450.
[102] Neam, *Introduction to the Cambodian Judicial Process*, 5 and 12.
[103] Ibid.

To provide for final review, the government created the Supreme People's Court and Supreme People's Prosecutor General, (hereinafter the "Supreme People's Court") in 1985.[104] The process and activity of this Supreme People's Court was under the Law on Organization and Activity of Supreme People's Court and Supreme People's Prosecutor General in 1987.[105] The Supreme People's Court replaced the Ministry of Justice and the Council of State as the final court of appeal.[106]

In 1993, Cambodia promulgated the new democratic constitution to turn the country from communist regime to democracy with separation of powers.[107] However, Cambodian judicial institution faced namely, the lack of an intermediate court of appeal. Thus, Cambodia arranged the new Law on Organization and Functioning of Court in 1993.[108] This law provided to establish an appellate court.[109] As a result, the government created the appellate court in 1994.[110]

The introduction of democracy into the nation influenced the names of courts. The previous names under the communist regime were changed. The new names of courts were the provincial/municipal court, appellate court, and supreme court.[111] Since then, Cambodian court system had full three-tiers and functions for resolving social disputes in common with most other jurisdictions around the world.

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[104] Law on Establishment of Supreme People's Court and Supreme People's Prosecutor General [ច្បាប់ស្តីពីការបង្កើតតុលាការ ជ្រាវជនកំពូល និង មហាអយ្យការអមតុលាការជ្រាវជនកំពូល] (1985).

[105] Law on Organization and Activity of Supreme People's Court and Supreme People's Prosecutor General [ច្បាប់ស្តីពី ការចាត់តាំង និង សកម្មភាពរបស់តុលាការជ្រាវជនកំពូល និង មហាអយ្យការអមតុលាការជ្រាវជនកំពូល] (1987); Avillaneda et al., *Introduction to Cambodian Law*, 133.

[106] Law on Organization and Activity of Supreme People's Court and Supreme People's Prosecutor General, art. 3; Neam, *Introduction to the Cambodian Judicial Process*, 6.

[107] Mensher, "The Tonle Sap: Reconsideration of the Laws Governing Cambodia's Most Important Fishery," 797; Joakim Öjendal and Kim Sedara, "Korob, Kaud, Klach: In Search of Agency in Rural Cambodia," *Journal of Southeast Asian Studies* 37, no. 03 (2006): 510.

[108] Law on Organization and Functioning of Court [ច្បាប់ស្តីពីការរៀបចំ និង ប្រព្រឹត្តទៅនៃអង្គតុលាការ] (1993).

[109] Ibid.

[110] Neam, *Introduction to the Cambodian Judicial Process*, 6; Law on Organization and Functioning of Court; Avillaneda et al., *Introduction to Cambodian Law*, 143.

[111] Law on Organization and Functioning of Court; Neam, *Introduction to the Cambodian Judicial Process*, 6.

b). Supreme Council of Magistracy

The 1993 Constitution provided that judiciary was an independent branch from legislative and executive power.[112] Furthermore, this Constitution embodied the King to be the guarantor of judicial independence.[113] The 1993 Constitution authorized to establish the Supreme Council of Magistracy (hereinafter called the "Magistracy") for fulfilling this task.[114]

In compliance with this constitutional requirement, the government established the Magistracy in 1994.[115] The process of the Magistracy was governed by the Law on Organization and Functioning of Supreme Council of Magistracy of 1994.[116] According to this law, the Magistracy had nine members, in whom the King was the chairman, the Minister of Justice, the president of the supreme court and the appellate court, the prosecutor general of the supreme court and appellate court, and other three judges, who had been elected by judges, served as the members.[117]

The Magistracy had duties to appoint, promote, and discipline judges.[118] The Minister of Justice was responsible for appointing and promoting judges and requesting approval from the King.[119] The Magistracy held a meeting as a disciplinary council, which was under presidency of the chairman or prosecutor general of the supreme court for disciplining judges or prosecutors.[120] In this case, the King and the Minister of Justice did not participate in this meeting.[121] However, the King presided over the disciplinary council for disciplining the chairman or prosecutor general of the supreme court.[122]

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[112] Constitution of Kingdom of Cambodia, art. 128 (1993).
[113] Law on Organization and Functioning of Supreme Council of Magistracy [ច្បាប់ស្តីពីការរៀបចំ និង ការប្រព្រឹត្តទៅនៃឧត្តមក្រុមប្រឹក្សានៃអង្គចៅក្រម], art. 1 (1994); Constitution of Kingdom of Cambodia, art. 132.
[114] Law on Organization and Functioning of Supreme Council of Magistracy, art. 1; Constitution of Kingdom of Cambodia, art. 132.
[115] Law on Organization and Functioning of Supreme Council of Magistracy.
[116] Ibid.
[117] Ibid., art. 2.
[118] Constitution of Kingdom of Cambodia, art. 133; Law on Organization and Functioning of Supreme Council of Magistracy, art. 11.
[119] Law on Organization and Functioning of Supreme Council of Magistracy, art. 11.
[120] Ibid., art. 12.
[121] Ibid.
[122] Ibid.

c). Bar Association of Cambodia

Post-war Cambodia did not have lawyers until 1995 when Cambodia established the bar association.[123] However, Cambodia had case defenders, which were called in Khmer language "*nak-ka-pier-kdei*," or "*smar-kdei*."[124] The *smar-kdei* was not a person who studied law or had breadth of legal knowledge. However, he or she had fair knowledge about laws and could represent clients in courts.[125]

The lawyering system emerged when Cambodia established the Bar Association of the Kingdom of Cambodia (BAKC) in 1995.[126] The government passed the Law on Status of Lawyers in 1995 for training and qualifying lawyer practice in Cambodia.[127] The BAKC had duties to administer and train legal students to become lawyers in post-war period.

d). Constitutional Council

The 1993 Constitution required an establishment of a Constitutional Council as the state top reviewing body in Cambodian legal system.[128] In response to the constitutional requirement, the government established the Constitutional Council in 1998. The process and activities of the Constitutional Council were governed by the Law on Organization and Functioning of Constitutional Council in 1998.[129]

The Constitutional Council was an independent and neutral institution for ensuring constitutional compliance, interpretation of constitution and law, and resolution of election dispute.[130] The Constitutional Council had nine members selected from eminent persons who held a degree of bachelor of law or above,

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[123] Law on Status of Lawyers [ច្បាប់ស្តីពីឋានន្តរិកៈមេធាវី] (1995).

[124] Bar Association of Kingdom of Cambodia, *Legal Profession in Cambodia*, 2005, 14; cited in Phallack Kong, "Overview of the Cambodian Legal and Judicial System," in *Introduction to Cambodian Law*, edited by Hor Peng, Kong Phallack, and Jorg Menzel (Konrad Adenauer Stiftung, 2012), 15; Neam, *Introduction to the Cambodian Judicial Process*, 44; Avillaneda et al., *Introduction to Cambodian Law*, 151.

[125] Neam, *Introduction to the Cambodian Judicial Process*, 44; Avillaneda et al., *Introduction to Cambodian Law*, 151.

[126] Neam, *Introduction to the Cambodian Judicial Process*, 42.

[127] Law on Status of Lawyers.

[128] Constitution of Kingdom of Cambodia, art. 136 (1993).

[129] Law on Organization and Functioning of Constitutional Council, [ច្បាប់ស្តីពីការរៀបចំ និង ការប្រព្រឹត្តទៅនៃក្រុមប្រឹក្សារដ្ឋធម្មនុញ្ញ] (1998).

[130] Constitution of Kingdom of Cambodia, art. 136; Law on Organization and Functioning of Constitutional Council, arts. 1 and 2.

administration, diplomacy, or economics and have breadth of work experience.[131] The nine members were appointed by different bodies, in which three members were appointed by the King, another three members were appointed by the Magistracy, and the last three members were appointed by a majority vote of the national assembly members.[132]

2. Institutional Development

Cambodia lacked human resources at the initial re-establishment of legal and judicial institutions. However, Cambodia has had a remarkable development of institutions and human resources for the last three decades. This section discusses the development of institutions and human resources in post-war Cambodia.

a). Challenge of Initial Institutional Reform

The re-establishment of legal and judicial system was arduous for the then-government because Cambodia faced a serious lack of human resources after the collapse of the Khmer Rouge regime. Cambodia had 400 to 500 legal professionals before the Khmer Rouge regime (1975-79).[133] Most of these legal scholars were killed during this regime. As a consequence, an estimate from six to ten legal professionals, who held bachelor and associate decrees, remained alive in the post-war period.[134]

In order to re-establish the judicial system, the government of the time was constrained to appoint judges with less than complete qualifications. Most selected judges had junior and high school education and were further trained in a short term (three-to five month) program of law at the Comrade School of Administration and Law (*sala-kama-phibal-rothabal-ning-nitesastr*) between 1982 and 1989.[135] Cambodian

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[131] Constitution of Kingdom of Cambodia, art. 138; Eminent persons are aged over 45 years old and work experience exceeds over 15 years. See: Law on Organization and Functioning of Constitutional Council, art. 3.
[132] Law on Organization and Functioning of Constitutional Council, art. 3.
[133] Avillaneda et al., *Introduction to Cambodian Law*, 147; Roderic Broadhurst and Chenda Keo, "Cambodia - A Criminal Justice System in Transition," in *Routledge Handbook of International Criminology*, edited by Cindy J. Smith, Sheldon X. Zhang, and Rosemary Barberet (Routledge, 2011), 340.
[134] Donovan, "Cambodia," 445; Ngoy Yuok (ឃក់ ង៉ុយ) and Chamroeun Ung (អុងចំរើន), *History of Royal University of Law and Economics* [ប្រវត្តិសាកលវិទ្យាល័យគ្រូវិទ្ធដីតិសាស្ត្រ និង វិទ្យាសាស្ត្រសេដ្ឋកិច្ច] (RULE, 2011), 16; Avillaneda et al., *Introduction to Cambodian Law*, 147; Neam, *Introduction to the Cambodian Judicial Process*, 35; Broadhurst and Keo, "Cambodia - A Criminal Justice System in Transition," 340.
[135] Donovan, "Cambodia," 450; Yuok and Ung, *History of Royal University of Law and Economics*, 15; Neam, *Introduction to the Cambodian Judicial Process*, 35. Some were selected past teachers and past clerks. Kirby, "Judicial Independence and Accountability," 7; Stephen P. Marks, "New Cambodian Constitution: From Civil War to a Fragile Democracy," *Colum. Hum. Rts. L. Rev.* 26 (1995 1994): 55.

judiciary had 72 judges, 40 prosecutors, and 508 clerks, who served the justice system throughout the country as of 1993.[136] Therefore, Cambodian judicial system faced the shortage of qualified persons to become judges at the initial institutional re-establishment.

b). Development of Human Resources

More than three decades have passed since the collapse of Khmer Rouge regime. Cambodia has developed a remarkable quantity of institutions and human resources during this period. Currently, Cambodia has 105 higher education institutions as of 2014.[137] A total number of 253,764 students have been pursuing higher education in the academic year 2012 – 2013.[138] A relative figure of students is estimated to graduate annually.

In a particular development of legal field, a number of higher education institutions have a training course in law. One of those examples is the Royal University of Law and Economics (RULE). RULE re-started its training, under the name of Comrade School of Administration and Law (*sala-kama-phibal-rothabal-ning-nitesastr*), for a three-to-five month training program in 1982.[139] However, RULE began to have bachelor and master course of law in 1992 and 2002, respectively.[140]

So far, RULE has produced a remarkable number of human resources in legal field. A number of 31,633 law students graduated from RULE as of 2014.[141] RULE has dispatched 1,065 scholarship students to study abroad from 1993.[142] From this figure, we are able to say, Cambodia no longer faces the serious lack of human resources as before.

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[136] Department of Civil Affairs (នាយកដ្ឋានកិច្ចការរដ្ឋប្បវេណី), *Report on Development of Cambodian Judicial Reform (from 1993 to Present)* [ជំនួយស្មារតីស្តីពីដំណើរវិវត្តន៍នៃការងារកំណែទម្រង់ក្នុងប្រព័ន្ធតុលាការកម្ពុជា (ពីឆ្នាំ១៩៩៣ដល់បច្ចុប្បន្ន)], 2013; Donovan, "Cambodia," 450.
[137] Ministry of Education, Youth, and Sport, *The Education, Youth and Sport Performance in the Academic Year 2012-2013 and Goals for the Academic Year 2014*, Education Congress, March 2014, 41.
[138] Ibid., 42.
[139] Donovan, "Cambodia," 450; Yuok and Ung, *History of Royal University of Law and Economics*, 15; Phalthy Hap, "The Recent Development in Cambodia: Technical Education and Legal Education" (Nagoya University Graduate School of Law, May 12, 2014).
[140] Hap, "The Recent Development in Cambodia: Technical Education and Legal Education."
[141] Sen Hun, "Welcoming Speech," (presented at Graduation Ceremony, Conference and Exhibition Hall, Koh Pich, 2014).
[142] Ibid.

c). Development of Judicial Sector

In a particular development, the judicial sector has enjoyed a noticeable development of both institutions and human resources since 1993. Judge underwent a proper two-year training program. Trainee judge were trained at school in the first year and would be served as interns in a ministry or court in the second year.[143] Those who were eligible for the judicial exam were those who (1) held diploma of secondary legal study and served the state for 6 years, (2) were civil servants with a high school degree, and (3) persons who completed legal study at a border camp.[144]

The first training term began in August 1994, in which 44 judges were further trained.[145] The government established the Royal Academy of Judicial Professions (RAJP) for training legal professions in 2002.[146] Currently, those who hold bachelor of law are eligible for judicial exam.[147] So far, RAJP has trained and produced a noticeable number of judges. Today, Cambodian judiciary comprises 259 judges, 142 prosecutors, 614 clerks, and 121 administrative staff as of 2014.[148]

In addition to the increase of judicial staff, the development of institutional coverage has also been noteworthy. Cambodia had 21 provincial/municipal courts, one appellate court, and one supreme court as of 1998.[149] Currently, Cambodia has 23 provincial/municipal courts.[150] Further, the government plans to establish several appellate courts in certain areas for provincial territorial jurisdictions in the near future.[151]

Apart from the increase of judicial personnel, the number of lawyers has also increased since the establishment of the BAKC in 1995. Cambodia had a few lawyers allowed to practice law prior to establishing

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[143] Neam, *Introduction to the Cambodian Judicial Process*, 35; Avillaneda et al., *Introduction to Cambodian Law*, 148.
[144] Neam, *Introduction to the Cambodian Judicial Process*, 35.
[145] Ibid.
[146] Sub-decree on Establishment of Royal Academy of Judicial Profession [អនុក្រឹត្យស្តីពីការបង្កើតសាលារៀនចៅក្រម] (2002); Avillaneda et al., *Introduction to Cambodian Law*, 145.
[147] Avillaneda et al., *Introduction to Cambodian Law*, 147.
[148] Ministry of Justice (ក្រសួងយុត្តិធម៌), *2013 Yearly Report of Ministry of Justice* [របាយការណ៍ប្រចាំឆ្នាំ២០១៣របស់ក្រសួងយុត្តិធម៌], January 27, 2014.
[149] Neam, *Introduction to the Cambodian Judicial Process*, 23; Avillaneda et al., *Introduction to Cambodian Law*, 139.
[150] Department of Civil Affairs (នាយកដ្ឋានកិច្ចការរដ្ឋប្បវេណី), *Report on Nationwide Statistics of Civil Cases and Court's Fee* [របាយការណ៍អំពីស្ថិតិរឿងក្តីរដ្ឋប្បវេណីទូទាំងប្រទេស និង ត្រាក់ប្រជាប់ក្តី], January 31, 2011.
[151] Law on Court Organization (2014).

the BAKC. Most of whom were ex-judges or one who held doctorate of law.[152] Due to lack of lawyers, case defenders (*smar-kdei*) were allowed to represent and defend case in court.[153]

The BAKC created a Lawyer Training Center for training lawyers. The initial training faced the shortage of qualified human resources. Therefore, the BAKC allowed to the case defenders to take the bar exam and further trained at the center to be qualified as the lawyers.[154] One who held bachelor of law was allowed to attend the center directly without the bar exam.[155] Furthermore, those, who held bachelor of law or equivalent decree and worked in legal or judicial sector for at least 2 years, judge or ex-judge who worked at least two years, and those who held doctorate of law, were exempted from the bar exam and training and could practice law as lawyers.[156]

Currently, the BAKC provides a two-year training term. Those who hold bachelor of law are eligible for the bar exam. The first year is the training at the Lawyer Training Center, and the second year is the internship at any lawyer's office.[157] Trainee lawyers are registered as the practicing lawyers after the completion.[158]

The BAKC has trained and produced a remarkable number of lawyers in post-war Cambodia. The first training of 33 trainee lawyers started in 1995.[159] The BAKC had 203 registered lawyers as of January 1998.[160] Currently, the Cambodia has a total number of 939 lawyers as of July 21, 2014.[161] This figure is far higher than the number of judges in the court system. Today, judges and lawyers play a crucial role in preserving the justice system in Cambodia. The following figure shows the statistics of judicial staff and lawyers in Cambodia.

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[152] Neam, *Introduction to the Cambodian Judicial Process*, 44.
[153] Ibid.; Avillaneda et al., *Introduction to Cambodian Law*, 151.
[154] If any case defender who did not have certificate from Lawyer Training Center as of December 31, 1997, he or she was no longer allowed to defend cases in court. See: Neam, *Introduction to the Cambodian Judicial Process*, 44.
[155] Ibid., 46–47.
[156] Ibid., 45.
[157] Ibid., 46; Avillaneda et al., *Introduction to Cambodian Law*, 152.
[158] Neam, *Introduction to the Cambodian Judicial Process*, 46; Avillaneda et al., *Introduction to Cambodian Law*, 152.
[159] Neam, *Introduction to the Cambodian Judicial Process*, 44.
[160] Ibid., 43.
[161] Bar Association of Kingdom of Cambodia, "Statistics of Total Number of Lawyers" [ស្ថិតិចំនួនមេធាវីនាំខមង], July 21, 2014, http://www.bakc.org.kh/km/lawyer-statistic (accessed August 6, 2014).

Figure 1: Number of judges, prosecutors, clerks, and lawyers in Cambodia

Supreme Court		Sub-Total	Total
Judges	17	24	66
Prosecutors	7		
Clerks	20	42	
Staff	22		
Appellate Court		Sub-Total	Total
Judges	17	27	113
Prosecutors	10		
Clerks	47	86	
Staff	21		
Provincial/Municipal Court (23)		Sub-Total	Total
Judges	225	350	975
Prosecutors	125		
Clerks	547	625	
Staff	78		
Total Judges and Prosecutors		401	1954
Total Clerks		614	
Total Lawyers		939	

Source: Ministry of Justice, Annual Report as of Jan 27, 2014, and BAKC, as of Jul 21, 2014

3. Institutional Procedure and Responsibility for Dispute Resolution

In addition to the quantity development of institutions and human resources, judicial institution has a remarkable development of institutional procedure in post-war period. This section will illustrate the development of institutional procedure and responsibility of court for dispute resolution; especially, after Cambodia adopted the new codes governing civil justice in Cambodia.

a). Development of Institutional Procedure

Cambodia has developed a remarkable number of substantive and procedural laws both criminal and civil litigations, prior to the adoption of the new Codes, were governed by most laws enacted in the communist

period. The Cambodian judiciary has proceeded with a course of criminal and civil litigation, while other litigations, for example, administrative dispute remain inactive under the current system.

Criminal proceeding is governed by the Provisions on Court System, Criminal Law, and Criminal Procedure, which was adopted by the United Nations for Transitional Authority in Cambodia (UNTAC) for temporary implementation in 1992 (mostly called "Transitional Criminal Law" or "UNTAC Law of 1992") and Law on Criminal Procedure of 1993.[162] Civil proceeding is administered by several norms such as Circular on Instruction of Civil Procedure of 1984, Law on Contract and Liability of 1988, Law on Marriage and Family of 1989, Law on Procedure of Civil Judgment Enforcement of 1992, and Law on Court Fee of 1993.[163]

Turning of the political regime from communism to democracy, the Cambodian government endeavored to establish new laws for governing justice system in compliance with the new 1993 democratic Constitution. Several years later, Cambodian government consecutively passed a number of major laws, including codes governing judicial proceedings under the assistance of various donors.

Cambodia adopted the Code of Criminal Procedure and Criminal Code in 2006 and 2009 respectively under the assistance of the French government.[164] Likewise, Cambodia passed the Code of Civil Procedure and Civil Code consecutively in 2006 and 2007 under a Japan-led project.[165] These new laws govern post-war judicial proceedings.

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[162] Provisions on Court System, Criminal Law, and Criminal Procedures for Implementation in Cambodia during Transitional Period [បទបញ្ញត្តិស្តីពីប្រព័ន្ធតុលាការ ច្បាប់ព្រហ្មទណ្ឌ និង នីតិវិធីព្រហ្មទណ្ឌសម្រាប់អនុវត្តនៅប្រទេសកម្ពុជាក្នុងសម័យអន្តរកាល] (1992); Law on Criminal Procedure [ច្បាប់ស្តីពីនីតិវិធីព្រហ្មទណ្ឌ] (1993).

[163] Circular on Instruction of Civil Procedure [សាលាចរស្តីពីសេចក្តីណែនាំអំពីនីតិវិធីរដ្ឋប្បវេណី] (1984); Law on Contract and Liability [ច្បាប់ស្តីពីកិច្ចសន្យា និង ការទទួលខុសត្រូវក្រៅកិច្ចសន្យា] (1988); Law on Marriage and Family [ច្បាប់ស្តីពីអាពាហ៍ពិពាហ៍ និង គ្រួសារ] (1989); Law on Procedure of Civil Judgment Enforcement [ច្បាប់ស្តីពីនីតិវិធីអនុវត្តសាលក្រមរដ្ឋប្បវេណី] (1992); Law on Court Fee [ច្បាប់ស្តីពីត្រាអាករប្រចាំឆ្នាំ] (1993).

[164] Code of Criminal Procedure of Cambodia [ក្រមនីតិវិធីព្រហ្មទណ្ឌនៃព្រះរាជាណាចក្រកម្ពុជា] (2006); Criminal Code of Cambodia [ក្រមព្រហ្មទណ្ឌនៃព្រះរាជាណាចក្រកម្ពុជា] (2009).

[165] Code of Civil Procedure [ក្រមនីតិវិធីរដ្ឋប្បវេណី] (2006); Civil Code of Cambodia (2007); Ministry of Justice (ក្រសួងយុត្តិធម៌), *Explanation on Code of Civil Procedure (I): Procedure of Lawsuit* [សេចក្តីពន្យល់ក្រមរដ្ឋប្បវេណី តាគន១៖ នីតិវិធីបណ្តឹង], 2008, 11.

In addition to this development of judicial procedures under the new codes, Cambodian judiciary is upgraded beyond expectation in 2014. Recently, Cambodia promulgated the new three court laws to replace the old court laws, which were enacted in the communist period, on July 16, 2014.[166] These new court laws were Law on Court Organization, Law on Status of Judges and Prosecutors, and Law on Organization and Functioning of Supreme Council of Magistracy.[167] The passage of the new three court laws could be considered as an incremental development and reform of post-war judicial institutions.

The tremendous change of judicial institution introduces a clear division of court structure and judges. The new court law indicates to establish four types of specialized courts; namely, civil, criminal, commercial, and labor.[168] The Law on Court Organization of 2014 divides lower court as specialized court, while upper courts as specialized chamber.[169] Furthermore, this new law authorizes to establish other specialized courts by Royal Decree as necessary.[170] Meanwhile, pending establishment of an administrative court, the civil court will be responsible for resolving administrative cases.[171] Judicial personnel, for example, prosecutors, investigating judges, and trial judges are clearly distinguished under the new court laws.[172]

b). Civil Proceedings under New Code

Before Cambodia adopted the Code of Civil Procedure in 2006, Cambodian court proceedings followed the inquisitorial system.[173] After Cambodia passed the new Code of Civil Procedure, Cambodian court proceedings followed the adversarial system, in which parties were active while judge was inactive in the process.[174]

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[166] See the date of signature of these laws by the King. Law on Court Organization (2014); Law on Statute of Judges and Prosecutors [ច្បាប់ស្តីពីលក្ខន្តិកៈនៃចៅក្រម និង ព្រះរាជអាជ្ញា] (2014); Law on Organization and Functioning of Supreme Council of Magistracy [ច្បាប់ស្តីពីការរៀបចំ និង ការប្រព្រឹត្តទៅនៃនគរបាលក្រុមប្រឹក្សានៃអង្គចៅក្រម] (2014).

[167] Law on Court Organization; Law on Statute of Judges and Prosecutors; Law on Organization and Functioning of Supreme Council of Magistracy.

[168] Law on Court Organization, arts. 5 and 14.

[169] See: Law on Court Organization.

[170] Ibid., art. 14.

[171] Ibid., art. 90.

[172] See: Law on Statute of Judges and Prosecutors; Law on Court Organization.

[173] Kamiki Atsushi, "Comparing the Civil Codes and the Codes of Civil Procedure Across Borders: The Cases of Japan and Cambodia," *Cambodian Yearbook of Comparative Legal Studies* 1 (2010): 44.

[174] Code of Civil Procedure, art. 92 (2006).

Civil proceedings, under the 2006 Code of Civil Procedure, undergo three main stages: (1) submission of complaint, (2) preparatory oral argument, and (3) oral argument. First, any affected citizen, who suffers from any damage, can submit a lawsuit to court for resolving their claim.[175] Court clerk is responsible for checking complaint form and tax. Court clerk will send the complaint to administrative court staff for registering complaint in the complaint registration book. Then, administrative court staff will send complaint to court chief for signature.[176]

Administrative court staff, after the court chief's signature, will send the case to the responsible judge that is automatically determined by court chief.[177] The responsible judge will check the legal viability of complaint. If the judge identifies defect, the judge will require the complainant to rectify it within appropriate time. [178] When a complaint is satisfactory, the judge will forward it to his or her clerk for inclusion in the docket.[179]

After a complaint is filed, the court will set the first date and call upon the parties to appear in the first meeting to prepare for preparatory oral argument within 30 days.[180] However, the court can extend this period upon necessity and judicial discretion.[181] Then, the court clerk will send the complaint to the respondent.[182] The preparatory oral argument will be set for date when both parties can attend.[183] The parties must prepare

[175] Ibid., arts. 74 and 75.
[176] The author made a critical discussion with a judge on August 23, 2014.
[177] Code of Civil Procedure, art. 26; Ministry of Justice, *Explanation on Code of Civil Procedure (I): Procedure of Lawsuit*, 58; Ministry of Justice (ក្រសួងយុត្តិធម៌), *Article-by-Article Commentary on Code of Civil Procedure* [សេចក្តីអំណត់ចំពោះមាត្រានីមួយៗនៃក្រមនីតិវិធីរដ្ឋប្បវេណី], 2007, 22.
[178] Whether it is complied with legal requirement - points of complaint and court fee. See: Code of Civil Procedure, art. 78; Ministry of Justice, *Article-by-Article Commentary on Code of Civil Procedure*, 81; Ministry of Justice, *Explanation on Code of Civil Procedure (I): Procedure of Lawsuit*, 59.
[179] The author made a critical discussion with a judge on August 23, 2014.
[180] Code of Civil Procedure, art. 80; Ministry of Justice, *Explanation on Code of Civil Procedure (I): Procedure of Lawsuit*, 60; Ministry of Justice, *Article-by-Article Commentary on Code of Civil Procedure*, 82.
[181] Code of Civil Procedure, art. 80; Ministry of Justice, *Explanation on Code of Civil Procedure (I): Procedure of Lawsuit*, 60; Ministry of Justice, *Article-by-Article Commentary on Code of Civil Procedure*, 82.
[182] Code of Civil Procedure, art. 79; Ministry of Justice, *Explanation on Code of Civil Procedure (I): Procedure of Lawsuit*, 59; Ministry of Justice, *Article-by-Article Commentary on Code of Civil Procedure*, 81.
[183] Code of Civil Procedure, art. 105; Ministry of Justice, *Article-by-Article Commentary on Code of Civil Procedure*, 103; Ministry of Justice, *Explanation on Code of Civil Procedure (I): Procedure of Lawsuit*, 75.

documents for submission for the preparatory oral argument.[184] The preparatory documents include the plaintiff's claim, defendant's response, points of dispute, and evidence that will be presented to the judge.[185]

When the parties appear in the preparatory oral argument, the judge will attempt conciliation deemed necessary and appropriate.[186] Conciliation can be made several times depending on judicial discretion.[187] If conciliation fails, the responsible judge will arrange parties' assertions, clarify points of disagreement, and organize evidence related to points of dispute in order to proceed to oral argument.[188]

The judge will set the date for oral argument when the parties are able to attend.[189] At the oral argument, the judge will allow both parties to make a statement of their claims and assertions and to present of evidence arranged in the preparatory oral argument.[190] The process starts with the statement of complainant, following by respondent.[191] At this stage, parties can present new evidence if the judge allows it.[192] The judge will allow new evidence if it does not slow down the hearing process.[193] If the judge finds that the new evidence is important to the case, oral argument may be extended.[194]

The new Cambodian Code of Civil Procedure authorizes the judge to attempt to conciliate a dispute at any stage of proceedings prior to judgment.[195] While conducting a hearing, if the judge sees an opportunity for

[184] Code of Civil Procedure, art. 101; Ministry of Justice, *Article-by-Article Commentary on Code of Civil Procedure*, 100; Ministry of Justice, *Explanation on Code of Civil Procedure (I): Procedure of Lawsuit*, 72.
[185] Code of Civil Procedure, art. 101; Ministry of Justice, *Explanation on Code of Civil Procedure (I): Procedure of Lawsuit*, 73; Ministry of Justice, *Article-by-Article Commentary on Code of Civil Procedure*, 100.
[186] Code of Civil Procedure, art. 104; Ministry of Justice, *Article-by-Article Commentary on Code of Civil Procedure*, 102; Ministry of Justice, *Explanation on Code of Civil Procedure (I): Procedure of Lawsuit*, 77.
[187] The author made a critical discussion with a judge on August 23, 2014.
[188] Code of Civil Procedure, art. 103; Ministry of Justice, *Article-by-Article Commentary on Code of Civil Procedure*, 102; Ministry of Justice, *Explanation on Code of Civil Procedure (I): Procedure of Lawsuit*, 75.
[189] Code of Civil Procedure, arts. 113 and 115; Ministry of Justice, *Explanation on Code of Civil Procedure (I): Procedure of Lawsuit*, 86; Ministry of Justice, *Article-by-Article Commentary on Code of Civil Procedure*, 110–11.
[190] Code of Civil Procedure, art. 116; Ministry of Justice, *Explanation on Code of Civil Procedure (I): Procedure of Lawsuit*, 88; Ministry of Justice, *Article-by-Article Commentary on Code of Civil Procedure*, 112.
[191] Ministry of Justice, *Explanation on Code of Civil Procedure (I): Procedure of Lawsuit*, 78.
[192] Code of Civil Procedure, art. 116; Ministry of Justice, *Explanation on Code of Civil Procedure (I): Procedure of Lawsuit*, 88–89; Ministry of Justice, *Article-by-Article Commentary on Code of Civil Procedure*, 112.
[193] Code of Civil Procedure, art. 116; Ministry of Justice, *Explanation on Code of Civil Procedure (I): Procedure of Lawsuit*, 88–89; Ministry of Justice, *Article-by-Article Commentary on Code of Civil Procedure*, 112.
[194] Code of Civil Procedure, art. 116; Ministry of Justice, *Explanation on Code of Civil Procedure (I): Procedure of Lawsuit*, 90; Ministry of Justice, *Article-by-Article Commentary on Code of Civil Procedure*, 113.
[195] Code of Civil Procedure, art. 97; Ministry of Justice, *Article-by-Article Commentary on Code of Civil Procedure*, 97; Ministry of Justice, *Explanation on Code of Civil Procedure (I): Procedure of Lawsuit*, 77.

possible conciliation, the judge will make an effort to conciliate parties before deciding the case.[196] However, if conciliation still fails, the judge will decide the case and issue a judgment based on submitted evidence.[197]

The new Code of Civil Procedure directs a single judge or a panel of three judges to conduct a hearing on the subject of matter.[198] The three-judge panel will be responsible for any dispute in which the claim exceeds 5 million riels (US$1,250) and other in a number of cases that call for a three-judge panel.[199] Deliberation by a three-judge panel is controlled by the presiding judge.[200] The decision is made by a majority of votes.[201]

Figure 2: The process of civil proceedings under new Code of Civil Procedure

Process of Civil Proceedings under New Code of Civil		
Complaint	Preparatory Oral Argument	Oral Argument
30 days	No limitation of time	

Source: Author analysis from the new Code of Civil Procedure, 2006

In short, the new civil proceedings require the first meeting to take place within 30 days. However, the time for processing consecutive preparatory and oral arguments depends on judicial discretion. This gives rise to procedural delay.

c). Institutional Responsibility for Dispute Resolution

Cambodia has enjoyed an increase of judicial institutions and staff; however, institutional capacity remains limited. Resolution lags behind the flow of incoming disputes. As a consequence, court show a a backlog of cases.

[196] Code of Civil Procedure, art. 104; Ministry of Justice, *Article-by-Article Commentary on Code of Civil Procedure*, 102; Ministry of Justice, *Explanation on Code of Civil Procedure (I): Procedure of Lawsuit*, 77.
[197] Code of Civil Procedure, art. 123; Ministry of Justice, *Explanation on Code of Civil Procedure (I): Procedure of Lawsuit*, 92; Ministry of Justice, *Article-by-Article Commentary on Code of Civil Procedure*, 117.
[198] Code of Civil Procedure, art. 23; Ministry of Justice, *Article-by-Article Commentary on Code of Civil Procedure*, 19; Ministry of Justice, *Explanation on Code of Civil Procedure (I): Procedure of Lawsuit*, 20.
[199] Code of Civil Procedure, art. 23; Ministry of Justice, *Article-by-Article Commentary on Code of Civil Procedure*, 19; Ministry of Justice, *Explanation on Code of Civil Procedure (I): Procedure of Lawsuit*, 20.
[200] Code of Civil Procedure, arts. 23 and 24; Ministry of Justice, *Article-by-Article Commentary on Code of Civil Procedure*, 19–20; Ministry of Justice, *Explanation on Code of Civil Procedure (I): Procedure of Lawsuit*, 20.
[201] Code of Civil Procedure, art. 25; Ministry of Justice, *Article-by-Article Commentary on Code of Civil Procedure*, 21; Ministry of Justice, *Explanation on Code of Civil Procedure (I): Procedure of Lawsuit*, 20.

Backlogs vary from one court to another. Courts which are located in town and those dealing with commercial activities face a heavy backlog. For instance, the Phnom Penh court stands number one among other courts, followed by the Kandal court, Siem Reap court, and Kampong Cham court.[202] Courts which are located remote areas face a light backlog of cases -- for example, courts in the Preah Vihear, Banteay Meanchey, Pailin, and Battambang.[203]

However, the capacity to clear cases varies from one court to another. Courts that clear cases most efficiently are Battambong, Phnom Penh, Pailin and Siem Reap courts. Courts that face slow performance are Banteay Meanchey, Preveng Veng, Takeo, Steung Treng, Kampong Thom, Preah Sihanouk, Kampong Speu, and Mondukiri courts.[204]

The following figure shows the statistics of civil cases that are previous remains, new entrance, and ongoing remains in courts throughout the country in 2010 and 2011.

[202] Department of Civil Affairs, *Report on Nationwide Statistics of Civil Cases and Court's Fee.*
[203] Ibid.
[204] The author interpreted the data from the table of statistics of civil cases nationwide in 2010 and 2011

Figure 3: The statistics of civil cases for all courts in 2010 and 2011

Report on Civil Cases Nationwide Level in 2010 and 2011						
	Court	2009 Remaining	New Entrance	Resolved	Ongoing Remaining	Comment
1	Phnom Penh	1817	1514	1806	1525	Whole year, 2010
2	Banteay Meanchey	316	26	17	325	February, 2010
3	Siem Reap	697	561	627	631	Whole year, 2010
4	Svay Rieng	383	178	322	239	Whole year, 2010
5	Steung Treng	48	N/A	N/A	48	N/A
6	Kratie	271	108	115	264	Whole year, 2010
7	Kandal	719	479	203	995	Whole year, 2010
8	Battambang	136	459	445	150	Whole year, 2010
9	Kampong Thom	428	N/A	N/A	428	N/A
10	Kampong Cham	479	360	250	589	Whole year, 2010
11	Prey Veng	194	26	38	182	8 months, 2010
12	Kampot	459	185	186	458	9 months, 2010
13	Preah Sihanouk	306	N/A	N/A	306	N/A
14	Kampong Chhnang	198	156	143	211	9 months, 2010
15	Pursat	259	135	136	258	Whole year, 2010
16	Kampong Speu	243	N/A	N/A	243	N/A
17	Koh Kong	109	65	76	98	Jan-Dec, 2009
18	Takeo	286	46	56	276	Jan and Aug, 2010
19	Mondulkiri	44	N/A	N/A	44	N/A
20	Preah Vihear	6	6	3	9	End of 2009 & Whole year 2010
21	Ratanaki	59	43	31	71	9 months, 2010
22	Pailin	14	25	12	27	9 months, 2010
Total		7471	4422	4505	7388	
23	Appellate Court	1487	N/A	N/A	1487	N/A
24	Supreme Court	1643	N/A	N/A	1643	N/A

Source: Ministry of Justice, Department of Civil Affair, 2011

The table shows that judicial institutional responsibility for dispute resolution in some courts still poses a challenge. Current court system is viewed to be corrupt and working slow over dispute resolution.[205]

[205] Sen, "Justice Ministry to Keep Track of Courts' Case Lists."

Even the Minister of Justice has known that people have lost trust in judicial system by changing the "Ministry of Justice" into the "Ministry of Injustice." [206]

The government has effort to re-establish judicial institution more than 30 years; however, the court system is yet to enhance public trust in its capacity. Backlogs and slow action have affected judicial reputation, which needs addressing to improve court performance and enhance public trust in judicial capacity.

B. Institutional Reform Policy towards Quasi-judicial Institutions

The reform of judicial institutions has seemed to stand still since the establishment of the Constitutional Council in 1998. Since then, institutional reform has inclined toward the introduction of quasi-judicial institutions. These methods have been favored by donors in the post-war country, as an alternative to the judiciary.[207] This idea has influenced Cambodian post-1998 institutional reform policy.

Cambodia established many quasi-judicial institutions with the ADR method under the auspices of donors in post-1998. These quasi-judicial institutions were established in three main sectors: (1) land disputes, (2) labor disputes, and (3) small claim disputes. The following section will review the quasi-judicial institutions introduced in post-1998 institutional reform policy.

1. Land Dispute Resolution Institution

After the collapse of the Khmer Rouge regime, Cambodia initially relied on courts to resolve all disputes; including land disputes. However, post-war land reform and privatization produced many land disputes.[208] Land disputes clogged the court system.[209]

The government reacted by establishing consecutive land dispute resolution institutions. These institutions were: the land dispute resolution commission of 1999, the cadastral commission of 2002, and

[206] Ibid.
[207] World Bank, *Legal and Judicial Reform: Strategic Direction*, 2003, 5; cited in Kaneko Yuka, "Catalistic Role of Legal Assistance between Formal Law and Social Norms: Hints from Japanese Assistance," *Journal of International Cooperation Studies* 15, no. 3 (2008): 61.
[208] Mgbako et al., "Forced Eviction and Resettlement in Cambodia," 40; Loehr, "External Costs as Driving Forces of Land Use Changes," 1036 and 1045; Un and So, "Land Rights in Cambodia," 289.
[209] Frank Van Acker, *Hitting a Stone with an Egg? Cambodia's Rural Economy and Land Tenure in Transition*, April 1999, 53.

national authority of land dispute resolution of 2006.[210] The following section concerns the background of ADR land dispute resolution institutions in Cambodia.

a). Land Dispute Resolution Commission

The land dispute resolution commission, hereinafter called "LDRC," was established in 1999.[211] LDRC was regarded as a pioneer ADR institution responsible for resolving land disputes in post-war Cambodia.

i. Institutional Background

Cambodia adhered to communism with a planned economy and collective ownership in the immediate post-war period.[212] Cambodia started a slight opening of the planned economy by re-privatization of land by providing ownership over residential land in 1989.[213] However, Cambodia turned its political regime from communist and planned economy to democracy and market economy in 1993 when Cambodia promulgating the new democratic constitution in 1993.[214] The full ownership over land was officially recognized under this new constitution.[215]

The change of political and economic regime heralded the emergence of land disputes in Cambodia. Land started to increase in value and invited land grabbing for commercial speculation.[216] Land disputes caused by land grabbing provoked social tension and clogged the court system, in which an estimate of 50 percent of court cases were land disputes as of 1999.[217] Remarkably, land disputes were most often triggered

[210] Decision on Establishment of Land Dispute Commissions in Provinces/Municipalities throughout the Country, No. 47/SSR (1999); Sub-decree on Organization and Functioning of Cadastral Commissions (2002); Royal Decree on Establishment of National Authority for Land Dispute Resolution, N.S/RKT/0206/097 (2006).
[211] Decision on Establishment of Land Dispute Commissions in Provinces/Municipalities throughout the Country; Declaration on Measures of Eliminating Anarchic Land Encroachment, No. 06 PRK (1999).
[212] Brinkerhoff, "Rebuilding Governance in Failed States and Post-Conflict Societies," 11; Blunt and Turner, "Decentralisation, Democracy and Development in a Post-Conflict Society," 76.
[213] Frings, "Cambodia after Decollectivization (1989-1992)," 50; John, "New Economic Order in Indochina," 232.
[214] Mensher, "The Tonle Sap: Reconsideration of the Laws Governing Cambodia's Most Important Fishery," 797; Öjendal and Sedara, "Korob, Kaud, Klach," 510.
[215] Constitution of Kingdom of Cambodia, arts. 44 and 50 (1993).
[216] Mgbako et al., "Forced Eviction and Resettlement in Cambodia," 40; Loehr, "External Costs as Driving Forces of Land Use Changes," 1036 and 1045; Un and So, "Land Rights in Cambodia," 289.
[217] Acker, *Hitting a Stone with an Egg?*, 53.

by authorities.[218] Land disputes affected a large number of Cambodian people, at least one in twenty-five families, throughout the country.[219]

Having seen such an adverse situation, the Prime Minister Hun Sen came out to publicly warn of "peasant revolution" in his public speech at a seminar on food and security at the Chamkar Doung Agriculture University in 1999.[220] Immediately, the government issued an edict to stop anarchic encroachment on the state land in 1999.[221] Then, the government declared to establish land dispute resolution commissions (LDRC) throughout provinces and municipalities in the same year.[222] ADR institutions in land disputes were introduced in parallel with courts in Cambodia.

ii. Institutional Jurisdiction

The LDRC was the first ADR institution for resolving land disputes in post-war Cambodia. LDRC was not an independent body, but was under the executive branch, subordinated to the Ministry of Interior and Council of Ministers.[223] The LDRC had delegated authority from the central government to investigate and solve land disputes throughout the provinces and municipalities, made reports and sent results to the central government.[224]

In structure, the LDRC was laid out as an extension of territorial administration. The LDRC had three echelons in hierarchy: (1) district/*khan* level, (2) provincial/municipal level, and (3) national level.[225] The

[218] Shaun Williams, "Internally Displaced Persons and Property Rights in Cambodia," *Refugee Survey Quarterly* 19, no. 2 (2000): 197.
[219]Shaun Williams, "Internally Displaced Persons and Property Rights in Cambodia," *Refugee Survey Quarterly* 19, no. 2 (2000): 196–97.
[220]Sen Hun, "Intensive Cultivation, Land Management, Logging Ban, Areas of Attention in Agricultures, Fisheries, and Forestry," 2002; see: The Cabinet of Samdech Hun Sen, "Cambodian New Vision" no. 51 (April 2002): 2; Sen Hun, "Stock-Taking Agriculture, Forest and Fisheries Conference," 2006 See:; The Cabinet of Samdech Hun Sen, "Cambodia New Vision" no. 98 (March 2006): 1.
[221]Decision on Establishment of Land Dispute Commissions in Provinces/Municipalities throughout the Country, No. 47/SSR (1999); Declaration on Measures of Eliminating Anarchic Land Encroachment, No. 06 PRK (1999).
[222]Decision on Establishment of Land Dispute Commissions in Provinces/Municipalities throughout the Country; Declaration on Measures of Eliminating Anarchic Land Encroachment.
[223]Sovannarith So et al., *Social Assessment of Land in Cambodia*, A Field Study (Working Paper 20) (Cambodia Development Research Institute (CDRI), 2001), 37.
[224] See: Decision on Establishment of Land Dispute Commissions in Provinces/Municipalities throughout the Country, Rule 3.
[225]Bib Hughes, *Land Ownership Dispute in Cambodia: A Study of the Capacity of Four Provinces to Resolve Conflicts over Land* (Oxfam, 2001), 1.

LDRC was composed of senior officials of the central government such as ministers, secretaries of state, military and police commanders, and provincial/municipal authorities.[226]

The LDRC was created by decision of the government order, not statutory law; therefore, this institution did not have clear procedure for decision-making.[227] Its competence overlapped with the courts and was a source of confusion.[228] Furthermore, the LDRC did not function well and effectively to deal with land disputes due to conflict of interest. [229] These factors were a source of serious procedural weakness.[230]

b). Cadastral Commission

The follow-up to the LDRC was a prompt action to the establishment of the Cadastral Commission, hereinafter called "CC" in 2002.[231] CC was the second institution responsible for resolving land disputes in post-war Cambodia.

i. Institutional Background

Cambodia adopted the 1992 Land Law in the transitional period.[232] As noted above, Cambodia turned its political regime from communism and planned economy into democracy and market economy by promulgating the new constitution in 1993. [233] The change of political and economic regime led to the conflict of property rights between the 1992 Land Law and 1993 Constitution in Cambodia.

The conflict rested on the concept and principle of the 1992 Land Law and 1993 Constitution were not consistent. The concept and principle of the 1992 Land Law followed the spirit of the 1989 Constitution – socialism and a planned economy.[234] The 1993 Constitution adopted democracy and a free market economy. [235] In order to follow the new concept and principle of the 1993 Constitution, the government initiated a new land

[226] See: Decision on Establishment of Land Dispute Commissions in Provinces/Municipalities throughout the Country, Rule 1 and Rule 2.
[227] Hughes, *Land Ownership Dispute in Cambodia*, 6.
[228] Ibid., 7.
[229] So et al., *Social Assessment of Land in Cambodia*, 37; Hughes, *Land Ownership Dispute in Cambodia*, 6.
[230] So et al., *Social Assessment of Land in Cambodia*, 37; Hughes, *Land Ownership Dispute in Cambodia*, 6.
[231] See: Sub-decree on Organization and Functioning of Cadastral Commissions (2002).
[232] Cambodia was underway to the Paris Peace Agreement. In October 21, 1991, the Paris Peace Accord was concluded, and ceasefire was occurred in Cambodia. Cambodia reached the national reunion and prepared for the general election under the auspices of the United Nations in 1993.
[233] Mensher, "The Tonle Sap: Reconsideration of the Laws Governing Cambodia's Most Important Fishery," 797; Öjendal and Sedara, "Korob, Kaud, Klach," 510.
[234] See: 1992 Land Law [ច្បាប់ភូមិឆ្នាំ១៩៩២] (1992); Constitution of State of Cambodia [រដ្ឋធម្មនុញ្ញនៃរដ្ឋកម្ពុជា] (1989).
[235] See: Constitution of Kingdom of Cambodia (1993).

law to replace the 1992 Land Law. The drafting of the new land law started in 1995 with technical support by the Asian Development Bank (ADB).[236]

The new land law was promulgated in 2001 (hereinafter the "2001 Land Law").[237] Henceforward, the 2001 Land Law superseded the 1992 Land Law for governing land issues in post-war period. The 2001 Land Law included some provisions regarding the cease of land possession as stated in the government edict of 1999, which dictated the stoppage of state land encroachment.[238] Moreover, Article 47 of this new land law provided for the creation of a Cadastral Commission for land dispute resolution under the Ministry of Land.[239]

Land disputes caused by land grabbing continued to rise. Prime Minister Hun Sen came out once again to publicly warn of "peasant revolution" in his public statement on the intensive cultivation, land management, logging ban, areas of attention in agriculture, fisheries and forestry on April 11, 2002.[240] Just immediately following the Premier's second warning, the government established the Cadastral Commission (CC) on May 31, 2002.[241]

The CC shared many characteristics with LDRC. The CC was also extended by territorial administration. There were three levels of the CC mechanism: District/*Khan* CC, Provincial/Municipal CC, and National CC.[242] The members of the CC mechanism were territorial authorities and cadastral officials.[243] In a sense, the LDRC was transformed into the CC under the enforceable legal framework of the 2001 Land

[236] Jannie Lasimbang and Chingya Luithui, *Cambodia: New Laws for A New Approach in the Northeast Provinces, Bridging the Gap: Policies and Practices on Indigenous Peoples' Natural Resource Management in Asia*, 2007, 128.
[237] See: 2001 Land Law (2001).
[238] Declaration on Measures of Eliminating Anarchic Land Encroachment, No. 06 PRK (1999); 2001 Land Law, art. 29.
[239] 2001 Land Law, art. 47.
[240] Hun, "Intensive Cultivation, Land Management, Logging Ban, Areas of Attention in Agricultures, Fisheries, and Forestry"; See: The Cabinet of Samdech Hun Sen, "Cambodian New Vision," 2.
[241] See: Sub-decree on Organization and Functioning of Cadastral Commissions (2002).
[242] Prakas on Principle and Procedure of Cadastral Commission [ប្រកាសស្តីពីសោលការណ៍ណែនាំ និង នីតិវិធីរបស់គណៈកម្មការសុរិយោដី], art. 2 (2002); Sub-decree on Organization and Functioning of Cadastral Commissions, art. 4.
[243] See: Sub-decree on Organization and Functioning of Cadastral Commissions; Sub-decree on Amendment of Article 5 and Article 28 of Sub-decree 47 ANK/BK on Organization and Functioning of Cadastral Commission [អនុក្រឹត្យស្តីពីវិសោធនកម្មមាត្រា៥ និង មាត្រា២៨ នៃអនុក្រឹត្យលេខ៤៧ អនក្រ បក ស្តីពីការរៀបចំ និង ការប្រព្រឹត្តទៅនៃគណៈកម្មការសុរិយោដី] (2006).

Law.[244] In this context, the CC became a legitimate institution under the Ministry of Land, which was responsible for conciliating and resolving unregistered land disputes.[245]

The names of the CC mechanism were changed in compliance with the new organic law on territorial administration. Administrative territories were originally divided into municipality and province; municipality was divided into *khan* and *sangkat*, and province was divided into district and commune, under the 1993 Constitution.[246] Administrative territories were divided into capital, province, municipality, district, *khan*, and *sangkat* under the new organic law of 2008.[247]

A number of administrative territories were promoted; for example, the Phnom Penh Municipality was promoted to the Phnom Penh Capital, and several districts were promoted to municipalities in some provinces.[248] The previous Municipal/Provincial CC was changed to the Capital/Provincial CC, and the District/*Khan* CC was changed to the Municipal/District/*Khan* CC.[249]

Each CC had permanent staff. According to *Prakas* on appointment of CC members in 2002, each CC had at least two permanent staff depending on territorial areas where the CC was located. The following figure shows the names, number of administrative territories, and estimate of CC staff throughout the country.

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[244] 2001 Land Law, art. 47.
[245] Ibid.
[246] Constitution of Kingdom of Cambodia, arts. 145 and 146 (1993).
[247] Law on Administration of Capital, Province/Municipality, District/Khan [ច្បាប់ស្តីពីការគ្រប់គ្រងរដ្ឋបាលរាជធានី ខេត្ត ក្រុង ស្រុក ខណ្ឌ], arts. 4 and 5 (2008).
[248] The provisions of Article 145 and 146 of the 1993 Constitution were amended in 2008 in order to comply with the new division of territorial administration.
[249] The amendment of the Sub-decree and relevant regulations are being arranged by the Ministry of Land. However, the new names are used in later regulations. See: Prakas on Power Delegation to Capital/Provincial Governor and As Chairman of Capital/Provincial Cadastral Commission for Deciding Land Disputes in Cadastral Commission Mechanism [ប្រកាសស្តីពីការធ្វើប្រតិភូកម្មអំណាចនៃតណៈអតិបាលរាជធានី ខេត្ត និង ជាប្រធានតណៈកម្មការសុរិយោដីរាជធានី ខេត្ត ដើម្បីធ្វើសេចក្តីសម្រេចលើសំណុំរឿងទំនាស់ដីធ្លីក្នុងយន្តការរបស់តណៈកម្មការសុរិយោដី], No. 32/PRK/DNS/GSCH (2010); Circular on Implementation of Decision Procedure over Land Dispute of the Municipal/Provincial Cadastral Commission in Cadastral Commission Mechanism [សារាចរណែនាំស្តីពីការអនុវត្តនីតិវិធីធ្វើសេចក្តីសម្រេចលើសំណុំរឿងទំនាស់ដីធ្លីរបស់តណៈកម្មការសុរិយោដីរាជធានី ខេត្តនៅក្នុងយន្តការរដ្ឋបាលសុរិយោដី], No. 01 DNS/SRNN (2010).

Figure 4: The number of CC mechanisms and staff in the territorial administration

Old Name	New Name	Number	Permanent Staff
National CC	National CC (unchanged)	1	3
Municipal/Provincial CC	Capital/Provincial CC	Capital (1)	2
		Province (24)	48
District/*Khan* CC	Municipal/District/*Khan* CC	Municipality (26)	52
		Khan (12)	24
		District (159)	318
Total Number of Staff			447

Source: Author[250]

ii. Institutional Procedure

As noted above, the CC was created under the authority of the 2001 Land Law.[251] This law provided that the procedure of the CC was to be established by subsidiary regulations.[252] Therefore, the government developed these subsidiary regulations. There were two main subsidiary regulations governing the procedure of the CC mechanism. The first was the Sub-decree on Organization and Functioning of Cadastral Commission in 2002.[253] The second was the *Prakas* on Principle of Instruction and Procedure of Cadastral Commissions in 2002.[254]

Under these regulations, the Municipal/District/*Khan* CC and Capital/Provincial CC had competence to conciliate disputes while the national CC had competence to decide and resolve the case.[255] The CC

[250] The number of CC staff was based on *Prakas* on the appointment of CC in 2002. Each CC had at least two members in each Prakas. Therefore, the author calculated this number by multiply 2. The number of administrative territories was based the author's compilation from the report of the Ministry of Interior in 2014.
[251] 2001 Land Law, art. 47 (2001).
[252] Ibid.
[253] Sub-decree on Organization and Functioning of Cadastral Commissions (2002).
[254] Prakas on Principle and Procedure of Cadastral Commission (2002).
[255] See: Sub-decree on Organization and Functioning of Cadastral Commissions; Prakas on Principle and Procedure of Cadastral Commission.

mechanism was competent to deal with unregistered land disputes.[256] Due to the fact that the majority of land was not registered, the government set two ways for dealing with land disputes, which depended on whether the land concerned was inside or outside of an area of systematic land registration.[257]

The first way was the procedure for dealing with unregistered land disputes inside the determined areas for systematic registration.[258] When Cambodia passed the new land law in 2001, the new land law introduced the systematic land registration.[259] The state authority had power to determine or earmark specific areas for systematic land registration.[260] The process of systematic land registration was sponsored by donors; especially, the World Bank.[261]

Initially, the government determined ten capital/provincial areas for systematic land registration.[262] The capital/provincial governors bore responsibility to determine areas for systematic land registration.[263] Specific areas where earmarked for the systematic land registration were called the "determined areas."[264] The Ministry of Land would appoint an ad-hoc commission, which was called "administrative commission" to bear responsibility for conducting land survey and land registration.[265]

Disputes inside the determined areas for systematic land registration would receive resolution, which was different from the echelons of the CC mechanism. The administrative commission would bear responsibility for initial conciliation of dispute in the determined areas.[266] If a dispute was not settled, the

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[256] See: 2001 Land Law, art. 47; Sub-decree on Organization and Functioning of Cadastral Commissions, art. 3; Inter-ministerial Prakas on Determination of Duties between Courts and Cadastral Commissions Concerning Land Disputes [ប្រកាសអន្តរក្រសួងស្តីពីការកំណត់តួនាទីភារកិច្ចរបស់តុលាការ និង គណៈកម្មការរដ្ឋបាលស៊ុបរិយោដីពាក់ព័ន្ធនឹងទំនាស់ដីធ្លី] (2003).

[257] See: Sub-decree on Organization and Functioning of Cadastral Commissions, art. 3; Prakas on Principle and Procedure of Cadastral Commission.

[258] Sub-decree on Organization and Functioning of Cadastral Commissions, art. 3 See:; Prakas on Principle and Procedure of Cadastral Commission.

[259] See: 2001 Land Law.

[260] Sub-decree on Procedure of Establishing Cadastral Index Map and Land Register [អនុក្រឹត្យស្តីពីនីតិវិធីនៃការកសាងផែនទីស្ថិរភាពដីធ្លី និង សៀវភៅសោហ៊ុយបណ្ដោះអាសន្ន], art. 2 (2002); Circular on Procedural Implementation of Establishing Cadastral Index Map and Land Register, 1 (2002).

[261] Inspection Panel, *Cambodia: Land Management and Administration Project*, Investigation Report, November 23, 2010, xiv.

[262] Multi-donor Appraisal Mission, *Proposed Land Management and Administration Project (LMAP),* Aide Memoire, October 22, 2001, 3.

[263] Sub-decree on Procedure of Establishing Cadastral Index Map and Land Register, art. 2.

[264] Ibid., art. 3; Circular on Procedural Implementation of Establishing Cadastral Index Map and Land Register, 1.

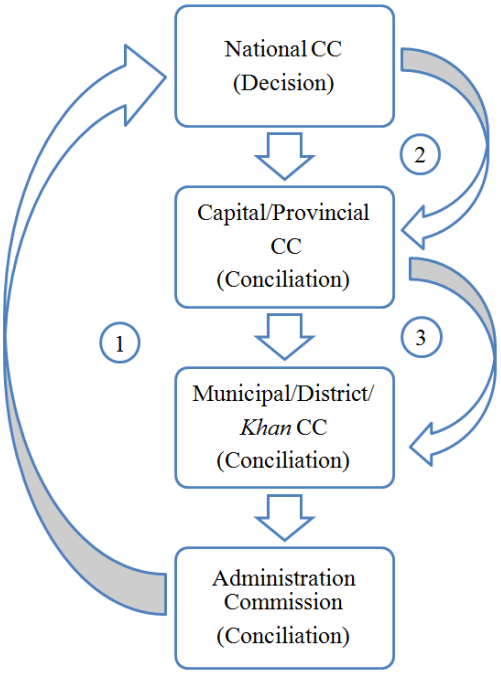
[265] Prakas on Principle and Procedure of Cadastral Commission, art. 2 (2002); Sub-decree on Procedure of Establishing Cadastral Index Map and Land Register, art. 3.

[266] Prakas on Principle and Procedure of Cadastral Commission, art. 2; Sub-decree on Procedure of Establishing Cadastral Index Map and Land Register, art. 3.

administrative commission would refer the case to the National CC, not the Municipal/District/*Khan* CC or Capital/Provincial, for conciliating and resolving the dispute.[267]

However, if the National CC did not have time to investigate and clarify the case, the National CC would forward the case to the Capital/Provincial CC for investigation and conciliation.[268] Likewise, if the Capital/Provincial CC did not have time to investigate the case, the Capital/Provincial CC would forward the case to the Municipal/District/*Khan* CC for investigating and conciliating the dispute.[269] The following figure shows the procedure of land dispute resolution inside the determined areas for the systematic land registration.

Figure 5: The procedure of land dispute resolution inside determined areas for registration



Source: Author

The second way was the procedure for dealing with land dispute outside the determined areas for

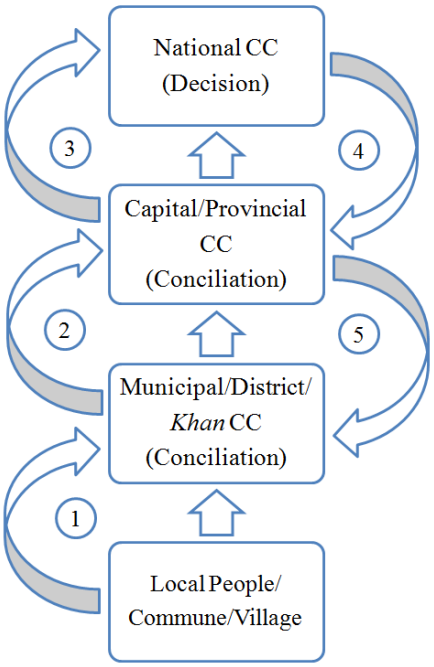
[267] Sub-decree on Organization and Functioning of Cadastral Commissions, art. 18 (2002); Sub-decree on Procedure of Establishing Cadastral Index Map and Land Register, art. 12.

[268] See: Letter on Granting Authorities to Chairman of Municipal/Provincial Cadastral Commission to Investigate and Conciliate Land Disputes that Could not be Conciliated by Administration Commission [លិខិតស្តីពីការប្រគល់សិទ្ធិជូនឯកឧត្តមប្រធានគណៈកម្មការរដ្ឋបាលស្រុកយោជីខេត្ត ក្រុងក្នុងការស៊ើបអង្កេត និង សម្រុះសម្រួលករណីទំនាស់ដែលគណៈកម្មការរដ្ឋបាលផ្នែកការសម្រុះសម្រួលពុំបានដោះស្រាយ] , No. 634/DNS/KSCH (2007).

[269] See: Circular on Implementation of Decision Procedure over Land Dispute of the Municipal/Provincial Cadastral Commission in Cadastral Commission Mechanism, No. 01 DNS/SRNN (2010).

systematic land registration.[270] The process of land dispute resolution outside the determined areas proceeded with a different course from the procedure of dispute resolution inside the determined areas. When there was a dispute outside the determined areas, the Municipal/District/*Khan* CC would take responsibility for conciliating dispute.[271] If the dispute was not settled, the Municipal/District/*Khan* CC would send the case to the Capital/Provincial CC for re-conciliation.[272] Likewise, if the Capital/Provincial CC could not conciliate the dispute, the Capital/Provincial CC would send the case to the National CC for resolution.[273] This figure shows the process of land dispute resolution outside the determined areas for systematic land registration.

Figure 6: The process of land dispute resolution outside the determined areas for registration



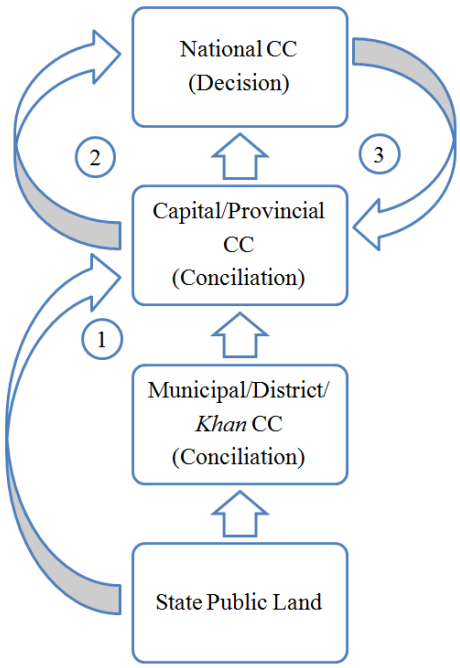
Source: Author

Both were general procedures for resolving unregistered land dispute. There were some remarkable exceptions to these procedures, where a land dispute involved in high-ranking authority or state public land. In

[270] See: Sub-decree on Organization and Functioning of Cadastral Commissions, art. 3; Prakas on Principle and Procedure of Cadastral Commission.
[271] Prakas on Principle and Procedure of Cadastral Commission, art. 3; Sub-decree on Organization and Functioning of Cadastral Commissions, art. 6.
[272] See: Sub-decree on Organization and Functioning of Cadastral Commissions; Prakas on Principle and Procedure of Cadastral Commission.
[273] See: Sub-decree on Organization and Functioning of Cadastral Commissions; Prakas on Principle and Procedure of Cadastral Commission.

such a category of disputes, the Municipal/District/*Khan* CC would send this case to the Capital/Provincial CC for resolution.[274] The following figure shows the procedure of land disputes with high-ranking authority or state public land.

Figure 7: The procedure of land dispute with high-ranking authority and state public land



Source: Author

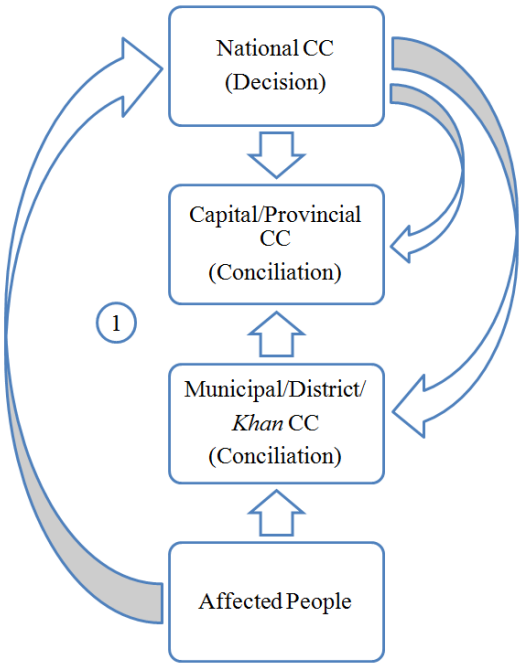
As described above, The National CC was the second instance for land dispute sent from the administration and third instance of land dispute sent from the Municipal/District/*Khan* CC.[275] However, the National CC could become the first instance in a number of cases; for example, dispute requiring immediate action due to threats, the use of force, or parties requesting the National CC to make temporary action to protect parties' interest in dispute. [276]

In such a circumstance, parties could make a direct complaint to the National CC for a temporary action.[277] The National CC had competence to resolve the dispute and determine the legal owner of the land.[278]

[274] Sub-decree on Organization and Functioning of Cadastral Commissions, art. 10; Prakas on Principle and Procedure of Cadastral Commission, art. 18.
[275] Sub-decree on Amendment of Article 5 and Article 28 of Sub-decree No. 47 ANK/BK dated May 31, 2002 on Organization and Functioning of Cadastral Commissions, NO. 34/ANK/BK art. 18 (2006); Prakas on Principle and Procedure of Cadastral Commission, art. 38.
[276] Prakas on Principle and Procedure of Cadastral Commission, art. 39.
[277] Ibid.

If the National CC found that the dispute was not a serious one, the National CC would forward the complaint to lower levels of the CCs based on jurisdiction. The following figure shows the procedure of land dispute resolution with need for immediate or temporary injunction.

Figure 8: The request for immediate or temporary injunction of land dispute resolution



Source: Author

iii. Institutional Responsibility, Development, and Challenge

The CC mechanism was arranged across territorial administrative levels. Each level had slightly different procedure and component for dispute resolution in each hearing forum. However, each level had a hierarchy to the others. This section will illustrate the hierarchical procedure and relation as well as the development and challenge of this CC mechanism.

[278] Sub-decree on Organization and Functioning of Cadastral Commissions, art. 20.

(1). Hierarchical Relation and Referral of Complaint

The CC mechanism was responsible for land dispute resolution at each level. However, each level had a hierarchical administrative relation, which induced upward-and-downward referral of complaints among redress fora.

Under the CC mechanism, any person who had dispute over the claim of possession or ownership of unregistered land, could file a complaint to the Municipal/District/*Khan* CC.[279]The Municipal/District/*Khan* CC would notify the complaint to all persons concerned within five days after the complaint reception.[280] The persons concerned would respond to the claim within 30 days after the notification reception.[281]

The investigation would start as soon as possible after the complaint reception.[282] The cadastral administration would appoint a cadastral official to be an "investigator" to investigate the complaint and meet parties, note down parties' assertion, and collect various information and evidence.[283] Investigator could meet witnesses and other persons who deemed necessary.[284] Parties would be present when conducting onsite investigation.[285] Parties could provide evidence and witness, which became part of official note of dispute.[286] Investigator would make report over fieldwork.[287]

The chairman of Municipal/District/*Khan* CC would arrange CC meeting to decide the conciliation process after the completion of investigation.[288] The Municipal/District/*Khan* CC would arrange an administrative meeting five days before the conciliation hearing in order to explain the procedure and select

[279] Prakas on Principle and Procedure of Cadastral Commission, art. 3; Sub-decree on Organization and Functioning of Cadastral Commissions, art. 2.
[280] Prakas on Principle and Procedure of Cadastral Commission, art. 7.
[281] Ibid., art. 8.
[282] Ibid., art. 10.
[283] Sub-decree on Organization and Functioning of Cadastral Commissions, art. 8; Prakas on Principle and Procedure of Cadastral Commission, art. 10.
[284] Prakas on Principle and Procedure of Cadastral Commission, art. 12.
[285] Ibid., art. 13.
[286] Ibid., art. 14.
[287] Ibid., art. 16.
[288] Ibid., art. 20.

conciliators.[289] Parties could choose three conciliators from the members of the Municipal/ District/*Khan* CC and ad-hoc members to form the conciliation panel.[290]

Parties would choose the three conciliators by consensus.[291] If parties did not agree on the members of the conciliation panel or could not form the conciliation panel, the chairman of the Municipal/District/*Khan* CC would designate the conciliators from the ad-hoc members and permanent members of the CC.[292] The chairman of the conciliation panel would bear responsibility for conciliating the dispute.[293]

The conciliators would meet the parties and determine the schedule for conciliating the dispute.[294] The conciliation forum would be held at the disputed land or a nearby place.[295] The conciliation process did not have a time limit, but in practice, the conciliation would meet at least three times depending on the availability of parties to attend the conciliation process.[296]

If the dispute was settled, the Municipal/District/*Khan* CC would make a report to the Capital/ Provincial CC and send the result to the Municipal/District/*Khan* Cadastral Office for registration.[297] If the dispute was not settled, the Municipal/District/*Khan* CC would forward the case to the Capital/Provincial CC for reconciliation.[298]

The process of the Capital/Provincial CC was similar to that of the Municipal/District/*Khan* CC. The Capital/Provincial CC had a secretariat for receiving complaints and investigating the dispute from the

[289] Sub-decree on Organization and Functioning of Cadastral Commissions, art. 7 (2002); Prakas on Principle and Procedure of Cadastral Commission, art. 20.
[290] Ad-hoc members consisting the chiefs of village, commune, sangkat, or elderly who deems respectful at locality, and other state institutions who deem concerned. See: Prakas on Principle and Procedure of Cadastral Commission, art. 22; Sub-decree on Organization and Functioning of Cadastral Commissions, art. 5.
[291] Prakas on Principle and Procedure of Cadastral Commission, art. 22.
[292] Ibid.
[293] Ibid.
[294] Ibid., art. 20.
[295] Ibid.
[296] The author interviewed a senior official of the Land Ministry on August 16, 2014.
[297] Sub-decree on Organization and Functioning of Cadastral Commissions, art. 11 (2002); Prakas on Principle and Procedure of Cadastral Commission, art. 26.
[298] Sub-decree on Organization and Functioning of Cadastral Commissions, arts. 10 and 11; Prakas on Principle and Procedure of Cadastral Commission, art. 28.

Municipal/District/*Khan* CC.[299] The Capital/Provincial CC would arrange an administrative meeting within 60 days after the complaint reception.[300]

The process of conciliation panel selection at the Capital/Provincial CC was the same as that of the Municipal/District/*Khan* CC.[301] However, the ad-hoc members were chosen from the representatives from the district, *khan*, commune, *sangkat*, and other provincial/municipal offices concerned.[302] If the dispute was settled, the Capital/Provincial CC would send the result to the Municipal/District/*Khan* Cadastral Office for registration.[303] If the dispute was not settled, the Capital/Provincial CC would forward the case to the National CC.[304]

The process of the National CC proceeded with two courses: (1) conciliation and (2) hearing. The National CC had a secretariat for accepting complaint and investigating the dispute.[305] After receiving the case, the National CC would, if deemed necessary, re-conciliate the dispute first.[306] The conciliation was the same as those of the Municipal/District/*Khan* CC and Capital/Provincial CC.[307] The ad-hoc members would be formed from the representatives of ministries and institutions concerned.[308] The National CC could either further investigate the case by itself or delegate the investigative power to the lower CCs.[309]

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[299] Sub-decree on Organization and Functioning of Cadastral Commissions, art. 14.
[300] Prakas on Principle and Procedure of Cadastral Commission, 31.
[301] Sub-decree on Organization and Functioning of Cadastral Commissions, art. 12; Prakas on Principle and Procedure of Cadastral Commission, arts. 31–37.
[302] Sub-decree on Organization and Functioning of Cadastral Commissions, art. 12; Prakas on Principle and Procedure of Cadastral Commission, art. 31.
[303] Sub-decree on Organization and Functioning of Cadastral Commissions, art. 16; Prakas on Principle and Procedure of Cadastral Commission, art. 36.
[304] Sub-decree on Organization and Functioning of Cadastral Commissions, art. 16; Prakas on Principle and Procedure of Cadastral Commission, art. 37.
[305] Sub-decree on Organization and Functioning of Cadastral Commissions, art. 19; See: Guideline on Hearing Procedure of National Cadastral CC [សេចក្តីណែនាំស្តីពីនីតិវិធីសវនការនៃគណៈកម្មការរដ្ឋបាលស្រុកយោងតាមច្បាប់ភូមិបាល] (2005).
[306] Prakas on Principle and Procedure of Cadastral Commission, art. 41; Sub-decree on Organization and Functioning of Cadastral Commissions, art. 21; See: Guideline on Hearing Procedure of National Cadastral CC.
[307] The author interviewed a Land Ministry senior official on August 16, 2014. See: Guideline on Hearing Procedure of National Cadastral CC.
[308] Prakas on Principle and Procedure of Cadastral Commission, art. 40; Sub-decree on Organization and Functioning of Cadastral Commissions, art. 17.
[309] The author interviewed a Land Ministry senior official on August 16, 2014. Further see: Guideline on Hearing Procedure of National Cadastral CC.

If a settlement could not be reached, the National CC chairman would set a date for hearing the case.[310] The National CC had a complex process for hearing and deciding the case, which depended on its composition, namely, the Minister of Land, as the chairman; the State Secretary of the Cabinet, as the member; and the State Secretary of the Ministry of Interior, as the member. Thus, the case was forwarded to these members for review before the decision-making. The National CC secretariat would send the case to the Cabinet office for checking. Then, the Cabinet office would proceed the case to the Ministry of Interior for review. Finally, the Ministry of Interior would continue to send the case back to the Minister of Land for consideration.[311]

The Minister of Land would assign a state secretary or undersecretary of state to bear responsibility for conducting the hearing. The designated incumbent would delegate the hearing power to the provincial or district governor to conduct the hearing on behalf of the national CC if he or she was busy, or the hearing was expected to conduct at the province or district.[312] The decision, on behalf, of the National CC would be made in writing, and the aggrieved party could challenge it in court for legal review within 30 days.[313]

(2). Challenge and Development of Institutional Responsibility

The CC mechanism had a noticeable challenge and development in its procedure and responsibility since the establishment in 2002. The CC mechanism had three echelons for conciliating and resolving land dispute.[314] The two lower levels of the CC mechanism; namely, the Municipal/District/*Khan* CC and Capital/ Provincial CC, had overlapping competence for the conciliation of land disputes.[315] The National CC had competence to resolve and decide the case.[316]

Mutual referral of complaints often occurs in such a structure. The lower CC often refers the case up

[310] Prakas on Principle and Procedure of Cadastral Commission, art. 41.
[311] The author interviewed a Land Ministry senior official on August 16, 2014.
[312] The author interviewed a senior government official at the Ministry of Land on August 16, 2014.
[313] Sub-decree on Organization and Functioning of Cadastral Commissions, art. 23; Prakas on Principle and Procedure of Cadastral Commission, arts. 47 and 48; See: Guideline on Hearing Procedure of National Cadastral CC.
[314] Prakas on Principle and Procedure of Cadastral Commission, art. 2; Sub-decree on Organization and Functioning of Cadastral Commissions, art. 4.
[315]See: Sub-decree on Organization and Functioning of Cadastral Commissions; Prakas on Principle and Procedure of Cadastral Commission.
[316]See: Sub-decree on Organization and Functioning of Cadastral Commissions; Prakas on Principle and Procedure of Cadastral Commission.

to the upper CC when complaints are not properly resolved.[317] The upper CC will check whether the lower CC properly resolves, or if the upper CC does not have enough time to investigate the case, the upper CC will forward the case to the lower CC for further investigation and resolution.[318] The Center for Advanced Study (CAS), studied over the process of CC mechanism and its responsibility in land dispute resolution, found the majority of the cases referred up to the upper CC were often sent back to the lower CC with instructions to conduct further investigations or to reattempt conciliation in 2006.[319]

Each referral always takes time and prolongs the cases, and sometimes, the case is kept pending without processing. The Center of Advanced Study found that around 50 percent of the caseload was pending.[320] Furthermore, cases were typically pending for years.[321] The CC mechanism received a total number of 3,763 cases, but it could succeed in resolving only 1,022 cases, approximately 27 percent as of March 2006.[322] Thus, the resolution of land disputes lagged behind the arrival of new cases, resulting in backlogs.

Backlogs of cases prompted the Ministry of Land to establish "Mobile Team," an assisting body to the CC mechanism, for resolving congestion of land disputes in 2007.[323] Mobile Team, under the auspices of the Deutsche Gesellschaft für Technische Zusammenarbeit (GTZ), worked as a group of five members for dealing with land disputes within the specific areas of accumulated land disputes.[324] When the disputes were successfully resolved, Mobile Team would move to another area under the assignment of the Ministry of Land.

There were seven teams working in accumulated areas of land disputes in districts such as Memot,

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[317]See: Letter on Granting Authorities to Chairman of Municipal/Provincial Cadastral Commission to Investigate and Conciliate Land Disputes that Could not be Conciliated by Administration Commission, No. 634/DNS/KSCH (2007); Daniel Adler et al., *Towards Institutional Justice? A Review of the Work of Cambodia's Cadastral Commission in Relation to Land Dispute Resolution*, 2006, 36.

[318] See: Letter on Granting Authorities to Chairman of Municipal/Provincial Cadastral Commission to Investigate and Conciliate Land Disputes that Could not be Conciliated by Administration Commission; Prakas on Power Delegation to Capital/Provincial Governor and As Chairman of Capital/Provincial Cadastral Commission for Deciding Land Disputes in Cadastral Commission Mechanism, No. 32/PRK/DNS/GSCH (2010); Circular on Implementation of Decision Procedure over Land Dispute of the Municipal/Provincial Cadastral Commission in Cadastral Commission Mechanism, No. 01 DNS/SRNN (2010).

[319]Adler et al., *Towards Institutional Justice? A Review of the Work of Cambodia's Cadastral Commission in Relation to Land Dispute Resolution*, 36.

[320]Ibid.

[321]Ibid.

[322]Hap, "The Implementation of Cambodia's Laws on Land Tenure," 34.

[323] Decision on Establishment of Mobile Team (2008); Decision on Establishment of Mobile Team in O'raing Ov, Kampong Cham Province and Svay Tiep, Svay Rieng Province (2010).

[324]Land Policy Council, *Report on Achievements of Land Reform Implementation (2002-2009) and Ways Forward through the Program Based Approach (2009-2013)*, June 2, 2011, 6.

Cheung Prey, Battambang, O'Chrov, Ponhea Krek, Peam Chor, and Baray. However, the land disputes in three districts – Cheung Prey, Battambang, and Peam Chor – were resolved.[325] Currently, only four groups remained working in the concentrated areas of land disputes.[326]

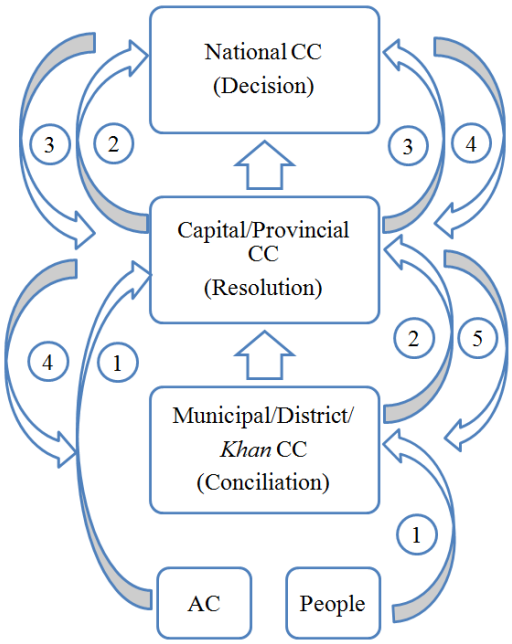
Having seen the mutual referral of complaints, which lacked proper investigation and resolution, the Ministry of Land started to reform the procedure of the CC mechanism. The Ministry of Land issued a letter to grant the authority to the Capital/Provincial CC to investigate and conciliate any land dispute that could not be settled by the administration commission on behalf of the National CC on June 7, 2007.[327] However, the Capital/Provincial CC could refer the case to the national CC for hearing when it could not settle the case.[328]

The Ministry of Land further reformed the CC mechanism by the delegation of decision power to the Capital/Provincial CC on January 21, 2010.[329] Thus, the two upper levels of the CC mechanism had power to decide the case. This was regarded as an important reform of the CC mechanism to deal with land disputes.

Despite such a delegation, the CC mechanism still faced the reciprocal referral of complaints. The Ministry of Land issued a circular to instruct and implement the procedure of decision-making at the Capital/Provincial CC on January 21, 2010.[330] According to this circular, the Capital/Provincial CC could forward the case to the Municipal/District/*Khan* CC to re-conduct the conciliation and hearing over the case.[331] This still caused the prolongation of cases in the CC mechanism. The following figure shows the new development and complexity of the CC mechanism.

[325]Ibid., 6.
[326] The author interviewed a senior official of the Land Ministry on August 16, 2014.
[327]The national CC expresses that "...[t]he national CC observed that a number of cases forwarded to the national CC by the municipal/provincial CC was the cases that were not properly resolved by the administration commission; namely, still lack investigation and conciliation…" See: Letter on Granting Authorities to Chairman of Municipal/Provincial Cadastral Commission to Investigate and Conciliate Land Disputes that Could not be Conciliated by Administration Commission, No. 634/DNS/KSCH (2007).
[328]Ibid.
[329] See: Prakas on Power Delegation to Capital/Provincial Governor and As Chairman of Capital/Provincial Cadastral Commission for Deciding Land Disputes in Cadastral Commission Mechanism, No. 32/PRK/DNS/GSCH (2010).
[330]See: Circular on Implementation of Decision Procedure over Land Dispute of the Municipal/Provincial Cadastral Commission in Cadastral Commission Mechanism, No. 01 DNS/SRNN (2010).
[331]Ibid.

Figure 9: The new development of process of land disputes in the CC mechanism



Source: Author

This figure shows that even though the CC mechanism was consecutively reformed, the complexity of institutional procedures still existed and caused mutual referral of complaints, which resulted in prolongation and backlogs. The following table shows the result of land dispute resolution by cadastral commissions since its establishment as of July 2011.[332]

[332]National Cadastral Commissions, *Report on Activities of Cadastral Commissions as of July 2011*, August 4, 2011, 2.

Figure 10: The total report of land resolution under the CC mechanism

Reports on Cadastral Commission (CC) from Establishment to July 2011						
No.	Name of CC	Received Case	Resolved Case	Dismissed Case	Withdrawn Case	Referral to Court/National CC
1	Phnom Penh	224	39	92	7	14
2	Kampong Cham	1098	464	452	110	2
3	Kampong Speu	195	87	103	0	0
4	Kandal	335	82	38	14	7
5	Takeo	193	63	60	15	3
6	Kampot	276	94	65	6	2
7	Prey Veng	414	244	46	35	3
8	Kampong Thom	321	52	100	70	7
9	Siem Reap	255	82	63	15	3
10	Battambang	365	168	95	35	48
11	Preah Sihanouk	116	19	60	0	3
12	Kampong Chhnang	162	56	27	0	0
13	Pursat	103	30	35	0	0
14	Banteaymeanchey	325	101	99	39	4
15	Kep	95	34	31	2	0
16	Svay Rieng	493	270	141	19	0
17	Koh Kong	60	19	24	3	2
18	Kratie	105	46	29	0	2
19	Pailin	67	16	48	0	0
20	Odormeanchey	254	143	72	22	2
21	Steung Treng	26	10	9	3	0
22	Ratanakiri	62	7	3	15	0
23	Mondukiri	26	4	9	4	0
24	Preah Vihear	43	21	12	0	0
25	National CC	184	60	12	23	28
	Referral from D/K/P	109	53	2	23	3
	Referral from AC	74	7	9	0	58
	Total - Outside LASSP	643	266	206	47	6
	Total - Inside LASSP	4970	1885	1507	367	103
	Nationwide Total	5688	2211	1725	437	109

Source: Ministry of Land, Secretariat of National Cadastral Commissions, 2011

The cadastral commissions receive many complaints, but resolution is relatively uncertain. The CCs tend to dismiss cases based on the division of institutional jurisdiction between court and CC.[333] According to the report of the Land Ministry showed that the CC mechanism dismissed 1,725 cases out of 5,688 received cases as of 2011.[334] The CC mechanism still consisted of 1,206 pending cases.[335] Cases are often kept prolonged under the CC. As a result, a limited number of cases were forwarded to court. These figures demonstrate the high rate of dismissal and case prolongation.

c). National Authority for Land Dispute Resolution

The National Authority for Land Dispute Resolution (hereinafter "NALDR") was a third institution that Cambodian government established to cope with land disputes in 2006.[336] The NALDR was the state top authority responsible for dealing with land disputes after the CC mechanism failed to curb with prevalence of land disputes. However, since its establishment, this state top authority could not prevent and stop land disputes, and land disputes still occurred.[337] This can be regarded as a third failure to cope with land disputes. This section will cover the institutional background, jurisdiction, and action of NALDR in dealing with land disputes in Cambodia.

i. Institutional Background

The CC mechanism succeeded in resolving only 1,022 cases out of the total 3,763 received cases, or approximately 27% as of March 2006.[338] The CC mechanism could successfully conciliate small and simple cases between villagers.[339] However, the CC mechanism seemed reluctant or unable to conciliate and solve big

[333]Land Policy Council, *Report on Achievements of Land Reform Implementation (2002-2009) and Ways Forward through the Program Based Approach (2009-2013)*, 6.
[334]National Cadastral Commissions, *Report on Activities of Cadastral Commissions as of July 2011*, 2.
[335] The total number of received cases were 5,688 cases. The total number of resolved, dismissed, withdrawn, and referred cases were 4,482 cases. Therefore, the pending cases were 1,206 cases.
[336]See: Royal Decree on Establishment of National Authority for Land Dispute Resolution, N.S/RKT/0206/097 (2006).
[337] Cambodian Human Rights Portal, "The Reported Land Conflict Cases 2007 to 2011 in Cambodia," 2011, http://sithi.org/temp.php?url=land_case.php (accessed August 16, 2011).
[338]Hap, "The Implementation of Cambodia's Laws on Land Tenure," 34.
[339]Center for Advanced Study, *Towards Institutional Justice? A Review of the Work of Cambodia's Cadastral Commission in Relation to Land Dispute Resolution* (GTZ and World Bank, 2006), 9; Raquel Yrigoyen Fajardo, Rady Kong, and Sin Phan, *Pathways to Justice: Access to Justice with a Focus on Poor, Women and Indigenous Peoples* (Ministry of Justice, 2007), xi.

land disputes relating to authorities, the military, and powerful persons.[340]

Having seen that the CC mechanism could not deal with a number of land disputes, and land disputes were still on the rise, the Prime Minister came out to repeatedly warn of "peasant revolution" in his public speech on the stock-taking, agriculture, forest and fisheries conference on March 29, 2006.[341] Following the third public warning, the government established the National Authority for Land Dispute Resolution (NALDR) in 2006.[342]

The NALDR is the state top authority consisting of political elites such as state ministers, ministers, secretaries, soldier commander, military commanders, opposition parties, and NGOs.[343] The NALDR membership was readjusted in 2008 and 2011.[344] Currently, the NALDR membership consists of 23 governmental elites.[345] The NALDR has a secretariat, locating in the Cabinet, responsible for receiving complaints. The NALDR secretariat consists of 16 senior government officials.[346] The Land Minister, who is the chairman of the National CC, is the vice-president, and the Capital/Provincial governor, who is chairman of the Capital/ Provincial CC is the member of NALDR.[347] The following table shows the current membership of NALDR.

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[340]Fajardo, Kong, and Phan, *Pathways to Justice*, xi; Velibor Popović, *Cambodia: Country Assessment*, 2009, 17.

[341]Hun, "Stock-Taking Agriculture, Forest and Fisheries Conference"; see: The Cabinet of Samdech Hun Sen, "Cambodia New Vision," 1.

[342]See: Royal Decree on Establishment of National Authority for Land Dispute Resolution, N.S/RKT/0206/097 (2006).

[343] Ibid., art. 1. Note: NGO representative denied participating, and the representative from the opposition party resigned; therefore, only the senior officials of the government are the current components of the National Authority for Land Dispute Resolution (NALDR).

[344] See: Royal Decree on Amendment of Article 1 of 2008 Royal Decree on Establishment of National Authority for Land Dispute Resolution [ព្រះរាជក្រឹត្យស្តីពីវិសោធនកម្មមាត្រា១នៃព្រះរាជក្រឹត្យស្តីពីការបង្កើតអាជ្ញាធរជាតិដោះស្រាយទំនាស់ដីធ្លីឆ្នាំ២០០៨], NS/RKT/1011/941 (2011); Royal Decree on Amendment of Article 1 of 2006 Royal Decree on Establishment of National Authority for Land Dispute Resolution [ព្រះរាជក្រឹត្យស្តីពីវិសោធនកម្មមាត្រា១នៃព្រះរាជក្រឹត្យស្តីពីការបង្កើតអាជ្ញាធរជាតិដោះស្រាយទំនាស់ដីធ្លីឆ្នាំ២០០៦], NS/RKT/1008/1106 (2008); Sub-decree on Appointment of Composition of National Authority for Land Dispute Resolution [អនុក្រឹត្យស្តីពីការតែងតាំងសមាសភាពរបស់ក្រុមប្រឹក្សាអាជ្ញាធរជាតិដោះស្រាយទំនាស់ទំនាងដីធ្លី] (2006).

[345] See: Royal Decree on Amendment of Article 1 of 2008 Royal Decree on Establishment of National Authority for Land Dispute Resolution; Royal Decree on Amendment of Article 1 of 2006 Royal Decree on Establishment of National Authority for Land Dispute Resolution; Sub-decree on Appointment of Composition of National Authority for Land Dispute Resolution.

[346] Sub-decree on Appointment of Composition of National Authority for Land Dispute Resolution; Sub-decree on Appointment of Composition of National Authority for Land Dispute Resolution [អនុក្រឹត្យស្តីពីការតែងតាំងសមាសភាពរបស់ក្រុមប្រឹក្សាអាជ្ញាធរជាតិដោះស្រាយទំនាស់ទំនាងដីធ្លី] (2008).

[347] Royal Decree on Amendment of Article 1 of 2008 Royal Decree on Establishment of National Authority for Land Dispute Resolution, art. 1.

Figure 11: The members of the National Authority for Land Dispute Resolution (NALDR)

Members of National Authority for Land Dispute Resolution		
No.	Membership	Status
1	Representative of Prime Minister	President
2	Minister of Land	First Vice-president
3	An Eminent Person	Standing vice-president
4	Several Eminent Persons	Vice-president
5	Minister of Environment	Member
6	Minister of Agriculture	Member
7	Minister of Industry	Member
8	Minister of Social Affairs	Member
9	Ministry of Justice	Member
10	Sate Secretary of Ministry of Defense	Member
11	State Secretary of Ministry of Interior	Member
12	State Secretary of Ministry of Economics and Finance	Member
13	State Secretary of Ministry of Water Resources	Member
14	State Secretary of Ministry of Fine Arts	Member
15	Superintendent General of National Police	Member
16	Commander-in-chief of Royal Armed Forces	Member
17	Commander of Land Forces	Member
18	Commander of Marine Forces	Member
19	Commander of Royal Gendarmerie	Member
20	Secretary General of Cambodia Development Council	Member
21	Lawyer of Government	Member
22	Governor of Capital/Province	Member
23	Representative of NGOs Concerned	Member

Source: Royal Decree on Appointment of Members of NALDR, 2006, 2008, and 2011

ii. Institutional Procedure and Jurisdiction

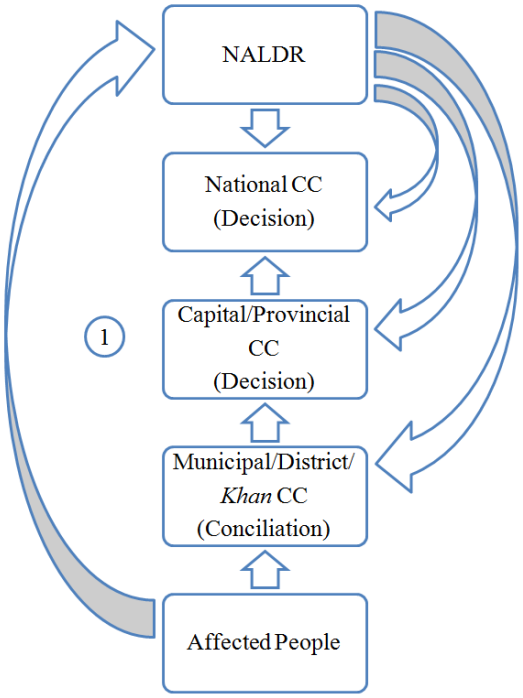
The NALDR was established in reaction to the prevalence of land disputes that the CC mechanism had failed to curb. The NALDR was established by Royal Decree, which was lower than the law in Cambodian legal hierarchy, on February 26, 2006.[348] This state top authority was put into operation under the Sub-decree on Organization and Functioning of the Secretariat General of the National Authority for Land Dispute

[348]See: Royal Decree on Establishment of National Authority for Land Dispute Resolution.

Resolution on July 14, 2006.[349] Currently, the NALDR has no law governing its procedure.

However, the NALDR had a number of institutional jurisdictions under the authorization of the Royal Decree and Sub-decree that empowered this body. According to the 2006 Royal Decree, the NALDR was commissioned to receive complaints, investigate, and resolve land disputes that were beyond the competence of the National CC and from every circle.[350] The NALDR also had duty to observe the process of land dispute resolution of the CC mechanism and other competent authorities.[351] In practice, the NALDR often delegated and ordered lower authority to take responsibility for resolving land disputes.[352] The following figure shows the process of NALDR in resolving land disputes.[353]

Figure 12: The process of NALDR in intervention to solve land disputes



Source: Author

Delegation impeded the efficiency and effectiveness of land dispute resolution, and even the Prime

[349]Sub-decree on Organization and Functioning of Secretariat General of the National Authority for Land Dispute Resolution [អនុក្រឹត្យស្តីពីការរៀបចំ និង ប្រព្រឹត្តទៅនៃអគ្គលេខាធិការដ្ឋានអាជ្ញាធរជាតិដោះស្រាយទំនាស់ដីធ្លី] (2006).

[350]Royal Decree on Establishment of National Authority for Land Dispute Resolution, art. 3; Council for Legal and Judicial Reform, *Pre-Assessment on Ombudsman and Other Complaint Systems in Cambodia*, February 2009, 3–5.

[351] Royal Decree on Establishment of National Authority for Land Dispute Resolution, art. 3.

[352] International Federation for Human Rights (FIDH), *Cambodia - Land Cleared for Rubber Rights Bulldozed*, October 2011, 29.

[353] The figure shows the process of the NALDR that forwards the cases to administrative ADR institutions in line. The NALDR also sends the case to court.

Minster has criticized the sluggishness of the NALDR.[354] This was inevitable, given the awkward composition of the NALDR members. From its establishment to 2010, the NALDR received a total number of 1,421 cases.[355] However, the NALDR could resolve 225 cases, (15,85%), while 1,043 cases (73,39%) were forwarded to other competent authorities.[356] In 2012, the NALDR received 103 complaints, an increase of 10 cases over 2011.[357] The NALDR could resolve 30 cases, while the remaining were left.[358]

Acute land disputes and consequent violence prompted the government to suspend economic land concessions (ELC) to private companies on May 7, 2012.[359] The government enforced the "Old Policy, New Action" by re-measuring and cutting off ELC-affected land for actual land possessors.[360] In order to exercise this New Action, the Prime Minister Hun Sen appointed his son, Hun Manit, as the deputy secretary general of the NALDR and appealed for students to voluntarily join the re-measurement mission.[361] In response to such an appeal, around 1,500 students were volunteered to measure disputed land in 16 provinces with cooperation with the existing cadastral officials. The number of volunteering students was increased to 2,016 persons in proportion to the coverage of 21 provinces.[362]

The "Old Policy, New Action" achieved a remarkable result. According to the data from the Ministry of Land showed that this mission completed the land survey of 710,000 parcels and issued 500,000 titles to affected people as of May 8, 2014.[363] Despite such a result, the "Old Policy, New Action" did not govern all land disputes throughout the country. This mission overlooked many land disputes, for instance, the case of Boeung Kak and Borei Keila land disputes that had happened in the heart of the Phnom Penh capital.[364]

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[354] Cambodian Human Rights Action Committee (CHRAC), *Still Losing Ground: Forced Evictions and Intermediation in Cambodia*, 2010, 34.
[355] Research and Information Center, *Statistical Analysis of Land Disputes in Cambodia, 2013*, September 2014, 5.
[356] Around153 cases, 10,76%, were pending. See: Ibid.
[357] Titthara May, "NALDR Shows Land Disputes Increase" [អាជ្ញាធរជាតិបង្ហាញចំនួនជម្លោះដីធ្លីដែលកើន], *Phnom Penh Post*, February 21, 2013.
[358] Among the types of dispute filed at the NALDR, the affected citizens asked for intervention stood number among other complaints, 56 out of 103 complaints and followed by claiming of land, 12 complaints. See: Ibid.
[359]Measure To Strengthen and Increase Efficiency of ELC Management, 01 BB (2012).
[360]Ibid.
[361] Titthara May, "Hun Sen's Son to Manage Land Dispute," *Phnom Penh Post*, June 28, 2012.
[362]*Youth Volunteers Achieve 440,000 ha of Land Measurement*, dir. Radio France Internationale (RFI), November 29, 2012, radio broadcast.
[363] Ministry of Land Management, Urban Planning and Construction, *Notification* [សេចក្តីជូនដំណឹង], Cambodia Doc., May 8, 2014.
[364] The author will describe this in later chapters.

2. *Maison dela Justice*/House of Justice

In addition to the establishment of the formal institutions to deal with land disputes, the Cambodian government also created an informal center for resolving disputes in a number of localities, under the "Access to Justice" project, hereinafter called "A2J." The A2J project covered small disputes between ordinary people The following section will demonstrate the institutional background, development, procedure, and jurisdiction of the A2J project.

a). Institutional Background

The A2J project was initiated by donors, especially, the United Nations Development Program (UNDP).[365] Many donors flooded into Cambodia after the 1993 general election. The government, through the Council for Legal and Judicial Reform, requested that the UNDP fund a fieldwork study of the "role and relationship between formal and informal justice system and review ADR mechanisms."[366] The UNDP funded this fieldwork study and produced an empirical report of the gap of access to justice through court in 8 provinces in Cambodia.[367] The fieldwork study resulted in a handbook, *Pathways to Justice: Access to Justice with a Focus on the Poor, Women and Indigenous People in Cambodia* in 2005.[368]

Following this study, the UNDP and the Cambodian government, under the Ministry of Interior and Ministry of Justice, agreed to establish an informal justice service center, called "*macha-mundul-seivakam-yutethor,*" in Khmer, "*Maison de la Justice"* in French, or "House of Justice" in English, under the A2J project in 2006.[369] The A2J project was initially under the auspices of the UNDP; however, it was handed over to the Ministry of Justice in 2010.[370] Currently, the A2J project continues under the management of the Ministry of Justice.[371]

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[365] Aparna Basnyat and Try Tan, *Access to Justice in Cambodia*, Mid-Term Project Assessment, February 2009, 21; Kimseng Men and Margaret Lamb, "Cambodia Launches House of Justice for Rural Communities," July 26, 2007, http://www.un.org.kh/undp/pressroom/press-releases/cambodia-launches-house-of-justice-for-rural-communities (accessed August 11, 2011).
[366] Basnyat and Tan, *Access to Justice in Cambodia*, 21; Men and Lamb, "Cambodia Launches House of Justice for Rural Communities."
[367] Basnyat and Tan, *Access to Justice in Cambodia*, 21.
[368] Fajardo, Kong, and Phan, *Pathways to Justice*.
[369] See: Inter-ministerial Prakas on Establishment of Maison dela Justice at District Level in Pilot Project, No. 85/Pr.K.K.Y.M.P/06 (2006).
[370] Ministry of Justice, *Annual Report: Access to Justice Project*, 2013, preface.
[371] See: Ministry of Justice, *Annual Report: Access to Justice Project*.

b). Institutional Development

Originally, the A2J was created under a pilot project, in which the first four pilot projects located in the commune and district level in two provinces – Kampong Speu and Kampong Chhnang in 2006.[372] However, the A2J started to broaden its service coverage to another 16 pilot projects in 6 provinces in 2008.[373] The government established another 11 projects at the municipal and *khan* level in 2013[374]. The Ministry of Justice plans to establish the A2J throughout the country.[375]

The A2J project had three levels. The national level was called the "National A2J." The National A2J had only one center, which consisted of 11 officials located in the Ministry of Justice. The municipality, district, and *Khan* level was called the "*Maison de la Justice*," or "House of Justice." The *Maison de la Justice* has 31 centers consisting of 93 officials, in which each center had three staff, located in various municipalities, districts, and *Khans*. The commune/*sangkat* level was called the "Commune Dispute Resolution Committee" (CDRC). The CDRC had 56 centers consisting of 392 members (each has seven staff) in various communes and *sangkats*.[376]

Figure 13: The numbers of staff working in *Maisons de la Justice*, Access to Justice Program

Numbers of Staff in the Access to Justice (A2J) Project			
Name	Location	Number	Staff
National A2J (Access to Justice)	Ministry of Justice	1	11
Maison de la Justice	Municipality, District, and *Khan*	31	93
Commune Dispute Resolution Committee	Commune and *Sangkat*	56	392
Total		88	496

Source: Ministry of Justice, Access to Justice Project, Annual Report 2013

[372]See: Inter-ministerial Prakas on Establishment of Maison dela Justice at District Level in Pilot Project.
[373]Those Maisons are in Kampong Speu, Kampong Chhnang, Battambang, Siem Reap, Rattanakiri, and Mondulkiri. See: Council for Legal and Judicial Reform, "Legal and Judicial Reform" no. 2 (July 2009): 8; Inter-ministerial Prakas on Establishment of Additional 16 Maisons dela Justice at District in Pilot Project [ប្រកាសអន្តរក្រសួងស្តីពីការបង្កើតមណ្ឌលសេវាកម្មយុត្តិធម៌នៅស្រុកចំនួន ១៦ បន្ថែមក្នុងគម្រោងសាកល្បង] (2008).
[374] See: Ministry of Justice, *Annual Report: Access to Justice Project*.
[375]*House of Justice*, dir. Radio Free Asia (RFA), December 15, 2010, radio broadcast.
[376] The commune/sangkat level consists of 7 members, including a commune chief, a police representative, a women's representative, and four citizens that are elected from the villagers. See: Ministry of Justice, *Annual Report: Access to Justice Project*, 1.

c). Institutional Procedure

Maison de la Justice is an informal institution created for small disputes.[377] Therefore, this institution is established by only inter-ministerial *Prakas*, which is far lower than law in Cambodian legal hierarchy.[378] *Maison de la Justice* does not have law governing its procedure. *Maison de la Justice*, in practice, follows the general concept of mediation, which later develops into two manuals governing its procedure and operation in 2010.[379]

The two manuals show a remarkable procedure for dispute mediation and resolution in *Maison de la Justice* in Cambodia. Local residents, who have small disputes, can go to *Maison de la Justice* for legal consultation. *Maison* official will provide legal consultation over their dispute and ask them whether they agree with *Maison* to mediate their dispute.[380]

If *Maison* official find that the dispute is beyond the competence of *Maison de la Justice*, or parties do not want to resolve their disputes through *Maison* service, *Maison* official will suggest them to file complaint to other competent institutions. However, if local residents agree to use *Maison* service, residents can make a complaint orally or in writing. If local residents cannot write or fill in the complaint form, *Maison* official will help them fulfill the complaint and read to them for confirmation.[381]

A *Maison* official will send the complaint to respondent within two days after the reception of complaint.[382] The *Maison* official will start to mediate the dispute after parties submit complaint. The *Maison* official can mediate dispute at least three times.[383] The first mediation will start within 7 days after parties submitted complaints. The *Maison* official needs to notify parties three days before mediation.[384] The place of

[377]Inter-ministerial Prakas on Establishment of Maison dela Justice at District Level in Pilot Project, Rule 3; Men and Lamb, "Cambodia Launches House of Justice for Rural Communities."
[378]See: Inter-ministerial Prakas on Establishment of Maison dela Justice at District Level in Pilot Project.
[379] Ministry of Justice, *Manual on Operation of District/Municipal Maison de La Justice* [ស្មៀនសៅណែនាំប្រតិបត្តិការសម្រាប់មន្ទីរសេនាកម្មយុត្តិធម៌ស្រុក ក្រុង], 2010; Ministry of Justice (ក្រសួងយុត្តិធម៌), *Manual on Conciliation* [ស្មៀនសៅណែនាំការសម្រុះសម្រួល], 2010.
[380] See: Ministry of Justice, *Manual on Operation of District/Municipal Maison de La Justice*; Ministry of Justice, *Manual on Conciliation*.
[381] See: Ministry of Justice, *Manual on Operation of District/Municipal Maison de La Justice*; Ministry of Justice, *Manual on Conciliation*.
[382] Ministry of Justice, *Manual on Operation of District/Municipal Maison de La Justice*, 11.
[383] Ibid., 12 and 17.
[384] Ibid., 11.

mediation is in the *Maison* center; namely, the municipal, district, *khan*, commune, or *sangkat* hall.[385]

d). Institutional Jurisdiction

The establishment of *Maison de la Justice* is to bring justice closer to people in their locality.[386] The primary purpose of *Maison de la Justice* is to serve marginalized groups.[387] Thus, *Maison de la Justice* mediates only small disputes between local residents.[388] The mediation of *Maison de la Justice* is voluntary.[389] If parties reach agreement, *Maison* official will close the dispute. If the parties cannot reach agreement, the case will be referred to the court.[390] Currently, four types of disputes are most common in *Maison de la Justice* in practice: (1) land dispute, (2) domestic violence, (3) defamation, (4) breach of marriage, and (5) debt.[391]

e). Performance

Presently, *Maison de la Justice* mediates disputes in localities where these centers are located. This section will consider the performance in dispute mediation and resolution under *Maison de la Justice* at the municipal, district, *khan* and commune/*sangkat* level.

i. Performance in Dispute Resolution at Municipal, District, *Khan* Level

Maisons de la Justice have been established in municipalities, districts, and *Khans*, totaling 31 centers consisting of 93 officials, in which each center has three staff.[392] According to the annual report of A2J project of the Ministry of Justice of 2013, *Maison de la Justice* had a total number of 1,510 cases, of which 753 cases remained from the previous year and 757 new cases entered.[393] The responsible centers could mediate 609 cases out of 1,510 caseloads, while 901 cases were pending.[394] The following figure shows the total cases of

[385] Ibid.
[386] Inter-ministerial Prakas on Establishment of Maison dela Justice at District Level in Pilot Project, No. 85/Pr.K.K.Y.M.P/06, Rule 3 (2006); Men and Lamb, "Cambodia Launches House of Justice for Rural Communities."
[387] Inter-ministerial Prakas on Establishment of Maison dela Justice at District Level in Pilot Project, Rule 3; Men and Lamb, "Cambodia Launches House of Justice for Rural Communities."
[388] Inter-ministerial Prakas on Establishment of Maison dela Justice at District Level in Pilot Project, Rule 3; Men and Lamb, "Cambodia Launches House of Justice for Rural Communities."
[389] Ministry of Justice, *Manual on Operation of District/Municipal Maison de La Justice*, 42.
[390] Popović, *Cambodia: Country Assessment*, 12.
[391] Ministry of Justice, *Manual on Conciliation*, 12.
[392] 7 members composed of a commune chief, a police representative, a women's representative, and four citizens that are elected from the villagers At commune level. See: Ministry of Justice, *Annual Report: Access to Justice Project*, 1.
[393] Ibid., 5.
[394] Ibid.

Mainson de la Justice at the municipal, district, and *khan* level.

Figure 14: The total number of disputes at *Maison de la Justice* at municipal, district, *khan* level

Maison de la Justice at municipal, district, *khan* level				
Total	Newly Received	Previously Remained	Pending	Already Mediated
1,510	757	753	901	609

Source: Ministry of Justice, Annual Report, 2013

There were three types of results among the mediated cases at the municipal, district, and *khan* level: 541 settled cases, 68 deposited cases, while 90 cases were referred to other authorities.[395] The following figure shows the number of mediated disputes under *Maison de la Justice* at municipal, district, *khan* level.

Figure 15: The types of mediated disputes at municipal, district, *khan* level

Mediated	Decision	
609	541	Settled
	68	Deposited
	90	Referred to other authorities

Source: Author, compilation from annual report of A2J project, Ministry of Justice, 2013

There were various types of disputes in *Maison de la Justice* at the municipal, district, and *khan* level. Land disputes were the second most common.[396] The following figure shows types of disputes mediated under the *Maison de la Justice* at municipal, district, *khan* level.

[395] Ibid.
[396] Ibid.

Figure 16: The types of mediated disputes at municipal, district, *khan* level

Type of Dispute	
Debt and contract	530
Land dispute	489
Divorce	133
Defamation and insult	103
Domestic violence	70
Property damage	53
Property claim	29
Minor injuries	11
Marriage disengagement	6
Other petite disputes	86

Source: Author, compilation from annual report of A2J project, Ministry of Justice, 2013

ii. Performance in Dispute Resolution at Commune/*Sangkat* Level

Commune dispute resolution committees (CDRCs) have 56 centers consisting of 392 members in various communes and *sangkats*.[397] Each center comprises seven members.[398] CDRCs are also active to deal with disputes at the commune/ *sangkat* level. According to the annual report of A2J project of the Ministry of Justice of 2013, CDRCs received a total number of 1,808 cases, of which 446 cases remained from the previous year and 1,362 new cases.[399] CDRCs could mediate 1,253 out of 1,808 cases, while 555 cases were pending.[400] The following figure shows the total number of cases at the commune and *sangkat* level.

[397] Ibid., 1.
[398] Ibid.
[399] Ibid., 5.
[400] Ibid.

Figure 17: The total number of disputes of Commune Dispute Resolution Committees at commune/ *sangkat* level

Commune Dispute Resolution Committees (CDRCs)				
Total	Newly Received	Previously Remained	Pending	Already Mediated
1,808	1,362	446	555	1,253

Source: Ministry of Justice, Annual Report, 2013

There were three results among the mediated cases at the commune and *sangkat* level: 53 settled cases, 1,124 deposited cases, while 76 cases were referred to other authorities.[401] The deposited cases were the highest number in the CDRC mediation. This showed the CDRCs intended to keep cases without processing. The following figure shows the mediated disputes in CDRCs.

Figure 18: The types of mediated disputes at commune and *sangkat* level

Mediated	Decision	
1,253	53	Settled
	1,124	Deposited
	76	referred to other authorities

Source: Author, Compilation from annual report of A2J, Ministry of Justice, 2013

There were various types of disputes appeared in CDRCs. However, land disputes still stood number two in row at commune/*sangkat* level.[402] This shows that land disputes are most common in many redress institutions. The following figure shows the total types of disputes in CDRCs.

[401] Ibid.
[402] Ibid.

Figure 19: The types of mediated disputes at commune and *sangkat* level

Type of Dispute	
Domestic violence	484
Land dispute	404
Debt and contract	298
Divorce	295
Defamation and insult	163
Property damage	34
Marriage disengagement	28
Property claim	18
Minor injury	14
Other petite disputes	70

Source: Author, Compilation from annual report of A2J, Ministry of Justice, 2013

In short, *Maison de la Justice* under the A2J project is active in both reception and mediation of small complaints at localities. *Maison de la Justice* could resolve half of entered cases. *Maison de la Justice* at municipal, district, and khan could settle cases better than CDRCs, where intended to deposit cases. However, *Maison de la Justice* still faces a heavy degree of backlog that needs addressing.

3. Labor Arbitration Council

By way of comparison, and to illustrate the prevalence of ADR mechanisms in Cambodia institutional reform, this section provides a brief overview of the Labor Arbitration Council (LAC), widely seen as a successful application of ADR techniques in Cambodia.

The LAC was established in 2002.[403] The LAC may be regarded as a unique institution for resolving labor disputes, and it could be said that it is a trusted institution for resolving disputes in post-war Cambodia compared to other institutions.

a). Institutional Background

Cambodia passed Labor Law in 1997 (hereinafter called "1997 Labor Law").[404] The 1997 Labor Law provided two types of labor disputes: (1) individual[405] and (2) collective.[406] Both types of dispute undergo

[403] Prakas on Arbitration Council [ប្រកាសស្តីពីក្រុមប្រឹក្សាឧទ្ធរណ៍ភាគល្អាស] (2002).

[404] 1997 Labor Law [ច្បាប់ការងារឆ្នាំ១៩៩៧] (1997).

preliminary conciliation from the Labor Inspector of the Ministry of Social Affairs, Labor, and Vocational Training (hereinafter called "Ministry of Labor") before proceeding to other institutions.[407]

Individual labor dispute will be sent to court after the unsettled conciliation from the Labor Inspector.[408] Collective labor dispute will be, if unsettled by the Labor Inspector, sent to arbitration council for resolution.[409] Therefore, the government, under the Ministry of Labor, created the labor arbitration council (LAC) for resolving collective labor dispute, as authorized under the 1997 Labor Law.[410]

The Ministry of Labor issued a *Prakas* to establish the LAC in 2002.[411] The LAC started its operation under the auspices of donors; especially, International Labor Organization (ILO) in 2003.[412] According to the 2002 *Prakas*, the LAC has at least 15 members.[413] Currently, the LAC has 30 members.[414] Each member is selected for one-year mandate annually but can be reselected.[415] The LAC members are chosen from tripartite components: one thirds from the Ministry of Labor, another one thirds from the employer association, and the last one thirds from the employee trade union.[416]

Presently, the LAC has only one institution located in the Phnom Penh Capital; however, its jurisdiction governs all collective labor disputes throughout the country. Sometimes, the LAC conducts a mobile hearing of a dispute, which is located outside of the capital.[417] The LAC service is free of charge.[418]

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[405] Individual dispute is a dispute between employer and one or more employee or apprentices and relevant to the interpretation or implementation of the provision of labor or apprenticeship contract or provision of a collective agreement and other regulations. See: Ibid., art. 300.
[406] Collective labor dispute is a dispute between one or more employers and a number of employees over the work condition, the use of rights granted to professional organization, the recognition of professional organization in enterprise, the issue of relations between employers and employees, and this dispute can disrupt the process of enterprise or destabilize the social security. See: Ibid., art. 302.
[407] Ibid., arts. 300 and 303.
[408] Ibid., art. 300.
[409] Ibid., art. 302.
[410] Ibid., art. 309.
[411] Prakas on Arbitration Council (2002).
[412] Phallack Kong, "Labor Arbitration in Cambodia: Law and Practice," *Cambodian Society of Comparative Law* 1 (2010): 163.
[413] Prakas on Arbitration Council, art. 1.
[414] The author interviewed Phallack Kong, arbitrator of the Labor Arbitrator Council on August 10, 2014.
[415] Prakas on Arbitration Council, art. 2.
[416] Ibid., art. 3.
[417] Prakas on Arbitration Council [ប្រកាសស្តីពីក្រុមប្រឹក្សាឧទ្ធរណ៍], art. 22 (2004).
[418] 1997 Labor Law, art. 316 (1997).

The LAC members are part-time volunteers, do not have fixed salary, but receive an honorarium for each case resolution of US$120.[419]

b). Institutional Procedure

The LAC procedure is under the *Prakas* of 2002. However, this *Prakas* is nullified by the new *Prakas* of 2004 (hereinafter called 2004 *Prakas*).[420] The 2004 *Prakas* provides a detailed procedure of the arbitration process in the *Prakas* itself and its annex.[421] The 2004 *Prakas* provides that collective labor disputes will be heard by a panel of three arbitrators called the "Arbitration Panel," which is selected by parties from the list of 30 members of the arbitration council.[422]

The LAC has a secretariat for accepting complaints, which are sent from the Labor Inspector who failed to settle collective labor disputes.[423] This secretariat will facilitate the forming of the Arbitration Panel within three days after the reception of unsettled complaint by allowing parties to choose arbitrator respectively.[424] The Arbitration Panel consists of three members, to whom each party chooses one arbitrator respectively, and both selected arbitrators will choose the third one as the leader of the panel.[425] The employee chooses an arbitrator from the trade union (employee) list, and employer chooses an arbitrator from the employer list. Then, the two will choose a third arbitrator from the list of the Ministry of Labor.[426] If there is a disagreement on the selection of the third arbitrator, the third one will be chosen by ballot.[427]

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[419] The author interviewed Phallack Kong, arbitrator of the Labor Arbitrator Council on August 10, 2014.
[420] The Ministry of Labor changed several articles of the Prakas of 2002. Prakas on Arbitration Council, art. 52.
[421] Prakas on Arbitration Council; Rule of Arbitration Council Procedure in accordance with Article 31 of Prakas on Arbitration Council [ទិដ្ឋានន៍នីតិវិធីក្រុមប្រឹក្សាឧជ្ជាកណ្តាលយោងតាមប្រការ៣១នៃប្រកាសស្តីពីក្រុមប្រឹក្សាឧជ្ជាកណ្តាល] (2004).
[422] Prakas on Arbitration Council, art. 12.
[423] Prakas on Establishment of Secretariat of Arbitration Council [ប្រកាសស្តីពីការបង្កើតលេខាធិការដ្ឋាននៃក្រុមប្រឹក្សាឧជ្ជាកណ្តាល]; Rule of Arbitration Council Procedure in accordance with Article 31 of Prakas on Arbitration Council; 1997 Labor Law, 310.
[424] 1997 Labor Law, art. 310; Rule of Arbitration Council Procedure in accordance with Article 31 of Prakas on Arbitration Council, art. 3.
[425] Prakas on Arbitration Council, art. 12 (2002).
[426] Ibid., art. 3; Rule of Arbitration Council Procedure in accordance with Article 31 of Prakas on Arbitration Council, art. 3.
[427] Prakas on Arbitration Council, art. 12; Rule of Arbitration Council Procedure in accordance with Article 31 of Prakas on Arbitration Council, art. 3.

The 1997 Labor Law puts a strong obligation on the LAC to report its decision to the Minister of Labor within 15 days after the reception of the complaint.[428] The Arbitration Panel will hold a meeting within three days for setting the date for hearing after its formation. [429] Then, the Arbitration Panel will inform the secretariat to notify parties to appear in the hearing forum on the set date.[430]

Parties can present their arguments orally and submit evidence at the hearing.[431] The Arbitration Panel can conduct a number of hearings depending on the subject matters to make decision. If the case is not complicate, the Arbitration Panel can decide it in a morning or afternoon session. If the case is a complex one, the Arbitration Panel can conduct the hearing sessions five to six times.[432] However, the award cannot exceed the fixed 15 days that the panel must report its decision to the Minister of Labor.[433]

In principle, the Arbitration Panel will issue the award by consensus. If the Arbitration Panel cannot reach the consensus, the Arbitration Panel will issue the award by the majority of votes.[434] However, the dissenting arbitrator is allowed to express his or her opinion in the annex of the award.[435] Then, the Arbitration Panel will report the award to the Minister of Labor. [436] The Minister of Labor will notify the award to the parties immediately, and parties can challenge the award to the Minister of Labor within 8 days after the date of notification reception.[437] The award cannot be applied when parties challenge, and parties can file a lawsuit to court for judicial review.[438]

[428] 1997 Labor Law, art. 313; Prakas on Arbitration Council, art. 39; Rule of Arbitration Council Procedure in accordance with Article 31 of Prakas on Arbitration Council, art. 3.
[429] Rule of Arbitration Council Procedure in accordance with Article 31 of Prakas on Arbitration Council, art. 4.
[430] Ibid.
[431] Prakas on Arbitration Council, art. 18 (2004); Rule of Arbitration Council Procedure in accordance with Article 31 of Prakas on Arbitration Council, art. 4.
[432] The author interviewed Phallack Kong, an arbitrator of the Labor Arbitration Council on August 10, 2014.
[433] 1997 Labor Law, art. 313; Prakas on Arbitration Council, art. 39; Rule of Arbitration Council Procedure in accordance with Article 31 of Prakas on Arbitration Council, art. 3.
[434] Prakas on Arbitration Council, art. 36.
[435] Ibid., art. 37.
[436] 1997 Labor Law, art. 313; Prakas on Arbitration Council, art. 39.
[437] 1997 Labor Law, art. 313; Prakas on Arbitration Council, art. 39.
[438] Prakas on Arbitration Council, art. 40.

c). Institutional Responsibility

The 1997 Labor Law and the 2004 *Prakas* put a mandatory limitation of 15 days for the LAC to bear responsibility for dispute resolution.[439] Mostly, the LAC could arbitrate disputes within this limited period.[440] The LAC could complete 1,521cases as of 2013 without backlog.[441] Therefore, the LAC is viewed as a most trustful and fast resolution institution in post-war Cambodia in comparing to courts and other ADR institutions. The following figure shows the annual entrance and resolution of cases under LAC.

Figure 20: The total labor dispute entrance and resolution under LAC from establishment until 2013

Year	2003	2004	2005	2006	2007	2009	2010	2011	2012	2013	Total
Cases	31	113	81	119	148	180	144	189	255	261	1,521

Source: Labor Arbitration Council, Annual Report 2012 and Newsletter April-June, 2014.

In short, the LAC is unique in its selection and hearing process. The method of arbitrator selection results in diversity and independence of resolvers and decision. The binding hearing process makes resolvers bear responsibility to fulfill their duties in resolving disputes. The LAC could resolve most disputes within the fixed period of 15 days. Therefore, the LAC has not encountered a backlog of cases and is viewed as a most efficient and effective institution in post-war Cambodia.

[439] 1997 Labor Law, art. 313; Prakas on Arbitration Council, art. 39; Rule of Arbitration Council Procedure in accordance with Article 31 of Prakas on Arbitration Council, art. 3 (2004).
[440] The author interviewed Kong Phallack, arbitrator of Arbitrator Council on August 10, 2014.
[441] The author calculated from labor arbitration council annual report, 2012 and Newsletter April-June 2014, and Kong, "Labor Arbitration in Cambodia," 166.

C. Chapter Summary

Cambodia has implemented institutional reform policy in two ways in the post-war period. Initially, the Cambodian government intended to restore and reform judicial institutions by re-establishing these institutions from scratch after the collapse of Khmer Rouge. The court of first instance was established in 1982, followed by the supreme court in 1985, and finally appellate court in 1993. Following these, the government continued to establish the supreme council of magistracy in 1993, the bar association in 1995, and the constitutional council in 1998.

However, the Cambodian government's institutional reform policy was changed post-1998. The government tended to make institutional reform toward quasi-judicial, namely, alternative dispute resolution (ADR) institutions in post-1998 policy. Multiple ADR institutions emerged in post-1998 Cambodia. The government introduced ADR methods in three main fields: (1) land, (2) small claims, and (3) labor.

Cambodia introduced multiple ADR institutions in the field of land disputes. Land dispute resolution institutions were established in response to the large number of land disputes, without serious study of institutional procedure and jurisdiction. Land disputes caused by land grabbing reached an emergency when the Prime Minister came out to publicly warn of "peasant revolution" in 1999.

Following this warning, the government decided to establish Land Dispute Resolution Commission (LDRC) throughout provinces and municipalities in order to curb with land disputes. However, LDRC was created by governmental decision, without a clear governing rule for accepting and resolving disputes. As a consequence, LDRC faced procedural problem and confusion of complaint reception with court.

Land disputes continued to rise as of 2002. Then, the Prime Minister came out to publicly warn of "peasant revolution" once again. Immediately, the government established the Cadastral Commission (CC) for dealing with land disputes. However, the CC was established under authorization of the 2001 Land Law for resolving unregistered land. In a sense, the LDRC was transformed into CC with clear responsibility for land dispute resolution. As a result, the CC shared many characteristics with the LDRC.

The government, under the Ministry of Justice and the Ministry of Land, issued the inter-ministerial *Prakas* on the division of institutional jurisdiction between the CC and the courts in 2003. The 2003 *Prakas* allowed the court to deal with registered and contractual land disputes, while the CC was responsible for resolving unregistered or untitled land disputes. Such a division has resulted in a push-and-pull movement, denial, and dismissal of complaints between both institutions.

Furthermore, the CC mechanism is constructed within an existing territorial administrative structure divided into district, province, municipal, and national level. Such arrangement reduces both the responsibility and the decision-making authority of each unit. As a consequence, CC has faced many backlogs. Therefore, the government established Mobile Teams, assisting bodies, to relieve these backlogs.

On the other hand, the CC mechanism was unable to resolve a number of big land disputes involving authority, powerful, military, and the rich. Land disputes still continued to rise; as a result, the Prime Minister came out to make a third public warning of "peasant revolution" in 2006. Immediately after that, the government decided to establish the National Authority for Land Dispute Resolution (NALDR) at the same year.

The NALDR is a state top authority, which is composed of many governmental elites such as state minister, minister, commander-in-chief of military, soldier, and police forces, and capital/provincial governors, as members. However, the NALDR is established by Royal Decree, which is lower than law in the Cambodian legal hierarchy. As a result, the NALDR has not had a governing law over its resolution process.

The authority of the NALDR is authorized under the 2006 Royal Decree and Sub-decree that put this institution into operation. According to these regulations, the NALDR was commissioned to investigate, and resolve land disputes beyond the National CC and receive complaints from everywhere. The NALDR is also empowered to observe the process of land dispute resolution by the CC mechanism and other institutions.

In practice, the NALDR could investigate disputes directly by cooperating with local authorities and submit to the chairman for decision. Alternatively, the NALDR could delegate or order local authorities to bear responsibility for investigating and resolving disputes, instead. Lack of procedural law, awkward composition of membership, and delegation have paralyzed this state top authority. These impeded the efficiency and effectiveness of dispute resolution.

The government established the *Maison de la Justice*, under the access to justice (A2J) project, for small claim disputes and marginalized groups in 2006. *Maison de la Justice* works as standalone petite court for dealing with small disputes in localities. Land disputes stand number two in frequency in these *Maison*s. Centers at municipal, district, and *khan* level could settle more disputes than commune/*sangkat* level, which tended to deposit cases.

The government created an ad-hoc tribunal for labor dispute called Labor Arbitration Council (LAC) in 2002. The LAC was established for only resolving collective labor disputes. Collective labor disputes were resolved by a three-arbitrator panel, who were selected by parties. The panel is obliged to make decision and report to the Minister of Labor within a mandatory 15 day. Since its establishment, the LAC has dealt well with disputes without backlogs of cases if comparing to court, land dispute resolution institutions, and *Maison de la Justice*, backlogs of cases are a challenge need addressing in these bodies.

In a word, the failure of land dispute resolution institutions to deal with and prevent land disputes was due to these institutions were established by reaction without serious studies of institutional procedure and jurisdiction. As a consequence, these institutions are not efficient and effective to curb with prevalence of land disputes. Reform of these institutions is necessary to end land disputes in Cambodia.

Chapter II Law in Action: Land Dispute Resolution in Cambodia

> [Officials] are not resolving the problem, and then the people come to Phnom Penh, and when they arrive in Phnom Penh, still no one resolves the problem.[…] It has been for very long under the leadership of Hun Sen that land disputes continue to occur. So now I have to watch and take action. If you don't work and you don't like to work hard, you can resign.
>
> Prime Minister Hun Sen, August 18, 2014.[442]

A. Challenge of Institutional Responsibility for Land Dispute Resolution in Cambodia

Cambodia has multiple institutions responsible for dealing with land disputes. These institutions are not efficient and effective to curb land disputes. Multiple institutions, instead, weaken institutional responsibility. Land disputes are chronic. Therefore, Prime Minister Hun Sen, recently, reiterated his concern over the chronic issue of land disputes at the seminar on national strategy on food security and nutrition in the governmental peace house in Cambodia on August 18, 2014.[443]

During the speech, the Prime Minister put strong blame on responsible authorities, at both local and national levels, for sluggishness (laziness) in resolving disputes, to the extent that affected citizens sought intervention in the capital.[444] The Prime Minister further added that when affected citizens ran for intervention seeking at the capital, authorities tried to block them by force from entering the capital. The Prime Minister confessed at the seminar that he rarely received petitions from dispute-affected citizens. Henceforward, the Prime Minister warned authorities not to accept petitions from dispute-affected citizens instead of him.[445] He further asserted that authorities did not follow his suggestions and worked only on paper.[446]

Land disputes have been a vexed issue for nearly three decades in post-war Cambodia. A number of land disputes have erupted into violence in some areas of the country in the past years. For instance, the villagers rioted against authorities exercising land expropriation in the Udong District of Kampong Speu

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[442] Sokheng Vong and Kevin Ponniah, "The Buck Stops Elsewhere," *Phnom Penh Post*, August 19, 2014.
[443] Pheap Aun and Reaksmey Hul, "Officials Trade Blame Over Kratie Land Dispute," *Cambodia Daily*, August 19, 2014; Vong and Ponniah, "The Buck Stops Elsewhere."
[444] Vong and Ponniah, "The Buck Stops Elsewhere"; Aun and Hul, "Officials Trade Blame Over Kratie Land Dispute."
[445] Vong and Ponniah, "The Buck Stops Elsewhere."
[446] Koh Santepheap, "Prime Minister Blames If Land Dispute Happens in Any Province, That Province Must Bear Responsibility" [នាយករដ្ឋមន្ត្រីបន្ទោស បើមានបញ្ហាដីធ្លីចេញពីខេត្តណា គឺខេត្តនោះទទួលខុសត្រូវ], August 19, 2014.

Province on June 09, 2011.[447] At least, ten people were wounded in this clash.[448] The military officers, serving as security guards for TTY Co. Ltd., opened fire at the villagers, who were protesting against the destruction of their cassava field in Snuol District of Kratie Province on January 18, 2012.[449] Four villagers were injured in this shooting.[450] In another case, hundreds of troops opened fire during suppression of the land claim movement in Chhlong District's Promar village of Kratie Province on May 15, 2012.[451] A 14-year-old girl was killed at scene, other two villagers were injured, thousands of local people were evacuated, and several protestors were charged and imprisoned.[452] This violence mirrored the seriousness of land disputes that needs to be addressed in Cambodia.

The previous chapter of this Dissertation argued that sluggishness of authorities responsible for land dispute resolution can be attributed to the hierarchical responsibility of public administration in Cambodia. This Chapter will present a more complete picture of the state of administration, as well as features of the property regime that are specific to Cambodia, concluding with a pair of case studies that illustrate how these factors interact in the context of actual disputes.

B. Cambodian Post-war Governmental Administration

Politics and public administration are closely linked in post-war Cambodia. Politics has overwhelmingly dominated public administration, which induces hierarchical constraints in public administration. This section will give a brief view of the political regime and administrative reform in post-war Cambodia.

1. Background of Political and Administrative Regime

[447] *Human Rights Watch Concern over Land Disputes in Cambodia*, dir. Radio Free Asia (RFA), June 23, 2011, radio broadcast.
[448] Ibid.
[449] LICADHO, *Attacks and Threats Against Human Rights Defenders in Cambodia 2010-2012*, December 2012, 15.
[450] Ibid.
[451] *Government Sends Troops to Crack Down People's Land Demand Movement in Kratie*, dir. Radio Free Asia (RFA), May 16, 2012, radio broadcast.
[452] *One Person Shot Dead in Land Fighting in Kratie*, dir. Radio Free Asia (RFA), May 16, 2012, radio broadcast; LICADHO, *Attacks and Threats Against Human Rights Defenders in Cambodia 2010-2012*.

Cambodia has experienced severe political turbulence and civil wars.[453] These have made post-war administrative reform encounter difficulties. Cambodia started to re-establish its administration from scratch after the collapse of the Khmer Rouge regime in 1979.[454] The new then-government continued to lead the country under a communist regime between 1979 and 1993, in which administration was centralized.[455] Subordinate officials (administrators and authorities) were appointed by the central government.[456]

However, the political and administrative regime was gradually changed since Cambodia agreed to end the chronic civil wars in 1991 and arranged the general election in 1993.[457] After the election, Cambodia declared the new Constitution on September 24, 1994 (hereinafter called "1993 Constitution").[458] The 1993 Constitution obliged Cambodia to follow democracy.[459] Both the political and administrative regime shifted from communism to democracy.[460]

The principle of power separation was clearly provided for in the 1993 Constitution.[461] Powers were separated into three branches – legislative, executive, and judicial.[462] The 1993 Constitution required elections for the National Assembly (lower house) at five-year intervals.[463] Cambodia has undergone five National Assembly elections since 1993. Among these elections, the fourth and fifth legislative terms were a critical

[453] Springer, "Violence, Democracy, and the Neoliberal 'Order,'" 143; Chandler, "The Tragedy of Cambodian History."
[454] Donovan, "Cambodia"; Kirby, "Judicial Independence and Accountability," 7.
[455] Brinkerhoff, "Rebuilding Governance in Failed States and Post-Conflict Societies," 11; Blunt and Turner, "Decentralisation, Democracy and Development in a Post-Conflict Society," 76.
[456] Blunt and Turner, "Decentralisation, Democracy and Development in a Post-Conflict Society," 76; Margaret Slocomb, "Commune Elections in Cambodia: 1981 Foundations and 2002 Reformulations," *Modern Asian Studies* 38, no. 02 (2004): 448, and 465–66.
[457] Ingrid Landau, "Law and Civil Society in Cambodia and Vietnam: A Gramscian Perspective," *Journal of Contemporary Asia* 38, no. 2 (May 2008): 247; Timothy Michael Carney and Lian Choo Tan, *Whither Cambodia?: Beyond the Election* (Institute of Southeast Asian, 1993), 2; Slocomb, "Commune Elections in Cambodia," 448; Andrew Robert Cock, "External Actors and the Relative Autonomy of the Ruling Elite in Post-UNTAC Cambodia," *Journal of Southeast Asian Studies* 41, no. 02 (2010): 242; John M. Sanderson and Michael Maley, "Elections and Liberal Democracy in Cambodia," *Australian Journal of International Affairs* 52, no. 3 (November 1998): 241.
[458] Constitution of Kingdom of Cambodia (1993); Margaret Slocomb, "The Nature and Role of Ideology in the Modern Cambodian State," *Journal of Southeast Asian Studies* 37, no. 03 (2006): 390.
[459] Law on National Election [ច្បាប់ស្តីពីការបោះឆ្នោតរើសតាំងតំណាងរាស្ត្រ], art. 2; Constitution of Kingdom of Cambodia, arts. 1 and 51; Slocomb, "The Nature and Role of Ideology in the Modern Cambodian State," 390.
[460] Mensher, "The Tonle Sap: Reconsideration of the Laws Governing Cambodia's Most Important Fishery," 797; Öjendal and Sedara, "Korob, Kaud, Klach," 510.
[461] Constitution of Kingdom of Cambodia, art. 51.
[462] Ibid.
[463] Law on National Election, art. 3; Constitution of Kingdom of Cambodia, art. 78.

turning-point for the political and administrative regime; especially, concerning institutional and hierarchical constraints in Cambodia.[464]

Five political parties won the fourth election, the Cambodia People's Party (CPP), 90 seats; Sam Rainsy Party, 26 seats; Human Rights Party, 3 seats; Norodom Ranaridth Party, 2 seats; and FUNCINPEC[465] party, 2 seats for the legislative term (2008 – 2013).[466] One party dominated the political and administrative regime in Cambodia in the fourth legislative term.[467] The winning party created coalition government with the Norodom Ranaridth and FUNCINPEC parties.[468]

This resulted in an imbalance of power. The opposition did not have enough authority to call for any government member to appear and answer questions relevant to his or her practice in the National Assembly. The National Assembly mostly approved what was proposed by the executive. As a result, the National Assembly came to be viewed by some as a rubber-stamp institution.[469]

Dominance of the single ruling party changed in the fifth legislative term, which was elected on July 28, 2013.[470] Only two political parties won seats in the National Assembly in this election – the CPP won 68 seats, and the Cambodia Nation Rescue Party (CNRP), which was combined from the Sam Rainsy Party and Human Rights Party, won 55 seats.[471] The result of this election showed that the ruling CPP lost 22 seats, while the opposition party gained 26 seats in the fifth legislative term.[472]

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[464] Duncan Mccargo, "Cambodia in 2013: (No) Country for Old Men?," *Asian Survey* 54, no. 1 (February 1, 2014): 72.

[465] FUNCINPEC is the abbreviation of National United Front for an Independent, Neutral, Peaceful, and Cooperative Cambodia.

[466] Chandler, "Cambodia in 2009," 229; Caroline Hughes, "Cambodia in 2008: Consolidation in the Midst of Crisis," *Asian Survey* 49, no. 1 (February 1, 2009): 206; Mccargo, "Cambodia in 2013," 74.

[467] Hughes, "Cambodia in 2008," 206 and 208.

[468] Ibid., 207.

[469] *Son Chhay Names National Assembly "Rubber-Stamp Institution"* [សោក សុន ឆ័យ ជាក់ចារឲ្យរដ្ឋសភាជារូបសាច័នប្រថាប់ត្រា], dir. Radio Free Asia (RFA), December 4, 2012, radio broadcast; Kevin Ponniah, "Leadership Elections Set," *Phnom Penh Post*, August 26, 2014.

[470] Cambodian Center for Human Rights, *Politics in the Kingdom: Increasing Female Representation2013 National Assembly Elections*, October 2013, 5.

[471] Mccargo, "Cambodia in 2013," 74–75.

[472] Ibid.

In spite of gaining more seats in the National Assembly, the CNRP denied the election result by allegation of fraud and boycotted the National Assembly.[473] The CPP formed the National Assembly and the government itself on September 23 and 25, 2013, respectively.[474] The government thus formed operated under a constitutional cloud.[475]

The CNRP stayed outside the National Assembly and protested for re-election resulting in political deadlock for almost a year. The parties made an agreement on political settlement to form a National Assembly on July 22, 2014.[476] Both parties agreed to divide and share positions in various committees, president, and vice-president of the National Assembly.[477] This secured the smooth process of the National Assembly. However, the effects the standoff persisted in the executive, which was composed of only members of the winning CPP.

2. Reform of Governmental Administration in Cambodia

Cambodia has been under the control of one dominating party since the collapse of the Khmer Rouge regime.[478] The reform of public administration was gradually made post-1993. The authorization of division between central and local government was made under the 1993 Constitution.[479] However, the reform of local government seemed rather slow after Cambodia changed the political regime and adopted the new constitution in 1993.[480] This section will discuss the development of administrative reform in Cambodia, which is divided into two levels: (1) central or national government and (2) local or sub-national government.

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[473] Ibid., 76.
[474] Phnom Penh Post, "Assembly, a House Divided," September 23, 2013; Mccargo, "Cambodia in 2013," 76.
[475] The 1993 Constitution requires at least 120 members for forming the National Assembly.
[476] *Agreement on Political Settlement Between Cambodia People's Party and Cambodia Nation Rescue Party* [កិច្ចព្រមព្រៀងស្តីពីដំណោះស្រាយនយោបាយរវាងតំណាងបក្សប្រជាជន និង តំណាងបក្សសង្គ្រោះជាតិ], July 22, 2014.
[477] Ibid.
[478] Hughes, "Cambodia in 2008," 206 and 207; Blunt and Turner, "Decentralisation, Democracy and Development in a Post-Conflict Society," 76; Chandler, "Cambodia in 2009," 229; Mccargo, "Cambodia in 2013," 74.
[479] Constitution of Kingdom of Cambodia, arts. 145 and 146 (1993).
[480] Caroline Hughes, "Cambodia," *IDS Bulletin* 37, no. 2 (April 1, 2006): 76; Mensher, "The Tonle Sap: Reconsideration of the Laws Governing Cambodia's Most Important Fishery," 797; Blunt and Turner, "Decentralisation, Democracy and Development in a Post-Conflict Society," 76.

a). Central/National Government

The national/central government refers to the cabinet and various ministries. The members of the central government are provided in the 1993 Constitution. Article 118 of the 1993 Constitution determines the members of the central government as follows:

> Cabinet is the government of the Kingdom of Cambodia. Cabinet is led by one prime minister accompanied by deputy prime ministers, state ministers, ministers, and secretaries of state as members.[481]

A year later, the government enacted the Law on Organization and Functioning of Cabinet to provide its power and process in 1994 (hereinafter called the "1994 Cabinet Law").[482] The 1994 Cabinet Law reiterated the members of the Cambodian cabinet members as that of the 1993 Constitution.[483]

However, the 1994 Cabinet Law further added the new members into the cabinet. Article 6 of the 1994 Cabinet Law determines "undersecretaries of states," who are political members, as non-permanent members of the cabinet.[484] Undersecretaries of state are appointed by Royal Decree upon the request of the Prime Minister.[485]

Presently, the central government of Cambodia has one cabinet, 26 ministries, and one secretariat of civil aviation.[486] The current members of the central government consist of 1 prime minister, 9 deputy prime ministers, 13 prime minster-accompanied delegate ministers, 15 state ministers, 27 ministers, 179 secretaries of state, and 235 undersecretaries of state.[487] The following table shows the current members of the central government in Cambodia.

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[481] Constitution of Kingdom of Cambodia, art. 118.
[482] Law on Organization and Functioning of Cabinet [ច្បាប់ស្តីពីការរៀបចំ និង ការប្រព្រឹត្តទៅនៃគណៈរដ្ឋមន្ត្រី] (1994).
[483] Ibid., art. 4.
[484] Ibid., art. 6.
[485] Ibid.
[486] Royal Decree on Appointment of Royal Government of Cambodia [ព្រះរាជក្រឹត្យតែងតាំងរាជរដ្ឋាភិបាលនៃព្រះរាជាណាចក្រកម្ពុជា] (2013); *Does Cambodia Need Big-head Government?* [តើកម្ពុជាពិតជាត្រូវការគណៈរដ្ឋមន្ត្រីក្បាលធំហួសមាឌមែនឬទេ?], dir. Radio Free Asia (RFA), December 4, 2013, radio broadcast.
[487] Royal Decree on Appointment of Royal Government of Cambodia; Royal Decree on Appointment of Undersecretary of Royal Government of Cambodia [ព្រះរាជក្រឹត្យតែងតាំងរដ្ឋលេខាធិការនៃរាជរដ្ឋាភិបាលនៃព្រះរាជាណាចក្រកម្ពុជា] (2013); *Civil Society Organizations Request Both Parties to Discuss to Increase Women in Politics* [សង្គមស៊ីវិលស្នើដូចបក្សធំៗពិភាក្សារឿងចំនួនស្ត្រីក្នុងទិស័យនយោបាយ], dir. Radio Free Asia (RFA), September 3, 2014, radio broadcast; *Does Cambodia*

Figure 21: The number of the current Cabinet of Cambodia

Members of Cambodian Cabinet	
Status	Number
Prime Minister	1
Deputy Prime Minister	9
State Minster	15
Prime Minister-accompanied Delegate Minister	13
Minister	27
Secretary of State	179
Undersecretary of State	235
Total	479

Source: Author, compilation from the Royal Decrees, September 24, 2013.

b). Local/Sub-National Government

The local government is also provided in the 1993 Constitution. The 1993 Constitution determines that the administration of local government be made by an organic law. Articles 145 and 146 of the 1993 Constitution state that:

> Article 145
>
> Territory of the Kingdom of Cambodia is divided into capital, province, municipality, district, *khan*, commune, *sangkat*.
>
> Article 146
>
> Capital, province, municipality, district, *khan*, commune, *sangkat* shall be administered by an organic law.[488]

Upon this provision, the government developed and passed organic laws governing local government in two stages. The first was the reform of commune/*sangkat* administration by enacting the Law on Administration of Commune/*Sangkat* in 2001 (hereinafter called the "2001 Commune Administrative Law").[489] The second was the reform of the upper territorial administration of commune/*sangkat*; namely,

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Need Big-head Government?; *Cabinet Has More Than 60 Advisors and Assistants* [**អីស្តីការគណៈរដ្ឋមន្ត្រីមានទីប្រឹក្សា និង ជំនួយការ ជាង៦០នាក់**], dir. Radio France Internationale (RFI), October 19, 2013, radio broadcast.

[488] Constitution of Kingdom of Cambodia, arts. 145 and 146 (1993).

[489] See: Law on Administration of Commune/Sangkat [**ច្បាប់ស្តីពីការគ្រប់គ្រងរដ្ឋបាលឃុំ សង្កាត់**] (2001).

district/*khan*, province/municipality, and capital by enacting the Law on Administration of Capital, Province/Municipality, District/*Khan* in 2008 (hereinafter called the "2008 Local Administrative Law").[490]The following section will demonstrate the administration and process of local government in post-organic laws.

i. Administration of Commune/*Sangkat*

Commune/*sangkat* became a territorial public legal entity when its administration was under the Law on Administration of Commune/*Sangkat* in 2001.[491] The 2001 Commune Administrative Law empowered the commune/*sangkat* administration to follow decentralization. [492] Therefore, the commune/*sangkat* administration is led by a council, called "commune/*sangkat* council."[493] The commune/*sangkat* council is elected by local people within every 5 years.[494] The first election was made in 2002.[495] Connume/*sangkat* councils have been elected three times as of 2012.

According to the 2001 Commune Administrative Law, commune/*sangkat* council has from 5 to 11 councilors depending on demography and geography. [496] The selection of these councilors to commune/*sangkat* council depends on the result of a proportional election, in which candidates are members of political parties. [497] The candidate receiving the largest number of votes becomes the chief of commune/*sangkat* council, which is called "commune/*sangkat* chief."[498] Consecutive two candidates, who receive relatively consecutive votes from the list, become the first and second vice-chief of commune/*sangkat* council.[499] The rest are ordinary members of commune/ *sangkat* council.

Currently, Cambodia has 1,633 communes/*sangkats*. Commune/*sangkat* councils consist of 11,459 persons.[500] Besides councilors, commune/*sangkat* council has a staff who works as an administrative clerk in

[490] See: Law on Administration of Capital, Province/Municipality, District/Khan (2008).
[491] See: Law on Administration of Commune/Sangkat.
[492] Ibid., art. 1.
[493] Ibid., art. 9.
[494] Ibid., art. 11; Law on Election of Commune/Sangkat Council [ច្បាប់ស្តីពីការបោះឆ្នោតជ្រើសរើសក្រុមប្រឹក្សាឃុំ សង្កាត់], art. 3 (2001).
[495] Blunt and Turner, "Decentralisation, Democracy and Development in a Post-Conflict Society," 76; Slocomb, "Commune Elections in Cambodia," 447.
[496] Law on Administration of Commune/Sangkat, art. 12.
[497] Ibid., art. 15; Law on Election of Commune/Sangkat Council, arts. 5 and 98.
[498] Law on Administration of Commune/Sangkat, art. 32.
[499] Ibid., art. 33.
[500] Committee for Free and Fair Election, *Final Assessment and Report on 2012 Commune Council Election*, 2012, 10; Women's Center of Cambodia, *Analysis - Cambodia Commune/Sangkat Council Election*, 2012, 12.

commune/*sangkat* administration.[501] An administrative clerk is appointed by the Minister of Interior to help the council in its daily work.[502]

Cambodia has a lower territorial administration than that of commune/*sangkat* called "village."[503] Village is the lowest territorial administration in Cambodian territorial administration, which falls outside the constitutional provision.[504] However, village is within territorial administration of commune/*sangkat*.[505]

Village administration does not have governing law, but operates under direct instruction of the Ministry of Interior.[506] Village administration is governed by a village chief, vice-chief, and a member.[507] Commune/*sangkat* council selects a village chief. Then, the village chief chooses other two villagers as his or her members. The Ministry of Interior will appoint them as village administrators.

ii. Administration of District, *Khan*, Province, Municipality, and Capital

After the reform of commune/*sangkat* administration in 2001, the government made further effort to reform the upper level of commune/*sangkat* administration; namely, in district, *khan*, province, municipality, and capital administration (hereinafter called "mid-tier offices"). The effort of reform appeared when the government passed the Law on Administration of Capital, Province, Municipality, District, *Khan* in 2008.[508]

Mid-tier offices became public legal entities when the 2008 Local Administrative Law took effect.[509] The 2008 Local Administrative Law empowered the mid-tier offices to benefit from both decentralization and deconcentration.[510] Mid-tier offices came to be controlled by two entities; namely, council and governor.[511]

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[501] Blunt and Turner, "Decentralisation, Democracy and Development in a Post-Conflict Society," 83.
[502] Law on Administration of Commune/Sangkat, art. 28; Blunt and Turner, "Decentralisation, Democracy and Development in a Post-Conflict Society," 83.
[503] Law on Administration of Commune/Sangkat, arts. 30 and 31.
[504] If one sees the Articles 145 and 146 of the 1993 Constitution, village is not mentioned as a territorial administration in Cambodia. However, village is, in practice, an active and watchdog body of the central government at closest level to local residents.
[505] Slocomb, "Commune Elections in Cambodia," 447.
[506] Law on Administration of Commune/Sangkat, art. 30.
[507] See: Ministry of Interior, *Action Plan on Village-Commune Safety Enforcement* [ផែនការណែនាំស្តីពីការចាត់តាំងអនុគ្គសោធនយោធាយកភូមិ ឃុំមានសុវត្ថិភាព], 2010; Law on Administration of Commune/Sangkat, art. 30.
[508] See: Law on Administration of Capital, Province/Municipality, District/Khan (2008).
[509] Ibid., art. 9.
[510] Ibid., art. 2.
[511] See: Law on Administration of Capital, Province/Municipality, District/Khan.

Mid-tier office councils are under indirect election.[512] The council is not directly elected by local people, but by their representation; namely, by commune/*sangkat* councils.[513] Election of mid-tier office councils are made by proportional system.[514] Any candidate, who wishes to stand for election, must register his or her candidacy in the list of any political party as membership.[515] The division of seats in council depends on election result. Any candidate, who receives most votes, will become the chief of council.[516]

The 2008 Local Administrative Law determines the number of each council relying on demography and geography.[517] Currently, Cambodia has 1 capital, 24 provinces, 26 municipalities, 159 districts, and 12 *khan*s.[518] This law sets the minimum and maximum of each council; for example, the council of Phnom Penh Capital does not exceed 21 councilors. Provincial councils have from 9 to 21 councilors. Municipal councils have from 7 to 15 councilors. District or *khan* councils have from 7 to 19 councilors.[519] Mid-tier office councils have a five-year mandate.[520]

Since the introduction of decentralization and deconcentration to administration of mid-tier offices in 2008, councils of these administrations have elected two times; namely, in 2009 and 2014. The second election was held on May 18, 2014, in which 11,459 commune/*sangkat* councilors elected 3,324 councilors of capital, province, municipality, district, and *khan* administration.[521]

Apart from councils, mid-tier offices have a council of governors.[522] The council of governors consists of one governor and a number of deputy governors.[523] The 2008 Local Administrative Law determines the minimum and maximum of the council of governors; for instance, the Phnom Penh council of

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[512] Ibid., art. 14; Law on Election of Capital, Provincial, Municipal, District, and Khan Council [ច្បាប់ស្តីពីការបោះឆ្នោតជ្រើសរើសក្រុមប្រឹក្សារាជធានី ក្រុមប្រឹក្សាខេត្ត ក្រុមប្រឹក្សាក្រុង ក្រុមប្រឹក្សាស្រុក ក្រុមប្រឹក្សាខណ្ឌ], arts. 1 and 4 (2008).

[513] Law on Election of Capital, Provincial, Municipal, District, and Khan Council, art. 27.

[514] Ibid., art. 13.

[515] Ibid., art. 16.

[516] Law on Administration of Capital, Province/Municipality, District/Khan, art. 17; Law on Election of Capital, Provincial, Municipal, District, and Khan Council, art. 13.

[517] Law on Administration of Capital, Province/Municipality, District/Khan, art. 18.

[518] National Election Committee (គណៈកម្មាធិការជាតិរៀបចំការបោះឆ្នោត), *The Number of Councils for Second Term Increases 70 Persons* [ចំនួនសមាជិកក្រុមប្រឹក្សាសម្រាប់អាណត្តិទី២កើនឡើង៧០នាក់], 2014.

[519] Law on Administration of Capital, Province/Municipality, District/Khan, art. 18.

[520] Ibid., art. 15; Law on Election of Capital, Provincial, Municipal, District, and Khan Council, art. 2.

[521] National Election Committee, *The Number of Councils for Second Term Increases 70 Persons*.

[522] Law on Administration of Capital, Province/Municipality, District/Khan, art. 138.

[523] Ibid., art. 139.

governors consists of at most 7 persons, while provincial council of governors ranges from 3 to 7 persons, and municipal, district, and *khan* council of governors ranges from 3 to 5 persons.[524]

Central government appoints each governor to serve in the governor council by rank. The King appoints governor of capital and province by Royal Decree upon the request from the Prime Minister and the Minister of Interior.[525] The Prime Minister appoints the deputy governor of capital and province; and governor of municipality, district, and *khan* by Sub-decree upon the request of the Minister of Interior.[526] The Minister of Interior appoints the deputy governor of municipalities, districts, and *khan* by *Prakas.*[527] Council of governors has a 4-year mandate but can be reappointed for another 4-year mandate.[528]

Councils and governors of mid-tier offices have interrelations. Councils work as legislative teams while governors work as executive teams. Councils arrange development plans at the local level, and governors implement these plans.[529] Governors, in practice, had more powers than councils the first legislative term (2009 – 2014).[530] The following table shows the division of territorial administration in Cambodia.

Figure 22: The division of territorial administration of local government in Cambodia

Territorial Administration in Cambodia		
Capital	1	25
Province	24	
Municipality	26	197
District	159	
Khan	12	
Commune	1,406	1,633
Sangkat	227	
Village	14,139	14,139

Source: Author, compilation from the report of Ministry of Interior, 2014

[524] Ibid., art. 140.
[525] Ibid., art. 141.
[526] Ibid.
[527] Ibid.
[528] Ibid., art. 147.
[529] See: Law on Administration of Capital, Province/Municipality, District/Khan.
[530] *Lawyers: Power of Council Only in Hand of Provincial and District Governor* [អ្នកច្បាប់៖ អំណាចក្រុមប្រឹក្សានៅតែក្នុងដៃទៅម្ចាយខេត្តនិងស្រុក], dir. Voice of America (VoA), May 16, 2014, radio broadcast.

3. Relation between Central and Local Government

The relation between central and local government is crucial to autonomy. Since the introduction of organic laws to commune/*sangkat* administration in 2001, and capital, province, municipality, district, and *khan* administration in 2008, local government become a territorial public legal entity, which follows administrative decentralization and deconcentration.

In spite of acquiring legal personality, local government does not have local autonomy.[531] Local government still suffers from hierarchical constraints and restriction of its powers.[532] Commune/*sangkat* act as the state representative agent under the designation or delegation from the central government in order to serve local people.[533]

Furthermore, commune/*sangkat* administration is subject to strict monitoring and intervention from the Ministry of Interior.[534] The Ministry of Interior can intervene in a number of issues over commune/*sangkat* administration such as checking legitimacy of work management and performance, use of power, and capacity development of commune/*sangkat*.[535] For such an intervention, the Minister of Interior can delegate this task to upper territorial administration such as capital, province, municipality, district, and *khan* to do the job. [536] If commune/*sangkat* administration cannot fulfill the required work, the Ministry of Interior will dissolve that commune/*sangkat* council.[537]

Apart from these, commune/*sangkat* administration is also restricted in its relations to upper levels of administration and outsiders, such as government, ministry, institutions, authority, agent of government, and

[531] Brinkerhoff, "Rebuilding Governance in Failed States and Post-Conflict Societies," 9; Blunt and Turner, "Decentralisation, Democracy and Development in a Post-Conflict Society," 76–77.
[532] Brinkerhoff, "Rebuilding Governance in Failed States and Post-Conflict Societies," 11; Blunt and Turner, "Decentralisation, Democracy and Development in a Post-Conflict Society," 77.
[533] Law on Administration of Commune/Sangkat, art. 42 (2001).
[534] Ibid., art. 55.
[535] Ibid., 53.
[536] Ibid., arts. 53 and 56.
[537] Ibid., art. 57.

various non-governmental organizations (NGOs). Such a relationship can be made only if it goes through the Ministry of Interior.[538]

Administration of mid-tier offices is under stricter control than commune/*sangkat* administration. Mid-tier offices are responsible for legal compliance to the central government.[539] These are representative agents of the central government and bear responsibility for government, ministry of Interior, and other institutions who are their superiors.[540]

Furthermore, administration of mid-tier offices is also restricted of self-determination concerning a number of sensitive issues.[541] In such a case, the administration must ask for opinion from the Minister of Interior before issuing any decision.[542]Researchers Peter Blunt and Mark Turner have described Cambodian local administration bodies as "administrative arms of central government and the line ministries."[543]

More importantly, even though local government – mid-tier offices and commune/*sangkat* – becomes a public legal entity, they do not enjoy independence in their finances. Both organic laws of 2001 and 2008 prohibit borrowing by local government entities.[544] Therefore, local governments cannot borrow money or take action that causes debt for administration. The following figure shows the hierarchical relation and responsibility of central and local governments in Cambodia.

[538] Sub-decree on Delegation of Power, Role, and Duty to Commune/Sangkat [អនុក្រឹត្យស្តីពីការផ្ទេរមុខងារអំណាច តួនាទី និង តារកិច្ច ទៅក្រុមប្រឹក្សាឃុំ សង្កាត់], art. 42 (2002).

[539] Law on Administration of Capital, Province/Municipality, District/Khan, art. 35 (2008).

[540] Ibid., art. 154.

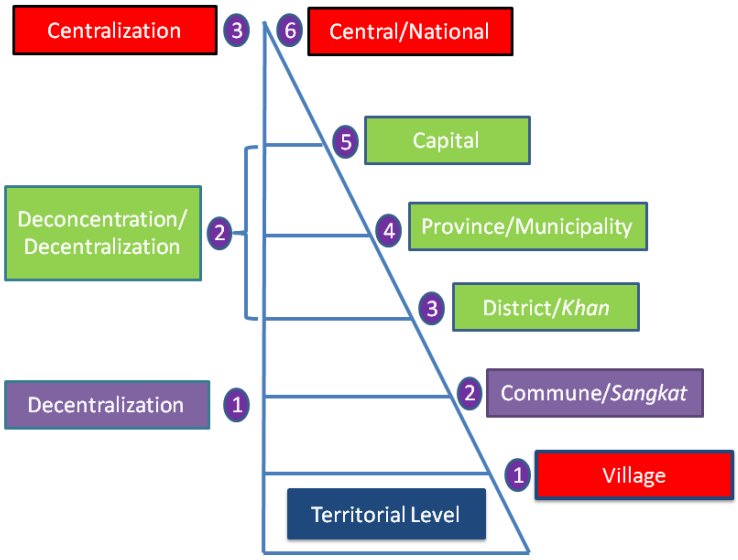
[541] Ibid., art. 82.

[542] Ibid.

[543] Blunt and Turner, "Decentralisation, Democracy and Development in a Post-Conflict Society," 79.

[544] Law on Administration of Capital, Province/Municipality, District/Khan, art. 252; Law on Administration of Commune/Sangkat, art. 80 (2001).

Figure 23: The hierarchical structure of whole administration in Cambodia



Source: Author

In short, governmental administration of Cambodia rests in three administrative regimes – centralization, deconcentration, and decentralization. The centralization power rests in the cabinet and various ministries. The joint administrative regime of decentralization and deconcentration is in capital, province, municipality, district, and *khan* level. The decentralization is in administration of commune/*sangkat* level. However, Cambodian decentralization regime is not complete yet because this decentralization is, in practice, still under strict control from centralized government. Blunt and Turner have remarked that "decentralised local democracy was only introduced more than 20 years after the overthrow of the Khmer Rouge" in Cambodia, but it was a "limited form of decentralization" and the reality of such decentralized power was "one of continued central control."[545]

4. Challenge of Governmental Administration in Practice

Politics and public administration have mutual influence in Cambodia. Strong politics will influence responsibility of public administration. In this context, administrators will adapt themselves to political influence rather than administrative responsibility provided under law. Cambodian post-war politics and public administration are inextricably intertwined.

[545] Blunt and Turner, "Decentralisation, Democracy and Development in a Post-Conflict Society," 76.

Cambodian post-war politics, like politics in general, is not transparent. After the collapse of the Khmer Rouge regime, Cambodia did not have a national reconciliation of the four fighting factions.[546] However, the four faction parties agreed to cease fighting by the Paris Peace Agreement in 1991 and arranged a general election in 1993 under the auspices of the United Nations Transitional Authority in Cambodia (UNTAC) in 1993.[547]

After the 1993 election, Cambodia still could not reunite the winning political parties to form a government. In order to reunite and be able to form a government, Cambodia adhered to power-sharing among the winning political parties, in which the opposition was allowed a co-prime minister and a number of co-ministers in post-1993 election government.[548] Despite the co-government, the incumbents did not trust each other, and this led to internal conflict leading to what a number of scholars called a *coup d'état*, in 1997.[549]

Competition of political parties has not been entirely transparent. For example, in one reported incident, one political party tried to weaken and defeat another by buying members of other parties.[550] In such cases, positions are created for political defectors in public administration.[551] Further, the integration of Khmer

[546] Montesano, "Current International Efforts in Cambodia," 86–87.
[547] Landau, "Law and Civil Society in Cambodia and Vietnam," 247; Carney and Tan, *Whither Cambodia?*, 2; Slocomb, "Commune Elections in Cambodia," 448; Cock, "External Actors and the Relative Autonomy of the Ruling Elite in Post-UNTAC Cambodia," 242; Sanderson and Maley, "Elections and Liberal Democracy in Cambodia," 241.
[548] Springer, "Violence, Democracy, and the Neoliberal 'Order,'" 144; Marks, "New Cambodian Constitution," 60; David Chandler, "Will There Be a Trial for the Khmer Rouge?," *Ethics & International Affairs* 14, no. 1 (March 1, 2000): 77; Ronald Bruce St. John, "Democracy in Cambodia -- One Decade, US$5 Billion Later: What Went Wrong?," *Contemporary Southeast Asia: A Journal of International & Strategic Affairs* 27, no. 3 (December 2005): 408.
[549] Springer, "Violence, Democracy, and the Neoliberal 'Order,'" 144; Hughes, "Cambodia," 72; Blunt and Turner, "Decentralisation, Democracy and Development in a Post-Conflict Society," 76; St. John, "Democracy in Cambodia -- One Decade, US$5 Billion Later," 411; Sorpong Peou, "Cambodia in 1998: From Despair to Hope?," *Asian Survey* 39, no. 1 (January 1, 1999): 20; Dolores A. Donovan, "Codification in Developing Nations: Ritual and Symbol in Cambodia and Indonesia," *UC Davis L. Rev.* 31 (1997): 698; Slocomb, "The Nature and Role of Ideology in the Modern Cambodian State," 394.
[550] Hughes, "The Politics of Gifts," 470; Blunt and Turner, "Decentralisation, Democracy and Development in a Post-Conflict Society," 76.
[551] Hughes, "The Politics of Gifts," 470; Blunt and Turner, "Decentralisation, Democracy and Development in a Post-Conflict Society," 76.

Rouge forces into Cambodian armed forces in 1998 further added burden to post-war Cambodian administration.[552]

These factors pushed Cambodian post-war administration into a pattern of "neo-patrimonialism."[553] This caused difficulties in administrative reform and aggravated hierarchical constraints in public administration.[554] Law enforcement and institution autonomy were weak despite the introduction of democracy and rule of law in 1993.

The Cambodian neo-patrimonial system is characterized a number of remarkable features. Neo-patrimonialism rests on "pyramidal hierarchies" of network to support and protect each other in public administration, as Caroline Hughes (2006) put forward the form of Cambodian post-war administration:

> …is pursuit of *khsae* or networks of support and protection, which operate through patron-client or kin relationships that combine pyramidal hierarchies of power and respect with personal dyads of favour and reciprocity.[555]

The pyramidal hierarchies produce a patron-client relation in post-war administration.[556] The patron-client relation has appeared in two kinds of noticeable relations. The first is the elite-patron relation, and the second is the popular patron-client relation.[557] Such a relation was strong in Cambodian administration, as Rob Ricigliano (2009) asserted:

> Central to how Cambodia works today is the "patron-client" relationship. Simply put, society is organized around the idea that there is a powerful patron who, in exchange for support from the rest of the society, assures people that their needs are met. This basic social compact has existed for many centuries and is deeply rooted in Cambodian culture. It shapes people's expectations of government and provides social order. Today, in Cambodia, the patron-client relationship takes on two distinct

[552] Biddulph, "Tenure Security Interventions in Cambodia," 228; Chandler, "Will There Be a Trial for the Khmer Rouge?," 69; Hughes, "Cambodia," 69; Sigfrido Burgos and Sophal Ear, "China's Strategic Interests in Cambodia: Influence and Resources," *Asian Survey* 50, no. 3 (May 1, 2010): 617; Peou, "Cambodia in 1998," 20–21.
[553] Daniel Adler, Douglas Porter, and Michael Woolcock, "Legal Pluralism and Equity: Some Reflections on Land Reform in Cambodia," *Justice for the Poor* 2, no. 2 (April 2008): 1; Kheang Un and Sokbunthoeun So, "Land Rights in Cambodia: How Neopatrimonial Politics Restricts Land Policy Reform," *Pacific Affairs* 84, no. 2 (June 2011): 294; Brinkerhoff, "Rebuilding Governance in Failed States and Post-Conflict Societies," 11; Chandler, "Cambodia in 2009," 229; Slocomb, "The Nature and Role of Ideology in the Modern Cambodian State," 390.
[554] Chandler, "The Tragedy of Cambodian History," 410.
[555] Hughes, "The Politics of Gifts," 470.
[556] Andrew Robert Cock, "Anticipating an Oil Boom: The 'Resource Curse' Thesis in the Play of Cambodian Politics," *Pacific Affairs* 83, no. 3 (September 2010): 527.
[557] Rob Ricigliano, *Cambodia: Adjustment or Conflict?* (Interagency Conflict Assessment, USAID, April 2009), 9.

forms: one that operates among the elites in the society (Elite Patron-Client System) and one that operates among the vast majority of Cambodians (Popular Patron-Client System).[558]

The patron-client system causes incumbents to bear reduced responsibility for provided obligation by laws and regulations.[559] This system makes incumbents intend to be responsible for their superiors rather obligation prescribed by law, as Netra Eng and David Craig (2009) put:

> In Cambodia, neo-patrimonialism most commonly involves powerful "backers" who provide security, protection and opportunity for advancement and extra rewards in return for personalised loyalty. Clients become part of an entourage around the backer, or, more commonly, part of a "line", a hierarchical connection extending up to the powerful, centrally connected backer. Whole ministries can become to a significant extent the personalised fief of a patron, who will install members of his network in all the significant roles and offer advancement based on further alignment with the network and its members' interests.[560]

The patron-client system is easily fallen into rent-seeking, which causes the slow and interrupted process of the systematic administration. In common, top elites have more opportunities to amass unofficial fees from various channels of rent-seekers, as Simon Springer (2009) asserted:

> The shadow state response allows elites to amass extraordinary wealth that is pocket rather than put back into developing the country, as this money is obtained through unofficial channels. Potential rivals are bound to the rulers in exchange for largesse, negating the creation of strong bureaucracies that could potentially heighten independent tendencies among elites. Such actually existing neoliberalism thereby allows systems of clientelism and patronage to continue.[561]

In this context, incumbents use their positions for private benefit. Thus, rent-seekers often seek top position in government for private capital gaining rather legal obligatory compliance, as Andrew Robert Cock (2010) put:

> This is partly because holding a senior position within the state apparatus has been one of the major avenues of private capital accumulation, with senior government officials actively seeking to advance their individual and network's interest through the powers they exercise in the holding of governmental office.[562]

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[558] Ibid.
[559] Brinkerhoff, "Rebuilding Governance in Failed States and Post-Conflict Societies," 12; Caroline Hughes and Joakim Öjendal, "Reassessing Tradition in Times of Political Change: Post-War Cambodia Reconsidered," *Journal of Southeast Asian Studies* 37, no. 03 (2006): 418; Feinberg, "The Epidemic of Petit Corruption in Contemporary Cambodia," 288.
[560] Netra Eng and David Craig, *Accountability and Human Resources Management in Decentralized Cambodia*, CDRI Working Paper Series No. 40, 2009, 33.
[561] Springer, "Violence, Democracy, and the Neoliberal 'Order,'" 144.
[562] Cock, "External Actors and the Relative Autonomy of the Ruling Elite in Post-UNTAC Cambodia," 243.

Neo-patrimonialism can have the effect of distorting the application. Responsible institutions could apply law selectively, as Daniel Adler, Douglas Porter, and Michael Woolcok (2008) raised:

> [I]n 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.[563]

In this context, Fabian Thiel (2010) called Cambodian post-war administrative structure an "'elite capture of law.'"[564] Such an administration, so-called neo-patrimonialism, undermined people's trust in government. This clearly showed in the fifth general election on July 28, 2013. The powerful ruling CCP, who had controlled the country over three decades, lost 22 seats in the National Assembly. The Prime Minister publicly blamed subordinate ministries, authorities, and state institutions, who laid claim to certain state organs as places or houses of their families at the first session of the fifth Cabinet meeting on September 25, 2013.[565]

During the public address, the Prime Minister committed to make a deep reform of public administration in the fifth legislative term (2013 – 2018).[566] The Prime Minister raised three steps for public administration reform in order to abolish nepotism and cronyism in state institutions:

> First, you must use a mirror to look at yourself.
>
> Second, you must take a bath to scrub your body.
>
> Third, you must heal your disease; otherwise, let others scrub your body.
>
> Prime Minister Hun Sen, Address of first Cabinet session on September 25, 2013.[567]

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[563] Adler, Porter, and Woolcock, "Legal Pluralism and Equity," 1.
[564] Thiel, "Donor-Driven Land Reform in Cambodia—Property Rights, Planning, and Land Value Taxation," 238.
[565] Cambodia Daily, "After Reform Promise, a Return to Statecraft as Usual," December 5, 2013; *Can New Government Scrub Old Officials?* [តើរដ្ឋាភិបាលថ្មីអាចដុសក្អែលមន្ត្រីចាស់បានដែរឬទេ?], dir. Radio France Internationale (RFI), September 26, 2013, radio broadcast.
[566] Cambodia Daily, "After Reform Promise, a Return to Statecraft as Usual"; *Can New Government Scrub Old Officials?*
[567] Cambodia Daily, "After Reform Promise, a Return to Statecraft as Usual"; *Can New Government Scrub Old Officials?*

The Prime Minister's speech concerning administration reform is a Khmer metaphor, which can be unpacked as follows. The first step is to leave ministries and state institutions opportunity to see and check what they have done in their supervised institutions once again. The second step is that if they see problems, they must take measure to clean or abolish these problems. The third step is that if they do not take action to resolve problems, let other authorities intervene, resolve, and punish all parties concerned. The Prime Minister's measure is favorable and leaves a chance for subordinated officials to correct mistakes and start to reform in this term.[568]

Hence, Cambodia is at a crossroads for change. This Dissertation should be understood as one contribution to discourse on reform called forth by the Prime Minister's forceful statements and concern on the land dispute issue. The Dissertation aims to propose methods of reforming ADR and judicial institutions based upon experience, and upon a comparison of Cambodian experience with that of two jurisdictions with more mature property systems.

Understanding the cause of land dispute is a necessary step toward that end. Accordingly, the next sections will conceptualize the substantive law and institutional arrangements of land administration.

C. Concept and Division of Land Ownership in Cambodia

Each country has a distinct historical relation to its land. Land tenure and ownership arise from people and enduring labor on such occupied land. Cambodia went through its history by enduring human labor on such land. Cambodia has its own unique features of land tenure and ownership. This will cover the background of land tenure and ownership, special division, and distinguished relations of such division in Cambodian property laws.

1. Background of Land Ownership in Cambodia

[568] However, Cambodia's current issue has reached the third measure. The third measure is appropriate to restore public trust in state institutions.

In the ancient period, land belonged to the King in Cambodia.[569] There was no private ownership; however, people had a right to occupy and use land. [570] Although people were not formal owners of land in theory, people were assumed owners of occupied land through tilling the land in practice.[571] This tradition became deeply entrenched in Cambodian society leading to a customary practice lasting for centuries.[572]

France colonized Cambodia from 1863 to 1953. France started to introduce a Western property system into Cambodia. In this spirit, the Convention, which was regarded as the first Cambodian land law, was declared to invalidate the exclusive royal land and recognize private ownership in Cambodia in 1884.[573] The introduction of Western property concepts ultimately crystallized when Cambodia promulgated the first Civil Code in 1920 (hereinafter called the "1920 Civil Code").[574]

The 1920 Civil Code divided Cambodian land into two categories: (1) private property and (2) collective property. Private property referred to any land that had been privately occupied by each individual. [575] Collective property divided into two categories: public property of collective and private property of collective.[576]

The 1920 Civil Code did not abandon the entrenched custom of land tenure practice in Cambodia.[577] The 1920 Civil Code included this customary tenure right under the fixed period of legal requirements, which

[569] Acker, *Hitting a Stone with an Egg?*, 33; Markussen, "Property Rights, Productivity, and Common Property Resources," 2280; East-West Management Institute (EWMI), *Land Law of Cambodia: A Study and Research Manual*, 2003, 19.
[570] Acker, *Hitting a Stone with an Egg?*, 33; Markussen, "Property Rights, Productivity, and Common Property Resources," 2280.
[571]Boreak Sik, *Land Ownership, Sales and Concentration in Cambodia*, Working Paper 16 (Cambodia Development Research Institute (CDRI), 2000), 3; Paul Rabé, "From 'Squatters' to Citizens? Slum Dwellers, Developers, Land Sharing and Power in Phnom Penh, Cambodia" (Dissertation, Faculty of the USC School of Policy, Planning, and Development, University of Southern California, 2009), 34; Acker, *Hitting a Stone with an Egg?*, 32–33; Ray Russell, "Land Law of the Kingdom of Cambodia," *Property Management* 15 (November 2, 1997): 102; Markussen, "Property Rights, Productivity, and Common Property Resources," 2280.
[572] Russell, "Land Law of the Kingdom of Cambodia," 102.
[573] Acker, *Hitting a Stone with an Egg?*, 33; Voan Lim, "Land Regime in Cambodia," in *The Cambodian Land Title Registration System* (East-West Management Institute (EWMI), 2006), 1; Russell, "Land Law of the Kingdom of Cambodia," 103; David M. Ayres, *Anatomy of a Crisis: Education, Development, and the State in Cambodia, 1953-1998* (University of Hawaii Press, 2000), 20; East-West Management Institute (EWMI), *Land Law of Cambodia*, 21.
[574]See: 1920 Civil Code of Cambodia (1920); East-West Management Institute (EWMI), *Land Law of Cambodia*, 21.
[575] 1920 Civil Code of Cambodia, art. 635.
[576] Ibid.
[577] East-West Management Institute (EWMI), *Land Law of Cambodia*, 21.

could lead to ownership acquisition.[578] In this context, the 1920 Civil Code introduced the principle of possession, which allowed local residents to occupy land.[579] Such an occupation, if satisfying five-year statute of limitation, would lead to ownership acquisition by land possessor.[580]

The 1920 Civil Code was extensively applied in Cambodia until 1975 when Cambodia fell into the Khmer Rouge regime.[581] By then, Cambodia achieved in the establishment of the land register, 100% under possession and 10% under ownership.[582] This demonstrated that Cambodia had a proper legal system governing property throughout the country prior to the collapse of property in 1975.

Cambodia fell under the control of the Khmer Rouge between 1975 and 1979. The Khmer Rouge regime nationalized all properties under the control of the state.[583] Private ownership was abolished.[584] Previous land documents and titles were largely destroyed.[585] People were forced to work on land for collective agricultural production.[586]

After the collapse of the Khmer Rouge regime, Cambodian property started to fall into confusion.[587] People moved and started to occupy vacant land and buildings on a "first-come, first-served" basis without clear support of ownership documentation.[588]

A number of land experts, around 50 out of 1000 cadastral officials, remained alive at the end of the

[578] 1920 Civil Code of Cambodia, arts. 708–25; East-West Management Institute (EWMI), *Land Law of Cambodia*, 21.
[579] 1920 Civil Code of Cambodia, art. 688; East-West Management Institute (EWMI), *Land Law of Cambodia*, 21–22.
[580] 1920 Civil Code of Cambodia, arts. 723 and 724.
[581] Russell, "Land Law of the Kingdom of Cambodia," 104–5.
[582]Lim, "Land Regime in Cambodia," 4; Un and So, "Land Rights in Cambodia," 291.
[583]Indira Simbolon, "Law Reforms and Recognition of Indigenous People's Communal Rights in Cambodia," in *Land and Cultural Survival: The Communal Land Rights of Indigenous Peoples in Asia* (Asian Development Bank, 2009), 71; Markussen, "Property Rights, Productivity, and Common Property Resources," 2280; Russell, "Land Law of the Kingdom of Cambodia," 104–5.
[584]Rabé, "From 'Squatters' to Citizens?," 188; Williams, "Internally Displaced Persons and Property Rights in Cambodia," 194; Biddulph, "Tenure Security Interventions in Cambodia," 226; Un and So, "Land Rights in Cambodia," 291; East-West Management Institute (EWMI), *Land Law of Cambodia*, 22.
[585] Thiel, "Donor-Driven Land Reform in Cambodia—Property Rights, Planning, and Land Value Taxation," 228; Un and So, "Land Rights in Cambodia," 291; East-West Management Institute (EWMI), *Land Law of Cambodia*, 22.
[586] Blunt and Turner, "Decentralisation, Democracy and Development in a Post-Conflict Society," 76; Ozay Mehmet, "Development in a Wartorn Society: What Next in Cambodia?," *Third World Quarterly* 18, no. 4 (1997): 675.
[587] Mensher, "The Tonle Sap: Reconsideration of the Laws Governing Cambodia's Most Important Fishery," 804 and 807.
[588]Khemro and Payne, "Improving Tenure Security for the Urban Poor in Phnom Penh, Cambodia," 182; Blunt and Turner, "Decentralisation, Democracy and Development in a Post-Conflict Society," 76; Feinberg, "The Epidemic of Petit Corruption in Contemporary Cambodia," 283.

Khmer Rouge period.[589] Due to a lack of human resources, Cambodia could not return to the previous practice of the pre-existing property system.[590] As a result, Cambodia implemented collective ownership once again between 1979 and 1989.[591] People worked in groups on collective land for agricultural products as under the name of solidarity groups (*krom samaki*).[592]

Solidarity groups were first active after the collapse of the Khmer Rouge regime because the whole country faced a shortage of food, and people struggled to sustain themselves.[593] However, the production of the solidarity groups decreased due to the unequal share of labor and product, accordingly.[594] The government decided to dissolve the solidarity groups and started to re-privatize land in 1989. [595] This was the start of the second period of private ownership in Cambodian history.[596]

The government issued two main decisions concerning land privatization policy, namely, the Policy on Farmers and the Policy on Land Management and Use for initial land reform, both in 1989 (hereinafter called the "1989 Policy Decisions").[597] According to the 1989 Policy Decisions, land in Cambodia was divided into four categories: (1) residential land (domicile), (2) productive land (paddy and farm), (3) land reserved for forest and fishery, and (4) reserved land of the state.[598] The last of these categories would play a particularly

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[589] Lim, "Land Regime in Cambodia," 3.

[590] Leah M. Trzcinski and Frank K. Upham, "Creating Law from the Ground Up: Land Law in Post-Conflict Cambodia," *Asian Journal of Law and Society* 1, no. 01 (2014): 58.

[591] Simbolon, "Law Reforms and Recognition of Indigenous People's Communal Rights in Cambodia," 72; Acker, *Hitting a Stone with an Egg?*, 34; Frings, "Cambodia after Decollectivization (1989-1992)," 49; Russell, "Land Law of the Kingdom of Cambodia," 105; Markussen, "Property Rights, Productivity, and Common Property Resources," 2280; Un and So, "Land Rights in Cambodia," 292; Mensher, "The Tonle Sap: Reconsideration of the Laws Governing Cambodia's Most Important Fishery," 807.

[592] Acker, *Hitting a Stone with an Egg?*, 5 and 34; Frings, "Cambodia after Decollectivization (1989-1992)," 49; Biddulph, "Tenure Security Interventions in Cambodia," 227; Russell, "Land Law of the Kingdom of Cambodia," 105; Thiel, "Donor-Driven Land Reform in Cambodia—Property Rights, Planning, and Land Value Taxation," 228; Un and So, "Land Rights in Cambodia," 292; Slocomb, "Commune Elections in Cambodia," 453.

[593] Acker, *Hitting a Stone with an Egg?*, 19; Frings, "Cambodia after Decollectivization (1989-1992)," 49; Biddulph, "Tenure Security Interventions in Cambodia," 227.

[594] Acker, *Hitting a Stone with an Egg?*, 19; Frings, "Cambodia after Decollectivization (1989-1992)," 49–50; Williams, "Internally Displaced Persons and Property Rights in Cambodia," 145; Russell, "Land Law of the Kingdom of Cambodia," 105; Blunt and Turner, "Decentralisation, Democracy and Development in a Post-Conflict Society," 76.

[595] Acker, *Hitting a Stone with an Egg?*, 35; Frings, "Cambodia after Decollectivization (1989-1992)," 50; Williams, "Internally Displaced Persons and Property Rights in Cambodia," 145.

[596] The first period of land privatization was in the French colony.

[597] See: Decision Concerning Policy on Farmers [សេចក្តីសម្រេចចិត្តស្តីពីគោលនយោបាយចំពោះកសិករ] (1989); Decision Concerning Policy on Land Management and Use [សេចក្តីសម្រេចចិត្តស្តីពីគោលនយោបាយស្រុតចំការ និង ប្រើប្រាស់ដីធ្លី] (1989).

[598] Residential land was distributed to each family, not exceeded 2,000 square meters. See: Decision Concerning Policy on Land Management and Use.

important role in the future course of land policy and dispute processing in Cambodia.

Furthermore, the 1989 Policy Decisions introduced three forms of land tenure: (1) ownership, (2) possession, and (3) concession.[599] However, the ownership concept was incomplete or ambiguous because through these decisions, "ownership right was permitted on residential land, and possession right on agricultural land."[600] Ownership regimes under both decisions were formalized when the government issued the Sub-decree on Providing Ownership on Residential Land to Khmer citizens on April 22, 1989 (hereinafter called the "1989 Residential Ownership Sub-decree").[601]

The 1989 Residential Ownership Sub-decree did also not determine the size of each type of ownership as that under the 1989 Decisions.[602] Therefore, the government issued Instruction on Policy Implementation of Land Management and Use on June 03, 1989 (hereinafter called the "1989 Instruction").[603] The 1989 Instruction determined the size of land ownership and possession under the three forms of land tenure. Ownership over residential land was limited to 2,000 square meters; possession of agricultural land was by five hectares, and land concession exceeded five hectares.[604]

At the outset of initial reform, Cambodia lacked human resources to manage the process.[605] Thus, the government left local authorities, who were controllers of previous solidarity groups, to redistribute land to local residents based on the number of families and availability of land without appropriate documentation.[606] In this context, only local authorities and neighboring people knew history and actual occupants of land in

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[599] Phalthy Hap, "The Implementation of Cambodia's Laws on Land Tenure" (Doctoral Thesis, Nagoya University, 2010), 48; See: Decision Concerning Policy on Land Management and Use.

[600] East-West Management Institute (EWMI), *Land Law of Cambodia*, 23; See: Decision Concerning Policy on Land Management and Use.

[601] See: Sub-decree on Providing Residential Land Ownership to Khmer Citizens [អនុក្រឹត្យស្តីពីការផ្តល់កម្មសិទ្ធិដីលំនៅឋានដល់ប្រជាពលរដ្ឋខ្មែរ] (1989); East-West Management Institute (EWMI), *Land Law of Cambodia*, 23.

[602] In 1989 decision determined area of residential land, not exceed 2,000 square meters, but agricultural land and concession land were not expressed. See: Decision Concerning Policy on Land Management and Use.

[603] See: Instruction on Implementation of Policy on Management and Use of Land [សេចក្តីណែនាំអនុវត្តគោលនយោបាយគ្រប់គ្រង និង ប្រើប្រាស់ដីធ្លី], NO. 03/SNN (1989); East-West Management Institute (EWMI), *Land Law of Cambodia*, 23.

[604] See: Instruction on Implementation of Policy on Management and Use of Land; East-West Management Institute (EWMI), *Land Law of Cambodia*, 23; Hap, "The Implementation of Cambodia's Laws on Land Tenure," 48.

[605] Around 50 out of 1000 cadastral officials remained alive in post-Khmer Rouge period. Therefore, Cambodia did not have enough land experts for managing land throughout the country. See: Lim, "Land Regime in Cambodia," 3.

[606] Acker, *Hitting a Stone with an Egg?*, 28 and 35; Frings, "Cambodia after Decollectivization (1989-1992)," 54; Biddulph, "Tenure Security Interventions in Cambodia," 227; Loehr, "External Costs as Driving Forces of Land Use Changes," 1039; Un and So, "Land Rights in Cambodia," 292.

localities.[607]

The initial land reform was only governed by regulations and policies of the government, not by legislation.[608] The 1989 Constitution of the State of Cambodia authorized a right to occupy and use land to be administered through subsidiary legislation.[609] Then, the government drafted the first land law in this spirit. In the process of developing this land law, Cambodia reached the transitional period (1989-1993).[610] This drafted land law was promulgated in 1992 (hereinafter called the "1992 Land Law").[611] The 1992 Land Law became the first fundamental law for governing all land issues in post-war land reform.

The 1992 Land Law followed most of concepts of the 1920 Civil Code.[612] The 1992 Land Law divided Cambodian land into two categories: (1) private property and (2) collective property. Private property referred to any land that had been privately occupied by each individual.[613] Collective property divided into two categories: public property of collective and private property of collective.[614] The 1992 Land Law allowed temporary possession, which could lead to ownership acquisition.[615] However, the principle of the 1992 Land Law was not different from that of the 1989 Policy Decisions; namely, allowed only private ownership over residential land.[616]

[607]So et al., *Social Assessment of Land in Cambodia*, 15; Peter Leuprecht, *Land Concessions for Economic Purposes in Cambodia: A Human Rights Perspective*, November 2004, 27; Mark Grimsditch and Nick Henderson, *Untitled: Tenure Insecurity and Inequality in Cambodian Land Sector*, 2009, 39; Natalie Bugalski and David Pred, "Formalizing Inequality: Land Titling in Cambodia," *A Year in Review 2009* (July 2010): 3.
[608] See: Decision Concerning Policy on Farmers (1989); Decision Concerning Policy on Land Management and Use (1989); Sub-decree on Providing Residential Land Ownership to Khmer Citizens (1989); Instruction on Implementation of Policy on Management and Use of Land.
[609]See: Constitution of State of Cambodia, art. 17 (1989); Decision Concerning Policy on Land Management and Use.
[610] Cambodia was underway to the Paris Peace Agreement. In October 21, 1991, the Paris Peace Accord was concluded, and ceasefire was occurred in Cambodia. Cambodia reached the national reunion and prepared for the general election under the auspices of the United Nations in 1993. Landau, "Law and Civil Society in Cambodia and Vietnam," 247.
[611] East-West Management Institute (EWMI), *Land Law of Cambodia*, 23 and 34; See: 1992 Land Law (1992).
[612] See: 1920 Civil Code of Cambodia, art. 634 (1920); 1992 Land Law, art. 10; East-West Management Institute (EWMI), *Land Law of Cambodia*, 23; Trzcinski and Upham, "Creating Law from the Ground Up," 58.
[613] 1992 Land Law, art. 10.
[614] Ibid.
[615] East-West Management Institute (EWMI), *Land Law of Cambodia*, 24; See: 1992 Land Law, arts. 61–76.
[616] East-West Management Institute (EWMI), *Land Law of Cambodia*, 24; 1992 Land Law, arts. 19 and 59.

A year later, Cambodia entered into the new era of political regime when the country held a general election and established the new Constitution in 1993 (hereinafter called the "1993 Constitution").[617] The new constitution bound Cambodia to a constitutionally monarchical democracy.[618] Therefore, the political and economic regime shifted from socialism and a planned economy to democracy and a free market economy.[619]

The change of the political and economic regime and the Constitution had a vast influence over the property system; namely, leading to the conflict of property rights under the 1992 Land Law and the terms of 1993 Constitution.[620] The concept and principle of the 1992 Land Law followed the spirit of the 1989 Constitution and several regulations adopted in 1989 – socialism and a planned economy, and incomplete recognition of ownership over residential land but occupation and use right of agricultural land.[621] The 1993 Constitution adopted democracy, free market economy, and recognized full ownership over land.[622] Thus, the 1992 Land Law could not satisfy the modern concept of social change and international economic integration.[623]

In order to follow the new concept and principle of the 1993 Constitution, the government initiated a new land law to replace the 1992 Land Law.[624] The drafting of the new land law started in 1995 with technical support by the Asian Development Bank (ADB).[625] Finally, the effort to establish the new land law was achieved when Cambodia formally promulgated the new land law on August 30, 2001 (hereinafter called the "2001 Land Law").[626] Henceforward, the 2001 Land Law superseded the 1992 Land Law.

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[617] Landau, "Law and Civil Society in Cambodia and Vietnam," 247; Carney and Tan, *Whither Cambodia?*, 2; Slocomb, "Commune Elections in Cambodia," 448; Cock, "External Actors and the Relative Autonomy of the Ruling Elite in Post-UNTAC Cambodia," 242; Sanderson and Maley, "Elections and Liberal Democracy in Cambodia," 241.
[618] Law on National Election, art. 2; Constitution of Kingdom of Cambodia, arts. 1 and 51 (1993); Slocomb, "The Nature and Role of Ideology in the Modern Cambodian State," 390.
[619] See: Constitution of Kingdom of Cambodia.
[620] East-West Management Institute (EWMI), *Land Law of Cambodia*, 33.
[621] For instance, the Article 1 of the 1992 Land Law provided that all land in Cambodia belonged to the state. This seemed contradictory to the concept of private land ownership in the free market economy. See: 1992 Land Law, art. 1; East-West Management Institute (EWMI), *Land Law of Cambodia*, 24 and 33.
[622] Constitution of Kingdom of Cambodia, art. 44 and arts. 56–64; East-West Management Institute (EWMI), *Land Law of Cambodia*, 33.
[623] Acker, *Hitting a Stone with an Egg?*, 32; East-West Management Institute (EWMI), *Land Law of Cambodia*, 33.
[624] East-West Management Institute (EWMI), *Land Law of Cambodia*, 26 and 33.
[625] Lasimbang and Luithui, *Bridging the Gap*, 128.
[626] 2001 Land Law (2001); East-West Management Institute (EWMI), *Land Law of Cambodia*, 25–28.

The 2001 Land Law made a number of changes. The 2001 Land Law changed the "public property of collective" into "public property of state" or "state public property."[627] "Private property of collective" was changed to "private property of state," or "state private property."[628] In common concept, previous "collective property of state" was then changed to "state land" or "state property."[629]

The second change was full recognition of ownership over land tenure. The 1992 Land Law followed the spirit of the 1989 Constitution adopted in the communist period, recognized ownership over residential land but only an occupation and use right for agricultural land.[630] The 2001 Land Law offered full recognition of ownership, either residential or agricultural, land in compliance with spirit of the 1993 Constitution.[631]

The 2001 Land Law denied any ownership prior to 1979, but recognized the acquisition of ownership through original possession for the period between 1989 and 2001.[632] The 2001 Land Law denied the principle of adverse possession for occupation commenting after 2001.[633] If one occupied land in compliance with the legal requirement of the 2001 Land Law for five-year statute of limitation, one would have ownership over that land, if and only if title to the land was not registered land.[634]

The third change was the establishment of a modern land cadastral commission and systematic land registration. The 1992 Land Law introduced only an ad-hoc method of land registration; namely, sporadic land registration.[635] The 2001 Land Law supplemented sporadic land registration with systematic land registration.[636]

The fourth change was the introduction of new methods of fragmenting ownership, through economic land concessions and land leases.[637] Economic land concessions can be authorized to grant by 10,000 hectares to

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[627] 1992 Land Law, art. 10 (1992); 2001 Land Law, arts. 12–19.
[628] 1992 Land Law, art. 10; 2001 Land Law, arts. 12–19.
[629] See: 1920 Civil Code of Cambodia, art. 365 (1920); 1992 Land Law, art. 10; 2001 Land Law, Chapter II (arts. 12–19); Sub-decree on State Land Management [អនុក្រឹត្យស្តីពីការគ្រប់គ្រងដីរដ្ឋ], art. 3 (2005).

[630] 1992 Land Law, arts. 1, 10, 19; East-West Management Institute (EWMI), *Land Law of Cambodia*, 24 and 33.
[631] 2001 Land Law, 29; Constitution of Kingdom of Cambodia, art. 44 (1993).
[632] 2001 Land Law, arts. 7 and 29.
[633] Ibid., Chapter IV (arts. 29–47) and art. 35.
[634] Ibid., arts. 30 and 35.
[635] 1992 Land Law, Part VII (arts. 203–17).
[636] 2001 Land Law, Part VI (arts. 226–46); Sub-decree on Procedure of Establishing Cadastral Index Map and Land Register (2002); Sub-decree on Sporadic Land Registration [អនុក្រឹត្យស្តីពីការចុះបញ្ជីដីធ្លីមានលក្ខណៈជាប់ដោយដុំ] (2002).

[637] 2001 Land Law, Chapter V (arts. 48–62) and Part IV (arts. 106–13); Sub-decree on Economic Land Concession, No. 146 ANK.BK (2005); Sub-decree on Mortgage and Transfer of Long-Term Lease and Concession Rights [អនុក្រឹត្យស្តីពីការដាក់បញ្ចាំ ការផ្ទេរនូវសិទ្ធិលើការជួលរយៈពេលវែង ឬ សិទ្ធិលើដីសម្បទានសេដ្ឋកិច្ច] (2007); Sub-decree Rule and Procedure of State

developer or investors for 99 years.[638] Long-term land leases can be made by 15 years or more.[639] However, long-term leases of state public property can be authorized for only 15 years.[640] Concessions or long-term leases over large areas of land are made to boost economic activity over land.[641] So far, over 1,181,522 hectares have been conceded or leased to private developers for agro-industrial purposes.[642]

The 2001 Land Law did not serve as the sole source of law relating to land for long; a conflict of Cambodian property laws happened again when Cambodia adopted the new Civil Code in 2007 (hereinafter called the "2007 Civil Code") under the assistance of Japanese drafting.[643] The 2007 Civil Code of Cambodia almost completely followed the Japanese Civil Code. Therefore, a number of provisions between the 2001 Land Law and the 2007 Civil Code were contradictory.

In order to readjust this contradiction, the enforcement of the 2007 Civil Code, which was promulgated in 2007, was suspended several years. This left chance for the Civil Code drafters to make consistency between the 2001 Land Law and the 2007 Civil Code.[644] The effort to readjust this contradiction between the 2001 Land Law and the 2007 Civil Code appeared four years later when the government promulgated the Law on Enforcement of Civil Code in 2011 (hereinafter called the "2011Civil Code Enforcement Law").[645] The 2011 Civil Code Enforcement Law cancelled and amended many provisions of the 2001 Land Law, which were contradictory to the 2007 Civil Code.[646]

In short, Cambodian property laws faced swift changes, which were a source of complexity, confusion, and disputes. Not only local residents, but also enforcement authorities and legal practitioners have an ambiguous concept of ownership entitlement and acquisition under the swiftly changed property system. As a

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Public Reclassification of State and Public Legal Entity [អនុក្រឹត្យស្តីពីទិដ្ឋាន និង នីតិវិធីនៃការធ្វើអនុបយោគទ្រព្យសម្បត្តិសាធារណៈរបស់រដ្ឋ និង នីតិបុគ្គលសាធារណៈ] (2006).

[638] 2001 Land Law, arts. 59 and 61; See: Sub-decree on Economic Land Concession.
[639] 2001 Land Law, art. 106; Sub-decree on Mortgage and Transfer of Long-Term Lease and Concession Rights, art. 2.
[640] Sub-decree Rule and Procedure of State Public Reclassification of State and Public Legal Entity, art. 18.
[641] See: 2001 Land Law, Chapter V (arts. 48–62) and Part IV (arts. 106–13); Sub-decree on Economic Land Concession; Sub-decree on Mortgage and Transfer of Long-Term Lease and Concession Rights; Sub-decree Rule and Procedure of State Public Reclassification of State and Public Legal Entity.
[642] Ministry of Agriculture, Forestry, and Fishing, *Statistics of Registered Economic Land Concession Companies*.
[643] Civil Code of Cambodia (2007).
[644] Besides the Land Law, there were a number of laws that the team tried to make consistency.
[645] Law on Enforcement of Civil Code [ច្បាប់ស្តីពីការអនុវត្តក្រមរដ្ឋប្បវេណី] (2011).
[646] Ibid.

result, competing claims have occurred among stakeholders. The next section will demonstrate the ambiguous division of land ownership, which results in competing claims in Cambodia today.

2. Division of Land Ownership under Cambodian Property Law

The rate of change in Cambodian property laws outstripped institutional capacity. Many land disputes, which cause social tension in Cambodia, are also attributed to these swift changes and ambiguous concepts of property division.

Cambodian property laws, especially the enforcing 2001 Land Law, divide land ownership into three categories: (1) public ownership, (2) collective ownership and (3) private ownership.[647] Of these, this Dissertation concerns only public ownership and private ownership. Collective ownership relates to indigenous and pagoda land, and the issues raised by takings disputes in this category are effectively the same as those affecting private land.[648]

a). Public Ownership

Public ownership is a vexed issue because it is a source of land dispute between state and land possessors in Cambodia.[649] The state often claims ownership over occupied land by local residents based on the concept of public ownership.[650] Therefore, a full understanding of this concept is important to grasp the foundations of land disputes in Cambodia today.

i. General Concept and Notion of Public Ownership

Public land, or public property, or state land, or state property has the same meaning insofar as both terms refer to land or property belonging to the state, or in a word, so-called "public ownership."[651] In this Dissertation, the terms "state land" or "state property" are used interchangeably.[652]

The scope of state land is ambiguous in modern Cambodia. State land is assumed to cover 80 percent of

[647] See: 2001 Land Law (2001).
[648] Collective ownership under the 2001 Land Law refers to land belonging to indigenous people and pagoda land. Originally, these lands belong to the public land.
[649] Cambodian Human Rights Portal, "The Reported Land Conflict Cases 2007 to 2011 in Cambodia."
[650] Inspection Panel, *Cambodia: Land Management and Administration Project*, Report and Recommendation, December 2, 2009, vii.
[651] See: 1920 Civil Code of Cambodia, art. 365 (1920); 1992 Land Law, art. 10 (1992); 2001 Land Law, Chapter II (arts. 12–19); Sub-decree on State Land Management, art. 3 (2005).
[652] See: 1920 Civil Code of Cambodia, art. 365; 1992 Land Law, art. 10; 2001 Land Law, Chapter II (arts. 12–19); Sub-decree on State Land Management, art. 3.

the whole Cambodian territory, while the remaining, 20 percent, is assumed to be owned by private persons.[653] Today, the majority of land is not registered. Around 3,6 millions of parcels have been registered as of August 2014.[654] Cambodia has more than 10 millions of land parcels for land registration.[655] Therefore, a large quantity of land area remains under the competing claims between state and private land possessors.

Several sources lay the foundation for the concept of "state land." The first source is the 1993 Constitution. Article 58 of the 1993 Constitution determines the identity of state land in Cambodia:

> State property is primarily comprised of land, underground, mountain, sea, seabed, continental shelf, coastline, airspace, island, river, canal, stream, lake, forest, natural resources, economic and cultural center, national defense base, and other facilities determined as belonging to the state. Management, use, and control of state property shall be determined in law.[656]

The 1993 Constitution enumerates types of state land. However, this provision is vague because the 1993 Constitution leaves subsidiary law to determine other kinds of state land. In response to the constitutional authorization, the government adopted the new land law in 2001. The 2001 Land Law reiterates the concept of state land under the principle of the 1993 Constitution, as in Article 12 provides:

> The state is the owner of properties in the territory of the Kingdom of Cambodia enumerated in the Article 58 of the 1993 Constitution and of all escheated properties, or properties that owners voluntarily give to the state, or properties that are not subject to private ownership acquisition by law, or are not properties privately possessed by the provisions of the Chapter IV of this law.[657]

In addition to the reiteration of Article 58 of the 1993 Constitution, this provision adds several kinds of properties, which can be considered state land. However, its definition of state land is still vague in scope and coverage. Therefore, the government developed a Sub-decree on State Land Management in 2005 for controlling state land (hereinafter called the "2005 State Land Sub-decree").[658] The 2005 State Land Sub-decree further extends the ownership of state land, as stated in Article 2:

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[653] Inspection Panel, *Cambodia: Land Management and Administration Project*, XX; Loehr, "External Costs as Driving Forces of Land Use Changes," 1039; Thiel, "Donor-Driven Land Reform in Cambodia—Property Rights, Planning, and Land Value Taxation," 227; Un and So, "Land Rights in Cambodia," 296; Neef, Touch, and Chiengthong, "The Politics and Ethics of Land Concessions in Rural Cambodia," 1086.
[654] The Author calculated this number from the report of the Ministry of Land. See: Ministry of Land Management, Urban Planning, and Construction, *Report on Total Result of August-2014 Activities and Ongoing Action Plan*, 3.
[655] Hap, "The Implementation of Cambodia's Laws on Land Tenure," 83; Thiel, "Donor-Driven Land Reform in Cambodia—Property Rights, Planning, and Land Value Taxation," 228.
[656] Constitution of Kingdom of Cambodia, art. 58 (1993).
[657] 2001 Land Law, art. 12.
[658] Sub-decree on State Land Management (2005).

> State land means all lands belong to the State, through which are under the management of National ministries or institutions and land which is granted to the public legal entities or establishments that are recognized by law as the legal persons for management.[659]

As of this provision, the concept of state land is slightly clear of concept, which refers to all properties under the state and state organs. However, the context and coverage are still a challenge for determination between the state and private land possessors.

In short, the government tries to extend state land as much as possible from the 1993 Constitution to the 2005 State Land Sub-decree. The next section will further explain the government's effort of extending state land by sub-categorization.

ii. Sub-categorization of State Land

State land is sub-categorized into two kinds: (1) state public land and (2) state private land.[660] Such a concept of division dated back to the 1920 Civil Code and 1992 Land Law.[661] The concepts of state land in both legislations were the same because the 1992 Land Law copied the majority of its concepts from the 1920 Civil Code for application in post-war land reform.[662] Both legislations mentioned sub-categories of state land, but failed to identify them with specificity.[663]

When Cambodia enacts the 2001 Land Law, it sub-categorizes state land into state public land and state private land.[664] Such a sub-category is further extended in subsidiary regulations.[665] The next section will try to identify the identities of state public land and state private land under Cambodian existing legislation.

(1). State Public Land

State public land is mentioned in the 2001 Land Law.[666] However, the 2001 Land Law does not give a clear definition of purpose and use of state public land. [667] Despite this, the purpose and use of state public land

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[659] Ibid., art. 2.
[660] See: 1920 Civil Code of Cambodia, art. 365 (1920); 1992 Land Law, art. 10 (1992); 2001 Land Law, Chapter II (arts. 12–19); Sub-decree on State Land Management, art. 3.
[661] 1920 Civil Code of Cambodia, art. 365; 1992 Land Law, art. 10.
[662] See: 1920 Civil Code of Cambodia, art. 634; 1992 Land Law, art. 10; East-West Management Institute (EWMI), *Land Law of Cambodia*, 23.
[663] 1920 Civil Code of Cambodia, arts. 635–43; 1992 Land Law, arts. 10–18.
[664] 2001 Land Law, Chapter II (arts. 12–19).
[665] See: ibid., art. 15; Sub-decree on State Land Management, art. 4; Royal Decree on Temporary Principle and Provision of State Public Land Reclassification of State and Public Legal Entity [ព្រះរាជក្រឹត្យស្តីពីសោធនកម្មនិង បញ្ញត្តិបណ្តោះអាសន្នដែលការផ្ទេរអនុបយោគទ្រព្យសម្បត្តិសាធារណៈរបស់រដ្ឋ និង នីតិបុគ្គលសាធារណៈ] (2006); Sub-decree Rule and Procedure of State Public Reclassification of State and Public Legal Entity (2006).

can be inferred from the context of the term "public."[668] State public land is dedicated exclusively to the public purposes.[669]

The public are assumed owners of state public land, while the state is only the representative owner and has representative right to manage such land for public use.[670] Having seen the significance of state public land, the 2001 Land Law enumerates state public land in a public sense, as stated in Article 15:

> (1) Any property that has a natural origin such as forest, navigable or floatable waterway, natural lake, navigable and floatable riverbank, and seashore;
> (2) Any property that is subject to particular arrangement for general interest such as quay of harbor, railway, railway station, and airport;
> (3) Any property that is put for public use by either in its natural state or after arrangement such as road, lane, oxcart way, pathway, garden, and public park, and reserved land for those;
> (4) Any property that is put into operation for public service such as public school or educational building, administrative building, and public hospital;
> (5) Any property that is made as natural reserve protected by law;
> (6) Archeological, cultural, and historical patrimony;
> (7) Immovable property that is royal property, which is not private property belonging to the royal family.[671]

Such a list is reiterated in the 2005 State Land Sub-decree.[672] In addition to this list, the 2005 State Land Sub-decree further adds "other types" of land that have characteristics to serve "public use," which can be included in state public land.[673]

In short, scope of state public land is small based on enumerated list of state public land under existing laws and regulations.

(2). State Private Land

The 2001 Land Law lists the types of state public land, but fails to define state private land.[674] The 2001 Land Law only mentions the use and transaction of state private land.[675] The failure to define state private land looms large on the existence and overlapping between state private land and individual private

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[666] 2001 Land Law, arts. 12–19.
[667] Ibid.
[668] Ibid., art. 15; Sub-decree on State Land Management, art. 4.
[669] Thiel, "Donor-Driven Land Reform in Cambodia—Property Rights, Planning, and Land Value Taxation," 230; Khemro and Payne, "Improving Tenure Security for the Urban Poor in Phnom Penh, Cambodia," 83.
[670] 2001 Land Law, art. 15; Sub-decree on State Land Management, art. 4.
[671] The number is given for clarification by the author. See: 2001 Land Law, art. 15.
[672] Sub-decree on State Land Management, art. 4.
[673] Ibid.
[674] 2001 Land Law, art. 17.
[675] Ibid.

land, which induces competing claim s.[676]

Although the 2001 Land Law fails to define state private land, the 2005 State Land Sub-decree defines state private land in Article 5:

> State private land is comprised of all land that excludes state public land and land occupied by private or collective possessors or owners in compliance with the 2001 Land Law. State private land includes all escheated properties, or properties that owners voluntarily give to the state, or properties in which legal possessors or owners are unidentified.[677]

Such a definition is not perfectly clear on the distinction between state private land and individual private land. The exclusion of state public land is rather clear because state public land is enumerated for recognition.[678] However, the exclusion of private or collective possessors or owners is blurred because the majority of land is not registered.[679] In practice, such a blurred provision causes competing claims between the state and private land possessors.[680] The next section will illustrate private ownership or private land, which is overlapped with state private land, which can give rise to ownership acquisition under current legislations.

b). Private Ownership

Private ownership of property or land is a special feature or concept in Cambodian property laws if compared to other jurisdictions. Sometimes, this feature causes confusion to foreign legal scholars, who may view Cambodian law through the lense of their legal order. This section will demonstrate the special feature of private ownership under Cambodia property laws.

i. Feature of Private Ownership under Cambodian Property Law

In most modern property systems, the ownership of most parcels has been established. Adverse possession is most often applied in a case involving a claim against private owner, cutting off the interest of the non-occupier. However, in Cambodia, when the 5-year limitation period is invoked against "state private" land. It has the effect of creating an ownership interest where none previously existed.

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[676] Inspection Panel, *Cambodia: Land Management and Administration Project*, vii; See: Cambodian Human Rights Portal, "The Reported Land Conflict Cases 2007 to 2011 in Cambodia."
[677] Sub-decree on State Land Management, art. 5.
[678] 2001 Land Law, art. 15; Sub-decree on State Land Management, art. 4.
[679] Around 3,4 millions of parcels have been registered as of April 2014. See: Ministry of Land Management, Urban Planning and Construction, *Notification*, Cambodia Doc., May 8, 2014.
[680] Inspection Panel, *Cambodia: Land Management and Administration Project*, vii; See: Cambodian Human Rights Portal, "The Reported Land Conflict Cases 2007 to 2011 in Cambodia."

This is the special feature of private ownership under Cambodian property laws. In order to testify this special feature of private ownership acquisition, this Dissertation raises the principle of title issuance to any land possessor when registration under the two circulars of the Ministry of Land. The first is the Circular on Procedural Implementation of Establishing Cadastral Index Map and Registration for systematic land title in 2002.[681] The second is the Circular on Procedural Implementation of Sporadic Land Registration for sporadic land title in 2004.[682]

Both circulars provided the same principle for issuing title to land possessor, whose land was under systematic land registration from the state, or who applied for land registration under sporadic land registration. The following quote was extracted from both circulars on the principle of title issuance.

> (1) Issuance of Ownership Title: will issue ownership title for any land that has been possessed peacefully without protest over 5 years until the promulgation of the new land law.
> (2) Issuance of Possession Certificate: will issue possession certificate for any land that has been possessed peacefully without protest and less than 5 years prior to the land law takes effect. This certificate can be exchanged for ownership title when possession of such a land has completed 5 years or over.[683]

Based on these circulars, whether a possession certificate or an ownership certificate is issued depends on the 5-year statute of limitation.[684] If less than 5 years, a possession certificate is issued, and over 5 years, ownership title. [685] This can testify that "ownership" over an occupied land, whether registered or not, is recognized based the 5-year limitation period. [686]

The principle of title issuance under both circulars is modified to follow the concept of the 2001 Land Law. [687] The 2001 Land Law divides status of land tenure into two: (1) possession (*phou-gak*) and (2) ownership (*kama-sith*).[688] Status of possession (*phou-gak*) refers to any land tenure less than 5 years, while

[681] Circular on Procedural Implementation of Establishing Cadastral Index Map and Land Register (2002).
[682] Circular on Procedural Implementation of Sporadic Land Registration (2004).
[683] Circular on Procedural Implementation of Establishing Cadastral Index Map and Land Register, 9; Circular on Procedural Implementation of Sporadic Land Registration, 12–13.
[684] Circular on Procedural Implementation of Establishing Cadastral Index Map and Land Register, 9; Circular on Procedural Implementation of Sporadic Land Registration, 12–13.
[685] Circular on Procedural Implementation of Establishing Cadastral Index Map and Land Register, 9; Circular on Procedural Implementation of Sporadic Land Registration, 12–13.
[686] 2001 Land Law, arts. 30, 31, and 40 (2001); Circular on Procedural Implementation of Establishing Cadastral Index Map and Land Register, 9; Circular on Procedural Implementation of Sporadic Land Registration, 12–13.
[687] 2001 Land Law, Chapter IV (arts. 29–47).
[688] See: 2001 Land Law.

status of ownership (*kama-sith*) refers to any land tenure over 5 years.[689]

The five-year statute of limitation is a change of status of land tenure from possession (*phou-gak*) to ownership (*kama-sith*).[690] Any occupant on possessed land less than 5 years is called possessor (*phou-ki*). When he or she completes or exceeds 5 years, the status of possessor (*phou-ki*) will be changed to the status of owner (*kama-sithi-kor*).[691] A possessor, who occupies land less than 5 years, has only a possessory right (*sith-phou-gak*).[692] A possessor, who occupies land more than 5 years, has an ownership right (*sith-kama-sith*), even though the land is not registered yet.[693]

The status of possessor (*phou-ki*) and owner (*kama-sithi-kor*) is made clear when such a possessed land is registered.[694] The issuance of a possession certificate or an ownership title depends on the completion of the 5-year statute of limitation requirement.[695] For instance, one who occupies land less than five years, when one requests to register this land, one will receive a possession certificate (*ban-phou-gak*).[696] If one occupies land over 5 years, when one requests to register this occupied land, one will receive an ownership title (*ban-kama-sith*).[697] If one does not register or neglects to register occupied land, one will still have an ownership right (*sith-phou-gak*), which is still protected by law.[698] If one registers it later, one will receive an ownership title (*ban-kama-sith*), not a possession certificate (*ban-phou-gak*).[699]

The effect of possessor (*phou-ki*), or possession (*phou-gak*), or possessory right (*sith-phou-gak)*, or possession certificate (*phou-gak*) and owner (*kama-sithi-kor*), or ownership (*kama-sith*), or ownership right (*sith-kama-sith*), ownership title (*ban-kama-sith*) rests on legal recognition. The status of less than 5 years of possession is less protected against a third party's claim.[700] The status of more than 5 years of possession without registration is stronger protection because one completes 5-year statute of limitation and is entitled to ownership rights (*sith-*

[689] Ibid., arts. 30, 31, and 40; Circular on Procedural Implementation of Establishing Cadastral Index Map and Land Register, 9; Circular on Procedural Implementation of Sporadic Land Registration, 12–13.
[690] 2001 Land Law, arts. 30,31, and 40.
[691] Ibid.
[692] Ibid.
[693] Ibid.
[694] Ibid., arts. 31 and 40.
[695] Ibid., arts. 30,31, and 40.
[696] Ibid.
[697] Ibid.
[698] Ibid., art. 42.
[699] Ibid., arts. 30,31, and 40.
[700] Ibid.

kama-sith).[701] More than 5-year possession and registration of such possessed land will be most protected and uncontestable because one receives definitive ownership title (*ban-kama-sith*), which is registered in the Land Register.[702] In this sense, ownership right (*sith-kama-sith*), or ownership title (*ban-kama-sith*) is stronger and more protected than possessory right (*sith-phou-gak*), or possession certificate (*ban-phou-gak*) under Cambodian property laws.[703] For land not previously owned, registration of title plays the evidentiary role of proving the initial claim against the land.

Although possessor (*phou-ki*), or possession (*phou-gak*), or possessory right (*sith-phou-gak)*, or possession certificate (*ban-phou-gak*) and owner (*kama-sithi-kor*), or ownership (*kama-sith*), or ownership right (*sith-kama-sith*), ownership title (*ban-kama-sith*) has difference in legal protection, they have the same right in use and transaction. In this sense, both possessor (*phou-ki*) and owner (*kama-sithi-kor*) can use and transact their land freely.[704]

So far, the status of land tenure under the 2001 Land Law is status of ownership right, not possessory right. The 2001 Land Law authorizes and recognizes ownership over land possession between 1989 and 2001.[705] In this sense, one who has occupied land within 5 years since 1989 without protest had ownership right (*sith-kama-sith*) and can request definitive an ownership title (*ban-kama-sith*) from the state by registration.[706]Any denial of land registration by the state authority will be considered a taking of legitimate unregistered ownership right under Cambodian property laws.

In short, a so-called possessor (*phou-ki*) is someone who holds possessed land less than five years with or without possession certificate (*ban-phou-gak*), while a so-called owner (*kama-sithi-kor*) is someone who hold possessed land more than five years with or without ownership title (*ban-kama-sith*) under Cambodian property laws.

ii. Private Ownership Acquisition

Following the comprehension of the concept of private ownership, the knowledge of private

[701] Ibid.
[702] Ibid.
[703] Civil Code of Cambodia, art. 137 (2007); 2001 Land Law, arts. 30, 31, and 40.
[704] 2001 Land Law, art. 39.
[705] Ibid., arts. 7 and 29.
[706] Ibid., art. 30.

ownership acquisition is fundamental for any land possessor, as well as enforcing authority and other legal practitioners. Cambodian property laws provide a number of private ownership acquisitions such as (1) possession, (2) social land concession, (3) legal transaction, and (4) adverse possession. This section will conceptualize private ownership acquisition under Cambodian property laws.

(1). Possession

Possession is a fundamental principle of private ownership acquisition in Cambodian post-war land reform. In common, the principle of possession is applied to unregistered properties.[707] Having seen the majority of land is not registered yet in Cambodia, the 2001 Land Law does not define private land at the time of its adoption.[708] Instead, the 2001 Land Law leaves one chapter; namely, the Chapter IV, elaborating about the principle of possession.[709] This Chapter refers to individual private land or private ownership in post-war land reform in Cambodia.

The Chapter IV of the 2001 Land Law starts with a title that "reestablishment of immovable property ownership by extraordinary acquisition of possession."[710] The term "extraordinary acquisition" has a special meaning in Cambodian property laws and history. The extraordinary acquisition can reflect Cambodia in three situations.

The first "extraordinary acquisition" is the collapse of Cambodian property system. Cambodia underwent many political revolts in the last haft of the twentieth century.[711] These situations ruined Cambodian human resources, law, and property system.[712] A number of land experts, around 50 out of 1000 cadastral officials, remained alive at the end of Khmer Rouge period.[713] Due to lack of human resource, Cambodia could not return to recognize pre-existing property system; therefore, the 2001 Land Law abolished pre-1979 ownership.[714]

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[707] Fraley, "Finding Possession," 51–53; Posner, "Essay," 552–53; Mossoff, "What Is Property?," 375.
[708] See: 2001 Land Law.
[709] Ibid., See: Chapter IV (arts. 29–47).
[710] Ibid., Chapter IV (arts. 29–47).
[711] Chandler, "The Tragedy of Cambodian History"; Springer, "Violence, Democracy, and the Neoliberal 'Order,'" 143; Leifer, *Dictionary of the Modern Politics of Southeast Asia*, 11.
[712] Brinkerhoff, "Rebuilding Governance in Failed States and Post-Conflict Societies," 11; Blunt and Turner, "Decentralisation, Democracy and Development in a Post-Conflict Society," 75–76; Nielsen, "Hybrid International Criminal Tribunals," 301.
[713] Lim, "Land Regime in Cambodia," 3.
[714] 2001 Land Law, art. 7.

The second "extraordinary acquisition" is that people had occupied land before the law existed. After the collapse of the Khmer Rouge regime in 1979, people moved and occupied vacant land and buildings on a "first-come, first-served" basis without appropriate documentation of ownership recognition.[715] In this context, people occupied land and buildings in a customary manner without unclear proof o f ownership.[716] Property system fell in confusion and controversy.[717]

Endless disputes by land grabbing occurred when government started to reform land tenure by allowing private ownership over land in order to have economic activity on land in 1989.[718] Land became commercial commodity on market and under target of land grabbing and competing claims in the society.[719] Land disputes caused by land grabbing provoked social tension and clogged the court system, in which an estimate of 50 percent of court cases were land disputes as of 1999.[720] More seriously, land disputes affected a large number of Cambodian people, at least one in twenty-five families, throughout the country.[721]

Having seen such an adverse situation, the Prime Minister Hun Sen came out to publicly warn of "peasant revolution" in his public speech at the seminar on food and security at the Chamkar Doung Agriculture University in 1999.[722] Immediately, the government issued an edict to stop anarchic encroachment on the state land in 1999.[723] As a consequence, the clause of possession cease appeared in the 2001 when it enacted. The 2001 Land Law recognized ownership of immovable property from 1989 to 2001 when this law took effect.[724] Any possession after this law took effect was not allowed, except for social land concession.[725]

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[715]Khemro and Payne, "Improving Tenure Security for the Urban Poor in Phnom Penh, Cambodia," 182; Blunt and Turner, "Decentralisation, Democracy and Development in a Post-Conflict Society," 76.
[716] Feinberg, "The Epidemic of Petit Corruption in Contemporary Cambodia," 283.
[717] Mensher, "The Tonle Sap: Reconsideration of the Laws Governing Cambodia's Most Important Fishery," 804 and 807.
[718] Frings, "Cambodia after Decollectivization (1989-1992)," 50; Hughes, "The Politics of Gifts," 469; John, "New Economic Order in Indochina," 232.
[719] Mgbako et al., "Forced Eviction and Resettlement in Cambodia," 40; Loehr, "External Costs as Driving Forces of Land Use Changes," 1036 and 1045; Un and So, "Land Rights in Cambodia," 289.
[720]Acker, *Hitting a Stone with an Egg?*, 53.
[721]Williams, "Internally Displaced Persons and Property Rights in Cambodia," 196–97.
[722]Hun, "Intensive Cultivation, Land Management, Logging Ban, Areas of Attention in Agricultures, Fisheries, and Forestry"; see: The Cabinet of Samdech Hun Sen, "Cambodian New Vision," 2; Hun, "Stock-Taking Agriculture, Forest and Fisheries Conference" See:; The Cabinet of Samdech Hun Sen, "Cambodia New Vision," 1.
[723]Decision on Establishment of Land Dispute Commissions in Provinces/Municipalities throughout the Country, No. 47/SSR (1999); Declaration on Measures of Eliminating Anarchic Land Encroachment, No. 06 PRK (1999).
[724] 2001 Land Law, art. 29 (2001).
[725] Ibid.. The author will explain this exception in the later section.

In a situation that the people had occupied land before law existed; therefore, the Chapter IV of the 2001 Land Law prescribed the "extraordinary acquisition" on purpose to transform local residents' occupied land under the status of possession (*phou-gak*) into ownership (*kama-sith*) under the authority of this Chapter.[726]

However, the 2001 Land Law provides a number of requirements in order to transform possession into ownership. The 2001 Land Law provides that only "legal possession" can be transformed into ownership.[727] The legal possession must have satisfied five legal requirements: (1) unambiguous, (2) non-violent/peaceful, (3) uncontested/notorious to public, (4) continuous, and (5) in good faith.[728] If one occupies land in compliance with these requirements, one will became a legal possessor over such an occupied land.[729]

Although one satisfies these legal requirements, one does not become a full or definitive owner over land. In this context, one must have completed the five-year statute of limitation.[730] Until the completion of required period, one, as a legal possessor, can request a definitive ownership title (*ban-kama-sith*) by registering occupied land at the cadastral office.[731]

In short, possession is an extraordinary acquisition of private ownership in post-war land reform in Cambodia. This principle is applied to unregistered land within 5-year statute of limitation without protest can lead to ownership acquisition over such an occupied land. Under the 2001 Land Law also, therefore, people who occupied land have a right to ownership, even before registration.

(2). Social Land Concession

The second means for private ownership acquisition under Cambodian post-war property laws is the social land concession. The 2001 Land Law imposes an ultimatum over the new start of possession after this law takes effect.[732] In this sense, there will not have new possession on state land after the 2001 Land Law

[726] Ibid.
[727] Ibid., art. 6.
[728] Ibid., art. 38.
[729] Ibid.
[730] Ibid., art. 30.
[731] Ibid.
[732] Ibid., art. 29.

comes into force on August 30, 2001.[733]

Although the 2001 Land Law cuts off new start of possession, it does not mean that the new way of possession is exhausted under this law. The 2001 Land Law authorizes another new way for private ownership acquisition by "social land concession" in post cut-off date.[734]

Social land concession is characterized differently from extraordinary possession authorized under the Chapter IV of the 2001 Land Law.[735] Extraordinary possession provides an incentive for people to move and clear vacant land.[736] Social land concession is, in contrast, subject to the requirement and scrutiny of the state authority.[737] The state authority will approve citizens who should be eligible for social land concession.[738]

In response to the spirit of the 2001 Land Law, the government developed the Sub-decree on Social Land Concession in 2003 (hereinafter called the "2003 Social Concession Sub-decree").[739] The 2003 Social Concession Sub-decree provides procedures and conditions of eligibility for social land concession.[740] The state will grant social land concession to landless or near-landless citizens for residential or household farming purposes.[741]

The conditions for social land concession are not much different from, but stricter than, those for extraordinary possession under the 2001 Land Law. The social land concession recipient must have occupied and farmed land within 5 years.[742] If the social land concession recipient satisfies a 5-year statute of limitation, he or she is eligible for ownership.[743] However, the recipient cannot sell, exchange, rent, or give gift within this limited period, in contrast to the extraordinary possession.[744]

The 2003 Social Concession Sub-decree enumerates a number of people who are considered eligible

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[733] Ibid.
[734] Ibid., arts. 48 and 49.
[735] Ibid., Chapter IV (arts. 29–47).
[736] Ibid.
[737] A land concession is a legal right established by a legal document issued under the discretion of the competent authority, given to any natural person or legal entity or group of persons to occupy a land and to exercise thereon the rights set forth by this law. See: Ibid., art. 48.
[738] A land concession is a legal right established by a legal document issued under the discretion of the competent authority, given to any natural person or legal entity or group of persons to occupy a land and to exercise thereon the rights set forth by this law. See: Ibid.
[739] Sub-decree on Social Land Concession [អនុក្រឹត្យស្តីពីសម្បទានដីសង្គមកិច្ច] (2003).
[740] Ibid., art. 1.
[741] Ibid., arts.1 and 2.
[742] Ibid., art. 18.
[743] Ibid.
[744] Ibid.

for social land concession from the sate in Article 3 as follows:

(1) Provide land to poor and landless family for residence;
(2) Provide land to poor family for household farming;
(3) Provide land to family who is affected by development project for new resettlement;
(4) Provide land to family who is affected by natural disaster;
(5) Provide land to repatriated family;
(6) Provide land to demilitarized and disabled family;
(7) Facilitate economic development;
(8) Facilitate economic land concession by providing land to workers for residential or farming purpose;
(9) Develop area where has not properly developed.[745]

Among the nine conditions above, the third one plays an important role in current development policy. Governmental development projects often affect and relocate local residents.[746] Those relocatees often receive social land concession from the state, as has been the case in the Borei Keila and Boueng Kak land development projects.[747] Those relocatees have right to land ownership or social land concession. If the relocatees have a right to ownership, they will become owners immediately after the relocation. If the relocatees have a right to social land concession, they will become possessors of conceded land within 5 years in order to transform this right into ownership right.[748]

In short, social land concession was a new mechanism of possession over state land after the introduction of the 2001 Land Law. Social land concession is granted to landless or near-landless persons for residential or household farming purposes. Social land concession is governmental benevolence to landless people.

(3). Ownership Acquisition by Legal Transaction

The third means of private ownership acquisition is the legal transaction. Legal transaction of properties becomes necessary when Cambodia opens the door to the outside world and the start of ownership privatization.

[745] Ibid., art. 3.
[746] By 2011, the total evicted households reached to 30,009 families, around 150,045 persons were forcibly evicted from the Phnom Penh city. See: Sahmakum Teang Tnaut, *Displaced Families: Phnom Penh 1990-2011*.
[747] The author will discuss about these cases in the later section.
[748] Sub-decree on Social Land Concession, art. 18.

The 2001 Land Law clearly states that all land, regardless of status of possession or ownership, can be sold freely in compliance with legal provisions.[749] The 2001 Land Law provides for legal transaction of land ownership acquisition between private persons.[750] Legal transaction is made by purchase, exchange, gift, succession, and decision of the court.[751]

A legal transaction or any change of possession or ownership must be registered or recorded in the cadastral land register.[752]Although the law provides such a requirement; in practice, citizens rarely register their properties when they transact.[753] Citizens frequently make a private sale contract between seller and buyer, which is witnessed by lower local authorities such as village or commune chief, or at most, district governor.[754]

Such a practice is not considered effective to change or transfer of property ownership if land is registered one. The ownership change must be made at the national level; namely, the General Department of Cadastre and Geography of the Ministry of Land for registering properties.[755]

(4). Adverse Possession

Adverse possession is a new principle of land tenure introduced to Cambodian property laws after Cambodia adopted the new Civil Code, which follows the Japanese model, in 2007.[756] Adverse possession is a principle of land occupation applied to registered land with a fixed period determined by law.[757] The new possessor, if he fulfills the legal requirement, can acquire ownership over registered land.[758]

[749] 2001 Land Law, art. 39 (2001).
[750] Ibid., arts. 6, 63, and 71.
[751] Ibid.
[752] Ibid., art. 65.
[753] So et al., *Social Assessment of Land in Cambodia*, 2.
[754] Trzcinski and Upham, "Creating Law from the Ground Up," 64; So et al., *Social Assessment of Land in Cambodia*, 2.
[755] 2001 Land Law, arts. 226–31; Trzcinski and Upham, "Creating Law from the Ground Up," 57.
[756] Civil Code of Cambodia, art. 162 (2007).
[757] Clarke, "Adverse Possession of Identity," 563; Williams, "Reaching Back to Move Forward," 597; Hogg, "The Relation of Adverse Possession to Registration of Title," 84.
[758] Davis, "Note: Keeping the Welcome Mat Rolled-Up," 74 and 83; Williams, "Reaching Back to Move Forward," 597; Cherek, "From Trespasser to Homeowner," 227.

Adverse possession is not authorized under the 2001 Land Law.[759] The 2001 Land Law prohibits private ownership acquisition over registered land even where the claimant's occupation predates the registration.[760] Article 35 of the 2001 Land Law allows competent authority to force unregistered possessors from occupied land when one who has title present or claim against possessors.

> Only competent authority acting on behalf of the state and public entity can evict possessor who does not have title or enough documents from the land.
>
> Ordinary person or authority who does not act on behalf of the state or public entity cannot forcibly evict peaceful possessor who has valid title. The eviction can be made only by the court order from the claimant t who filed a claim at the court.
>
> The court must check to verify form, origin, date, and conditions of the title presented. The court cannot refuse to issue the eviction order in favor of person who presented valid and complete cadastral title.[761]

In addition to this article, Article 239 of the 2001 Land Law recognizes cadastral index map and land register has "legal value and precise effect."[762] The 2001 Land Law, based on these articles, gives value to a person who holds title. Title holder will win the case of competing claims between title holder and land possessor without enough documents proving land tenure.[763]

The presumed value of title dominating actual possession causes many social consequences when outsiders who hold titles win actual possessors in court or other institutions.[764] Currently, most of local residents have occupied land without registration or titles.[765] When there is a competing claim over occupied

[759] 2001 Land Law, arts. 35 and 239.
[760] Ibid.
[761] Ibid., art. 35.
[762] Ibid., art. 239; Trzcinski and Upham, "Creating Law from the Ground Up," 58.
[763] Trzcinski and Upham, "Creating Law from the Ground Up," 64.
[764] Ibid.
[765] The current land registration is achieved around 3,6 million parcels. Cambodia has more than 10 million parcels for registration. See: Ministry of Land Management, Urban Planning, and Construction, *Report on Total Result of August-2014 Activities and Ongoing Action Plan*, 3; Hap, "The Implementation of Cambodia's Laws on Land Tenure," 83; Thiel, "Donor-Driven Land Reform in Cambodia—Property Rights, Planning, and Land Value Taxation," 228.

land, actual possessors are difficult to prove evidence of land tenure.[766] Thus, provision giving dominant value to title has disadvantaged many actual possessors in Cambodia.[767]

When Cambodia adopted the new Civil Code modeled by the Japanese system in 2007, which took effect by the Law on Enforcement of Civil Code of 2011, this new Code introduced the principle of adverse possession to Cambodian property laws.[768] Since the effect of the 2007 Civil Code, the principle of adverse possession over registered property is applied in Cambodia.[769] Article 162 of the 2007 Civil Code provides the principle of adverse possession:

> (1) Any person who have occupied an immovable property peacefully and notoriously to the public and has willingness to own such an occupied immovable property within 20 years shall acquire ownership over such occupied property.
>
> (2) Any person who have occupied an immovable property peacefully and notoriously to the public and has willingness to own such an occupied immovable property within 10 years shall acquire ownership over such occupied property if that person was honest and innocent when he/she started to possess that immovable property.
>
> (3) Provisions of paragraphs (1) and (2) shall not apply to immovable property that belongs to state property at any category.[770]

Article 162 of Cambodian 2007 Civil Code completely follows Article 162 of Japanese Civil Code, except for the paragraph (3).[771] The statute of limitation for ownership acquisition under these articles is 10 years, or 20 years depending on integrity of land possessors.[772] However, this statute of limitation is contradictory to the 2001 Land Law that authorizes only 5-year possession for acquiring land ownership.[773]

In order to facilitate this contradiction, which is due to blatant copy and translation from the Japanese version without a serious view of the 2001 Land Law, the Commentary of the 2007 Civil Code, which was

[766] Kaneko Yuka, "An Alternative Way of Harmonizing Ownership with Customary Rights: Japanese Approach to Cambodian Land Reform," *Journal of International Cooperation Studies* 18, no. 2 (2010): 7; Trzcinski and Upham, "Creating Law from the Ground Up," 64.
[767] Trzcinski and Upham, "Creating Law from the Ground Up," 64.
[768] Civil Code of Cambodia (2007); Law on Enforcement of Civil Code (2011).
[769] Civil Code of Cambodia, art. 162.
[770] Ibid.
[771] Japanese Civil Code [民法], Law no. of 1896, art. 162 (JP); Civil Code of Cambodia, art. 162.
[772] Japanese Civil Code 1896, art. 162; Civil Code of Cambodia, art. 162.
[773] 2001 Land Law, art. 30 (2001).

arranged by the drafters in 2010, explains that these provisions will apply to registered property.[774] In this context, the 5-year possession of the 2001 Land Law is applied to original land, which is assumed the first registration (the principle of possession).[775] When land is registered, the 10-year or 20-year possession of the 2007 Civil Code will apply to it as the second registration (the principle of adverse possession).[776] This makes Cambodian property laws adopt the principle of adverse possession in post-2007 Civil Code.

The introduction of the principle of adverse possession will be a good sign for protecting a number of land possessors, especially, to whom deem to be informal or illegal slum dwellers under the past practice, who have occupied land claimed to belong to the state or a third party. However, this principle of adverse possession seems narrow and weak to protect land possessors when the 2007 Civil Code inserts a strict condition for applying this principle in the paragraph (3).[777]

As mentioned above, the provisions of Article 162 of Cambodian 2007 Civil Code copies the concept from Japanese Civil Code.[778] However, Japanese Civil Code does not contain the paragraph (3) as that of Cambodian Civil Code.[779] The paragraph (3) puts a narrow application of the principle of adverse possession in Cambodia, in which this principle cannot be not applied to state land *at any category*.[780]

The paragraph (3) seems contradictory to the principle of the 2001 Land Law. The 2001 Land Law divides state land into two categories, namely, state public land and state private land.[781] The core of the 2001 Land Law is to authorize possession on state private land leading to private ownership acquisition.[782] State private land has function as individual private land. If the adverse possession cannot be applied to state private land, it deems questionable.

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[774] Ministry of Justice (ក្រសួងយុត្តិធម៌), *Article-by-Article Commentary on Civil Code of Cambodia* [សេចក្តីកំណត់ត្រាចំពោះមាត្រានីមួយៗនៃក្រមរដ្ឋប្បវេណី], 2010, 130–31.
[775] Ibid.
[776] Ibid., 130.
[777] Civil Code of Cambodia, art. 162.
[778] Japanese Civil Code, Law no. of 1896, art. 162 (JP); Civil Code of Cambodia, art. 162.
[779] Japanese Civil Code 1896, art. 162; Civil Code of Cambodia, art. 162.
[780] Civil Code of Cambodia, art. 162.
[781] 2001 Land Law, See: (2001).
[782] Ibid., Chapter IV (arts. 29–47).

Furthermore, the inclusion of the paragraph (3) in Article 162 of the 2007 Civil Code is not seriously considered of the size of land ownership between state and individual private persons in Cambodia. State land (state public and state private land) consists of 80 percent of the whole Cambodian territory, while private land is assumed to be 20 percent.[783] If land were already registered, the majority of land would belong the state. The paragraph (3) does not allow applying the principle of adverse possession to state land.[784] Therefore, the percentage of application of adverse possession is relatively less. Such an inclusion is not critically thought of the need of land by local residents and increasing pressure of the landless and land disputes in Cambodia today.

In short, the principle of adverse possession, which is introduced by the 2007 Civil Code, is a good sign, but it does not give much advantage to land possessors in the future.

3. Relation among State Public Land, State Private Land, and Individual Private Land

Regardless of the principle of adverse possession introduced by the 2007 Civil Code, relation among state public land, state private land, and individual private land is unique under Cambodian property laws. Currently, the division of such land remains unclear and overlapping because the majority of land is not registered yet.[785] In common sense, land belongs to the state; in this context, the whole Cambodian territory could be called "state land."[786]

However, such a division was made in legal concept. The 2001 Land Law divided state land into three relative parts: (1) state public land, (2) state private land, and (3) individual private land.[787] The final

[783] Inspection Panel, *Cambodia: Land Management and Administration Project*, XX; Loehr, "External Costs as Driving Forces of Land Use Changes," 1039; Thiel, "Donor-Driven Land Reform in Cambodia—Property Rights, Planning, and Land Value Taxation," 227; Un and So, "Land Rights in Cambodia," 296; Neef, Touch, and Chiengthong, "The Politics and Ethics of Land Concessions in Rural Cambodia," 1086.
[784] Civil Code of Cambodia, art. 162.
[785] The current land registration is achieved around 3,6 million parcels. Cambodia has more than 10 million parcels for registration. See: Ministry of Land Management, Urban Planning, and Construction, *Report on Total Result of August-2014 Activities and Ongoing Action Plan*, 3; Hap, "The Implementation of Cambodia's Laws on Land Tenure," 83; Thiel, "Donor-Driven Land Reform in Cambodia—Property Rights, Planning, and Land Value Taxation," 228.
[786] This concept is the hangover from the communist period. In that time, all land belongs to the state. Further see the 1989 Constitution and 1992 Land Law. Therefore, when Cambodian transformed to democracy, the calling is still dominant and accustomed to ear. Therefore, state land is commonly in Cambodia, which refers to the whole territory land.
[787] The 2001 Land Law divided land into five categories: (1) state public land, (2) state private land, (3) indigenous collective land, (4) pagoda land, and (5) individual private land. However, this Dissertation divided only three categories for easy understanding. See: 2001 Land Law.

determination of ownership over land depended on land registration.[788] This section will demonstrate legal effect and relation among the three categories of land under Cambodian property laws.

a). Legal Effect and Relation of State Public Land and State Private Land

State public land and state private land have a different legal effect. The 2001 Land Law determined state public land to be inalienable and with no statute of limitation.[789] However, state public land may have been subject to permission for temporary occupation and use, but such a use was precarious and revocable if occupant did not pay tax.[790] State public land can be subject to long-term lease not exceeding 15 years.[791] State public land was not subject to ownership acquisition by extraordinary possession under the Chapter IV of the 2001 Land Law.[792]

State private land had a different legal regime from state public land. State private land was subject to the same legal regime as individual private land. In this context, state private land could be subject to sale, exchange, distribution, transfer of rights, and land concession.[793] Transaction of state private land was made by sub-decree.[794]

Although Cambodian property laws have divided state land into state public and state private land, both have had a close relation in practice. State public land can be reclassified as state private land when it lost public use, as stated in Article 16 of the 2001 Land Law provided:

> State public properties, when losing public use, can be reclassified as state private properties by reclassification law.[795]

In accordance with this provision, reclassification of state public land into state private land must be made by law.[796] So far, Cambodia had not had such a law for governing state land reclassification. However, the government enacted Royal Decree on Temporary Rule and Provision of State Public Land Reclassification

[788] See: ibid., arts. 3031 and 226–31; Trzcinski and Upham, "Creating Law from the Ground Up," 57.
[789] 2001 Land Law, art. 16.
[790] Ibid.
[791] Sub-decree Rule and Procedure of State Public Reclassification of State and Public Legal Entity, art. 18 (2006).
[792] 2001 Land Law, art. 16.
[793] Ibid., art. 17.
[794] Ibid.
[795] This article is translated and underlined by the author for emphasis. See: Ibid., art. 16.
[796] Ibid.; Sub-decree on State Land Management, art. 14 (2005).

of State and Public Legal Entity for authorizing state land reclassification instead of the required law in 2006 (hereinafter called the "2006 Land Reclassification Royal Decree").[797]

The 2006 Land Reclassification Royal Decree provided the requirements of state land reclassification from state public land to state private land in Article 3:

> The reclassification from state public land to state private land can be made only if it satisfies the following conditions:
> (1) That property no longer serves the public use, or
> (2) That property loses its full qualification in serving the public use, or
> (3) That property is no longer directly used by the public.[798]

Furthermore, the government created the Sub-decree on Rule ad Procedure of State Public Land Reclassification of State and Public Legal Entity in the same year (hereinafter called "2006 State Land Reclassification Sub-decree").[799] The 2006 State Land Reclassification Sub-decree governed procedure of land reclassification. [800] Both 2006 State Land Reclassification Royal Decree and Sub-decree authorized reclassification of state public land to be made by sub-decree.[801]

T date, the government has reclassified thousands of hectares from state public land into state private for social development, in some cases resulting in controversial evictions, as in the case of Boeung Kak area.[802]

b). Legal Effect and Relation of State Land and Private Land

Apart from the relation between state public land and state private land, both categories have a close link with individual private land, which is nebulous and overlapping. This often causes competing claim disputes in Cambodia.[803] The 2001 Land Law prohibited private ownership acquisition of state public land

[797] Royal Decree on Temporary Principle and Provision of State Public Land Reclassification of State and Public Legal Entity (2006).
[798] Ibid., art. 3.
[799] Sub-decree Rule and Procedure of State Public Reclassification of State and Public Legal Entity (2006).
[800] Ibid., art. 40.
[801] Royal Decree on Temporary Principle and Provision of State Public Land Reclassification of State and Public Legal Entity, art. 5; Sub-decree Rule and Procedure of State Public Reclassification of State and Public Legal Entity, art. 41.
[802] The Dissertation will illustrate this case in the next section of this Chapter.
[803] Inspection Panel, *Cambodia: Land Management and Administration Project*, vii; See: Cambodian Human Rights Portal, "The Reported Land Conflict Cases 2007 to 2011 in Cambodia."

even if such a possession was made at any time.[804] However, this law authorized private ownership acquisition on state private land by principle of possession before its cut-off date on August 30, 2001.[805] This prohibition was clearly indicated in Article 18 of the 2001 Land Law:

> The following are null and void and cannot be made legally:
>
> (1) Any possession of public property belonging to the state and public legal entity, and any transformation of possession of state private property into ownership, even such possession and transformation had occurred at any time, that were not complied with the legal norms and procedures which had already set out;
>
> (2) Any transformation of land concession, even such transformation had occurred before this law took effect, except for social land concession;
>
> (3) Any concession that is not complied with provisions of the Chapter V;
>
> (4) Any possession of state private property, by any means, occurred after this law had taken effect.[806]

In reliance on this article, conversion to private land through individual possession was limited to state private land as of August 30, 2001.[807] Due to the fact that the majority of land was not registered, state private land and individual private land were overlapping.[808] Any individual, who occupied land before this cut-off date, could acquire ownership over state private land only.[809]

Private ownership over state public land cannot be acquired regardless of the length of possession.[810] The state can assert and confiscate such a possessed land based on retroactive clause of the 2001 Land Law. In addition, the 2001 Land Law stipulates three imperative penalties for any possession deemed illegal: forced eviction, non-compensation, and criminalization, as stated in Article 43:

> The public property of the state shall not be subject to ownership acquisition at any case.
>
> The status of the occupant of the state public property remains precarious and illegal if that status is not authorized by formalities prescribed in law.

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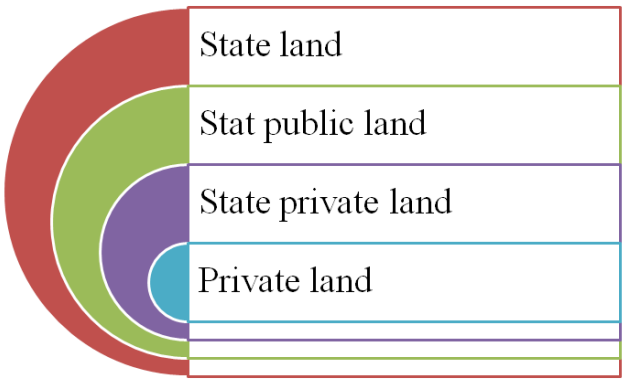
[804] 2001 Land Law, art. 18 (2001).
[805] Ibid., Chapter IV (arts. 29–47).
[806] Ibid., art. 18.
[807] Ibid., Chapter IV (arts. 29–47).
[808] The current land registration is achieved around 3,6 million parcels. Cambodia has more than 10 million parcels for registration. See: Ministry of Land Management, Urban Planning, and Construction, *Report on Total Result of August-2014 Activities and Ongoing Action Plan*, 3; Hap, "The Implementation of Cambodia's Laws on Land Tenure," 83; Thiel, "Donor-Driven Land Reform in Cambodia—Property Rights, Planning, and Land Value Taxation," 228.
[809] 2001 Land Law, Chapter IV (arts. 29–47).
[810] Ibid., art. 18.

An individual who has illegally occupied shall be forced to urgently vacate and shall be punished as determined in article 259 of this law.[811]

An individual who has illegally occupied is not entitled to any compensation over his/her works and improvements made on that immovable property.[812]

This article further adds burden on land possessors, deems informal or illegal slum dwellers on state land or land belonging to third party. The state authority can force those dwellers from occupied land without appropriate compensation and charge them under criminal law.[813]As a result, Cambodian land is overlapping among state public land, state private land, and individual private land, which induce competing claims among stakeholders and endless disputes in Cambodia. The following figure shows the relation and overlapping ownership of land in Cambodia.

Figure 24: The overlapping land ownership under Cambodian property laws



Source: Author

In short, the relation of state public land, state private land, and individual private ownership has a close link and overlapping tenure in practice. State public land is regulated for public use, which cannot be subject to private ownership acquisition. However, state public land can be subject to temporary occupation and a 15-year long-term lease. State private land has the same legal regime as individual private land; namely, it can be subject to business transactions. The interlink of state public land and state private is that state public

[811] Article 259 of the 2001 Land Law provides that "[a]n infringement against public property shall be fined from five million (5,000,000) Riel to fifty million (50,000,000) Riel and/or shall be imprisoned from one (1) to five years. The perpetrator must vacate the public property immediately. Perpetrator is not entitled to any indemnity for works or improvements made on that property."
[812] This article is translated and underscored by the author for emphasis. See: 2001 Land Law, art. 43.
[813] This article is translated and underscored by the author for emphasis. See: Ibid.

land, when it loses its public use, can be reclassified as state private land. In this context, lost-public use state land could be subject to individual ownership acquisition, as a consequence. Land reclassification must be made by law. Currently, Cambodia does not have an appropriate law governing this; but it is made by temporary regulation.

D. Land Administration and Registration

Land administration and registration are preliminary for preventing and protecting land disputes caused by grabbing. Land disputes arise from the negligence of authority responsible for land administration and registration. When dispute occurs, resolution often faces conflict of interest. Thus, affected residents cannot satisfy dispute solution; as a consequence, they protest against enforcement of forced eviction. The following section will demonstrate authorities responsible for land administration and land registration, which result in conflict of interest in competing claim dispute resolution between state and individual private person.

1. State Land Management Authority

State land is under the control of an authority, which is authorized under the 2005 State Land Sub-decree.[814] This authority is called the "State Land Management Authority." [815] The State Land Management Authority has a duty to manage, classify, and reclassify state land for registration and development.[816] The State Land Management Authority is divided into levels: (1) local level and (2) national level.

The local level has two echelons, namely, the municipal/district/*khan* level and provincial/municipal level. The district/*khan* level is called the "Municipal/District/*Khan* State Land Working Group."[817] The Municipal/District/*Khan* State Land Working Group is composed of the municipal/district/*khan* governor as the chairman and subordinated institutions as members.[818] The capital/provincial level is called the "Capital/Provincial State Land Management Committee."[819] The Capital/Provincial State Land Management

[814] See: Sub-decree on State Land Management (2005).
[815] Ibid., art. 2.
[816] Ibid., arts. 1 and 2.
[817] Ibid., arts. 7 and 23.
[818] Ibid., art. 27.
[819] Ibid., arts. 6 and 23.

Committee is composed of the capital/provincial governor as the chairman, and various subordinated institutions as members.[820]

The national level has three main bodies involved in the process: (1) Ministry of Land, (2) Land Policy Council, and (3) Council of Ministers.[821] The Ministry of Land will register classified land sent from local level. If the Ministry of Land disagrees with the classified land, the Minister of Land will send classified land to the Land Policy Council for consideration. If the Land Policy Council agrees, the Land Policy Council will send the classified land to the Ministry of Land for registration. If the Land Policy Council disagrees, the Land Policy Council will send the classified land to the Council of Ministers for decision. Then, the Ministry of Land will register the classified land by the decision of the Council of Ministers.[822]

2. Land Registration Authority

The categorization of a given parcel of land as state public land, state private land, and individual private land is determined at the time of registration.[823] Cambodia has authorities responsible for registering land by the type of registration systems. Cambodia has two types of land registration systems: (1) sporadic land registration and systematic land registration.[824] Each has a different registration process, but the same level of responsible authority in territorial administration. This section will demonstrate the land registration process and responsible authority in post-war Cambodia.

a). Sporadic Land Registration

Sporadic land registration is one of land registration systems in post-war Cambodia. This system was introduced when Cambodia started to re-privatized land in 1989.[825] The sporadic land registration system has continued its mission until today. This section will cover the background, responsible authority, and process of sporadic land registration in Cambodia.

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[820] Ibid., art. 23.
[821] Ibid., art. 12.
[822] Ibid.
[823] See: 2001 Land Law, arts. 3031 and 226–31 (2001); Trzcinski and Upham, "Creating Law from the Ground Up," 57.
[824] See: Sub-decree on Organization and Functioning of Cadastral Commissions (2002); Sub-decree on Sporadic Land Registration (2002).
[825] Acker, *Hitting a Stone with an Egg?*, 37; Hap, "The Implementation of Cambodia's Laws on Land Tenure," 78.

i. Background of Sporadic Land Registration

Sporadic land registration refers to land registration initiated by individual private persons applying for land registration at state cadastral office.[826] Sporadic land registration was introduced in post-1989 Cambodia land reform.[827] The then-government appealed to people to come and apply for registering their occupied land at the cadastral office in 1989.[828] In response to this appeal, people came and applied for land registration, and around 4.5 million of application forms were filed at cadastral offices.[829]

The initial sporadic land registration did not have comprehensive regulations for governing its process. The process was a *de facto* practice under some governmental circulars and instructions.[830] As of 2002, the government adopted the Sub-decree on Sporadic Land Registration for managing the sporadic land registration process (hereinafter called the "2002 Sporadic Registration Sub-decree").[831] The 2002 Sporadic Registration Sub-decree materialized the *de facto* practice in legal effect.[832] Furthermore, the Ministry of Land developed the Circular on Procedural Implementation of Sporadic Land Registration for detailing procedural mechanism for sporadic land registration process in 2004.[833]

ii. Responsible Authority for Sporadic Land Registration

Sporadic land registration proceeds with a course of bureaucratic process. A number of central and local authorities are key actors involved in the process of measurement, approval, and issuance of titles. Cadastral

[826] Adler, Porter, and Woolcock, "Legal Pluralism and Equity," 3; Hap, "The Implementation of Cambodia's Laws on Land Tenure," 78.
[827] Acker, *Hitting a Stone with an Egg?*, 37; Hap, "The Implementation of Cambodia's Laws on Land Tenure," 49.
[828] Sophal Chan, Saravy Tep, and Sarthi Acharya, *Land Tenure in Cambodia: A Data Update*, Working Series 19 (Cambodia Development Research Institute (CDRI), 2001), 30; Acker, *Hitting a Stone with an Egg?*, 37; Russell, "Land Law of the Kingdom of Cambodia," 107; Hap, "The Implementation of Cambodia's Laws on Land Tenure," 49.
[829] Chan, Tep, and Acharya, *Land Tenure in Cambodia*, 30; Acker, *Hitting a Stone with an Egg?*, 37; Russell, "Land Law of the Kingdom of Cambodia," 107; Hap, "The Implementation of Cambodia's Laws on Land Tenure," 49.
[830] Instruction on Implementation of Policy on Management and Use of Land, NO. 03/SNN (1989); Notification on Acceptance of Land Registration Application Form and Ongoing Practice [សេចក្តីជូនដំណឹងស្តីពីការទទួលពាក្យស្នើកាន់កាប់ដីធ្លី និងទិដ្ឋានការអនុវត្តបន្ត] (1990); Council of Ministers Informed Minister of Agriculture on Extension of Land Application Form Acceptance Until June 30, 1990 [រដ្ឋមន្ត្រីទទួលបន្ទុកខុទ្ទកាល័យក្រុមប្រឹក្សារដ្ឋជំទាមជូនសមមិត្តរដ្ឋមន្ត្រីក្រសួងកសិកម្មរុក្ខាប្រមាញ់និងនេសាទស្តីសុំអនុញ្ញាតពន្យារពេលទទួលពាក្យស្នើសុំកាន់កាប់ដីធ្លីរហូតដល់ថ្ងៃទី៣០-០៦-១៩៩០] (1990); Instruction/03 SnN/Dec 08 1990/ on Readjustment of Circular 03 SnN dated June 30, 1989 of the Council for Ministers [សេចក្តីណែនាំ/០៣សណន/០៨ធ្នូ ១៩៩០/ស្តីពីការកែសម្រួលសេចក្តីណែនាំលេខ ០៣ ចុះថ្ងៃទី ៣០ ខែមិថុនា ឆ្នាំ១៩៨៩] (1990).
[831] Sub-decree on Sporadic Land Registration (2002).
[832] See: ibid.
[833] Circular on Procedural Implementation of Sporadic Land Registration (2004).

administration extends its bureaucracy from central to local level in territorial administration. There are two levels of cadastral administration: (1) central cadastral administration and (2) local cadastral administration.

The central cadastral administration is the Ministry of Land, in which the General Department of Cadastre and Geography is responsible for setting technical standard for border demarcation, cadastral index map, other documents, and final approval of title issuance.[834]

The local cadastral administration has two levels: (1) the District/*Khan* Cadastral Administration and (2) the Provincial/Municipal Cadastral Administration. The District/*Khan* Cadastral Administration is responsible for survey, border demarcation, and check of land registration request; namely, the fieldwork. If the District/*Khan* Cadastral Administration cannot do this job of technical capacity, the District/*Khan* Cadastral Administration can request the Provincial/Municipal Cadastral Administration for help. The Provincial/Municipal Cadastral Administration is responsible for checking, approving, and sending the output of the fieldwork to the central administration for approval. [835]

iii. Process of Sporadic Land Registration

Sporadic land registration is initiated by individual land possessor.[836] Any possessor can apply for land registration by submitting application form to commune/*sangkat* chief. [837] Commune/*sangkat* chief will help him/her fill in the application form and send to the Municipal/District/*Khan* Cadastral Administration for checking.[838]

The Municipal/District/*Khan* Cadastral Administration will check the application form. If the Municipal/ District/*Khan* Cadastral Administration finds the application form inappropriate or land occupation illegal, the Municipal/District/*Khan* Cadastral Administration will deny the application form with reasoning and return the application form to the applicant. [839] However, the applicant can appeal to the Capital/Provincial Cadastral

[834] Sub-decree on Sporadic Land Registration, art. 2.
[835] Ibid.
[836] Adler, Porter, and Woolcock, "Legal Pluralism and Equity," 3; Hap, "The Implementation of Cambodia's Laws on Land Tenure," 78.
[837] Sub-decree on Sporadic Land Registration, art. 7; Circular on Procedural Implementation of Sporadic Land Registration, 1–2.
[838] Sub-decree on Sporadic Land Registration, art. 7; Circular on Procedural Implementation of Sporadic Land Registration, 1–2.
[839] Sub-decree on Sporadic Land Registration, art. 8; Circular on Procedural Implementation of Sporadic Land Registration, 3.

Administration for review. [840] If the Municipal/District/*Khan* Cadastral Administration finds that the requested land for registration is in dispute, the Municipal/District/*Khan* Cadastral Administration will arrange the dispute conciliation.[841]

If the Municipal/District/*Khan* Cadastral Administration finds the application form appropriate, the Municipal/District/*Khan* Cadastral Administration will record it in the application reception book and set the date for fieldwork.[842] The Municipal/District/*Khan* Cadastral Administration will send the proposed date of fieldwork to the municipal/district/*khan* governor within 3 days.[843] The municipal/district/*khan* governor will announce and notify the date of fieldwork to the applicant within 14 days at municipality, district, *khan*, commune, *sangkat* halls and easily visible place in village where the fieldwork will conduct.[844]

On the fieldwork day, the Municipal/District/*Khan* Cadastral Administration will send officials for conducting fieldwork (hereinafter called the "fieldwork officials").[845] The fieldwork officials will ask the land possessors for information relevant to land, survey and demarcate land.[846] If there is a border dispute during the fieldwork, the fieldwork officials will conciliate the dispute.[847] If the dispute is not settled, the fieldwork officials will send the case to the Municipal/District/*Khan* CC for conciliation.[848]

After the completion of fieldwork and data is collected, the Municipal/District/*Khan* Cadastral Administration will conduct the technical verification over collected document.[849] After checking, the Municipal/

[840] Sub-decree on Sporadic Land Registration, art. 8; Circular on Procedural Implementation of Sporadic Land Registration, 3.
[841] Sub-decree on Sporadic Land Registration, art. 8; Circular on Procedural Implementation of Sporadic Land Registration, 3.
[842] Sub-decree on Sporadic Land Registration, art. 8; Circular on Procedural Implementation of Sporadic Land Registration, 2.
[843] Circular on Procedural Implementation of Sporadic Land Registration, 2.
[844] Sub-decree on Sporadic Land Registration, art. 9; Circular on Procedural Implementation of Sporadic Land Registration, 2.
[845] Sub-decree on Sporadic Land Registration, art. 10; Circular on Procedural Implementation of Sporadic Land Registration, 4.
[846] Sub-decree on Sporadic Land Registration, art. 10; Circular on Procedural Implementation of Sporadic Land Registration, 4.
[847] Sub-decree on Sporadic Land Registration, art. 10; Circular on Procedural Implementation of Sporadic Land Registration, 5.
[848] Sub-decree on Sporadic Land Registration, art. 10; Circular on Procedural Implementation of Sporadic Land Registration, 5.
[849] Sub-decree on Sporadic Land Registration, art. 11; Circular on Procedural Implementation of Sporadic Land Registration, 7–8.

District/*Khan* Cadastral Administration will approve the document, which is called the "screening document."[850] Then, the Municipal/District/*Khan* Cadastral Administration will make a public display of the screening document, including a map of land parcel and location, and list of landowners, within 30 days at the municipality, district, *khan*, commune, and *sangkat*.[851] The municipal/district/*khan* governor will notify the applicant within 7 days before the public display.[852]

During the public display, any land possessor, legal representative, or person interested in the land parcel can object to the displayed document by communication with the Municipal/District/*Khan* Cadastral Administration stand-by officials at the displayed place.[853] The Municipal/District/*Khan* CC will resolve the objection and disputed land before proceeding with a course of registration and title issuance.[854]

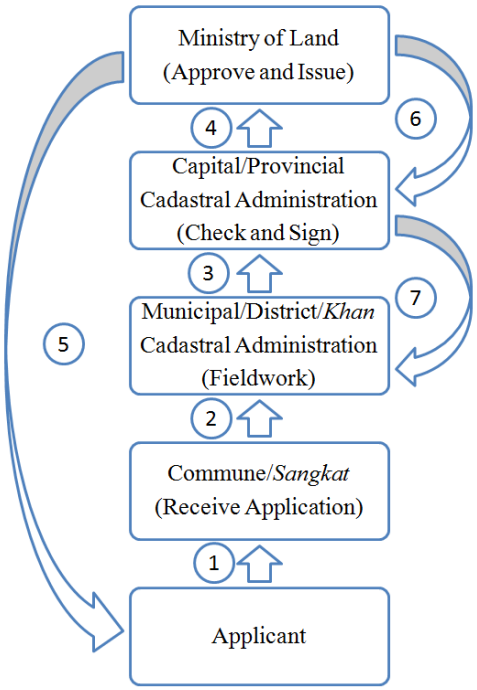
After the period of public display, if there is no objection, the displayed document is considered valid.[855] The Municipal/District/*Khan* Cadastral Administration will include the land parcel into the sporadic index map.[856] The Municipal/District/*Khan* Cadastral Administration will send the document to the Capital/Provincial Cadastral Administration for signature.[857] The Capital/Provincial Cadastral Administration will continue to send the document to the central Cadastral Administration; namely, the General Department of Cadastre and Geography at the Ministry of Land.[858]

The General Department of Cadastre and Geography will record the land parcel in the Land Register.[859] After the land parcel is recorded, the General Department of Cadastre and Geography will issue land title to the applicant.[860] Then, the General Department of Cadastre and Geography will send the list of registration information to Capital/Provincial Cadastral Administration and Municipal/District/*Khan* Cadastral Administration

[850] Sub-decree on Sporadic Land Registration, arts. 12 and 13; Circular on Procedural Implementation of Sporadic Land Registration, 7–8.
[851] Sub-decree on Sporadic Land Registration, art. 13; Circular on Procedural Implementation of Sporadic Land Registration, 8.
[852] Sub-decree on Sporadic Land Registration, art. 13; Circular on Procedural Implementation of Sporadic Land Registration, 8.
[853] Sub-decree on Sporadic Land Registration, art. 14; Circular on Procedural Implementation of Sporadic Land Registration, 8.
[854] Sub-decree on Sporadic Land Registration, art. 14; Circular on Procedural Implementation of Sporadic Land Registration, 8–13.
[855] Circular on Procedural Implementation of Sporadic Land Registration, 9.
[856] Sub-decree on Sporadic Land Registration, art. 15.
[857] Ibid., art. 16; Circular on Procedural Implementation of Sporadic Land Registration, 10.
[858] Sub-decree on Sporadic Land Registration, art. 16; Circular on Procedural Implementation of Sporadic Land Registration, 10.
[859] Sub-decree on Sporadic Land Registration, art. 17.
[860] Ibid., art. 18.

for recordation.[861] The following figure shows the process of sporadic land registration in Cambodia.

Figure 25: The administrative process of sporadic land registration



Source: Author

In short, sporadic land registration is bureaucratic in process. As a result, the process of title registration and issuance is slow.

b). Systematic Land Registration

In addition to the sporadic land registration, which was introduced in post-1989 land reform, Cambodia had another registration system that was introduced under the authorization of the 2001 Land Law.[862] This new registration system was called the "systematic land registration." [863] This section will cover the background, responsible authority, and process of systematic land registration in Cambodia.

[861] Ibid., art 19.
[862] See: 2001 Land Law, Part VI (arts. 226–46) (2001); Sub-decree on Procedure of Establishing Cadastral Index Map and Land Register (2002).
[863] See: 2001 Land Law, Part VI (arts. 226–46); Sub-decree on Procedure of Establishing Cadastral Index Map and Land Register.

i. Background of Systematic Land Registration

The systematic land registration started in 2002.[864] The process of systematic land registration was under the support of multiple donors, in which the World Bank was major counterpart that contributed US$ 23.4 million for this project.[865] The systematic land registration proceeded under multiple-donor project called the "Land Management and Administration Project (LMAP)."[866] The LMAP, initially, covered only ten municipal/provinces, including Phnom Penh capital earmarked for registration.[867]

However, the arrangement of the LMAP resulted in forced evictions and relocations of local residents; especially, of the case of Boueng Kak land dispute.[868] Following the endless protest from the affected residents, the World Bank suspended funding the LMAP in 2009. [869] Since then, the LMAP was changed into the Land Administration Sub-sector Project (LASSP).[870] The LASSP continued to register land with a number of donors, except the World Bank.[871]

ii. Responsible Authority for Systematic Land Registration

The process of the systematic land registration proceeded under two main regulations.[872] The first was the Sub-decree on Procedure of Establishing Cadastral Index Map and Land Register in 2002 (hereinafter

[864] Hap, "The Implementation of Cambodia's Laws on Land Tenure," 24; Bugalski and Pred, "Formalizing Inequality," 2.
[865] Markussen, "Property Rights, Productivity, and Common Property Resources," 2280; Trzcinski and Upham, "Creating Law from the Ground Up," 59; Inspection Panel, *Cambodia: Land Management and Administration Project*, xiv; Bugalski and Pred, "Formalizing Inequality," 3.
[866] Markussen, "Property Rights, Productivity, and Common Property Resources," 2280; Trzcinski and Upham, "Creating Law from the Ground Up," 59.
[867] Multi-donor Appraisal Mission, *Proposed Land Management and Administration Project (LMAP)*, 3; Markussen, "Property Rights, Productivity, and Common Property Resources," 2280.
[868] Trzcinski and Upham, "Creating Law from the Ground Up," 69; Bugalski and Pred, "Formalizing Inequality," 3.
[869] Inspection Panel, *Cambodia: Land Management and Administration Project*, xiv; Trzcinski and Upham, "Creating Law from the Ground Up," 69.
[870] Thiel, "Donor-Driven Land Reform in Cambodia—Property Rights, Planning, and Land Value Taxation," 228; Ministry of Land Management, Urban Planning, and Construction, *Report on Total Result of August-2014 Activities and Ongoing Action Plan*, 8.
[871] Thiel, "Donor-Driven Land Reform in Cambodia—Property Rights, Planning, and Land Value Taxation," 228; Ministry of Land Management, Urban Planning, and Construction, *Report on Total Result of August-2014 Activities and Ongoing Action Plan*, 8.
[872] See: Sub-decree on Procedure of Establishing Cadastral Index Map and Land Register (2002); Circular on Procedural Implementation of Establishing Cadastral Index Map and Land Register (2002).

called the "2002 Systematic Registration Sub-decree").[873] The second was the Circular on Establishing Cadastral Index Map and Land Register, which was adopted in the same year.[874]

The 2002 Systematic Registration Sub-decree determines responsible authorities for registering land.[875] The responsible authorities for systematic land registration are not different from those of the sporadic land registration system; namely, the national and local levels.[876] However, the systematic land registration has an "administrative commission" responsible for specific earmarked areas.[877] The membership of administrative commission is provided in Article 3:

- Representative of provincial/municipal governor, as chairman;[878]
- Cadastral official who is liable for determined area, as member;
- Provincial/municipal cadastral official who responsible for administrative work, as member;
- Governor or representative of district/*khan*, as member;[879]
- Chief or representative of village, as member;
- Two elders in determined area; as members.[880]

Capital/provincial governors, who are the capital/provincial state land management committee, will be responsible for appointing an ad-hoc administrative commission for registering land in the determined area.[881] The relations among administrative commission, Capital/Provincial Cadastral Commission, and central Cadastral Commission are not different from those of the sporadic land registration.

iii. Process of Systematic Land Registration

Systematic land registration is the state mechanism for registering land in a certain area by the determination of the state. In this context, the state determines a specific area for registration. In this process, land possessors wait for such a registration and coordinate with cadastral officials by proving evidence or document relevant of land tenure to cadastral officials.

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[873] Sub-decree on Procedure of Establishing Cadastral Index Map and Land Register.
[874] Circular on Procedural Implementation of Establishing Cadastral Index Map and Land Register.
[875] Sub-decree on Procedure of Establishing Cadastral Index Map and Land Register, art. 1; Circular on Procedural Implementation of Establishing Cadastral Index Map and Land Register.
[876] Sub-decree on Procedure of Establishing Cadastral Index Map and Land Register, art. 2.
[877] Ibid., art. 3; Prakas on Principle and Procedure of Cadastral Commission (2002); Circular on Procedural Implementation of Establishing Cadastral Index Map and Land Register.
[878] Territorial administration was changed in 2008. Previously called "provincial/municipal governor" was changed to "capital/provincial governor." This Dissertation used the name.
[879] Likewise, previously called "district/*khan* governor" was changed to "municipal/district/*khan* governor."
[880] Sub-decree on Procedure of Establishing Cadastral Index Map and Land Register, art. 3.
[881] Ibid.; Circular on Procedural Implementation of Establishing Cadastral Index Map and Land Register, 1.

The process of systematic land registration has three important steps: (1) determination of the area, (2) establishment of the administrative commission, and (3) operation of land registration. Determination of the is is preliminary step for administrative commission and registration process. The 2002 Systematic Registration Sub-decree confers the power to capital/provincial governor, who is the chairman of the Capital/Provincial State Land Management Committee and the chairman of Capital/Provincial CC, to declare an area for systematic land registration.[882] The capital/provincial governor will announce any specific area earmarked for systematic land registration after discussion and approval from the Ministry of Land.[883]

After the area is determined, the capital/provincial governor will appoint an ad-hoc administrative commission responsible for registering land in this area.[884] The administrative commission will hold internal meetings to explain procedures, divide roles in members, and put forward date and place of public meeting concerning the announcement of the determined area to capital/provincial governor.[885]

The capital/provincial governor will write a formal letter that describes and allows the operation of systematic land registration to lower local authorities in the determined area within 15 days before the public meeting takes place.[886] The capital/provincial governor will announce the date and place of the public meeting within 7 days before the operation starts in order to allow local residents in the determined area to know the procedure of systematic land registration, prepare documents, and cooperate with the ad-hoc administrative commission.[887]

On the operation day, the General Department of Cadastre and Geography of the Ministry of Land will send fieldwork officials, who form an administrative commission to survey and demarcate the borders of land, collect data relevant to the identity of the land and possessors.[888] After completing data collection and

[882] Sub-decree on Procedure of Establishing Cadastral Index Map and Land Register, art. 2; Bugalski and Pred, "Formalizing Inequality," 3.
[883] Sub-decree on Procedure of Establishing Cadastral Index Map and Land Register, art. 2; Circular on Procedural Implementation of Establishing Cadastral Index Map and Land Register, 1.
[884] Sub-decree on Procedure of Establishing Cadastral Index Map and Land Register, art. 3; Circular on Procedural Implementation of Establishing Cadastral Index Map and Land Register, 1.
[885] Sub-decree on Procedure of Establishing Cadastral Index Map and Land Register, art. 6; Circular on Procedural Implementation of Establishing Cadastral Index Map and Land Register, 2.
[886] Sub-decree on Procedure of Establishing Cadastral Index Map and Land Register, art. 6; Circular on Procedural Implementation of Establishing Cadastral Index Map and Land Register, 2.
[887] Sub-decree on Procedure of Establishing Cadastral Index Map and Land Register, art. 6; Circular on Procedural Implementation of Establishing Cadastral Index Map and Land Register, art. 2.
[888] Sub-decree on Procedure of Establishing Cadastral Index Map and Land Register, art. 4; Circular on Procedural Implementation of Establishing Cadastral Index Map and Land Register, 1.

checking, the fieldwork officials will prepare documents for public display (hereinafter called the "screening document").[889] The capital/provincial governor, upon the request of the administrative commission, will announce the display of the screening document, including cadastral index map and list of land possessors, within 30 days at easily visible places in the determined area.[890]

During the public display of the screening document, any possessor or person interested in the land parcel, can object to the screening document to the administrative commission if the displayed document has error.[891] The administrative commission will resolve the objection by conciliation. If the objection is not conciliated, the administrative commission will forward the case to the National CC,[892] but from 2010, only to the Capital/Provincial CC for resolution.[893]

If the land possessor or person interested in the land parcel does not object to the displayed document within this period of fixed 30 days, the displayed data would consider correct, except for the land possessor or interested person had a clear document for proving reasons that he/she could not have objected during the displayed period.[894] In this case, he/she could file an objection to CC for resolution as determined by law.[895]

After the display period or dispute resolution is concluded, the administrative commission will approve and sign on the screening document and send to the capital/provincial cadastral office for technical check and signature.[896] The capital/provincial cadastral office will send the document to the capital/provincial governor for approval and signature.[897] The capital/provincial governor will send the document to the Minister of Land for signature.[898] Then, the document will be sent to the central cadastral administration for registration.[899] When the land is registered, the Ministry of Land will issue land titles in the determined area.[900]

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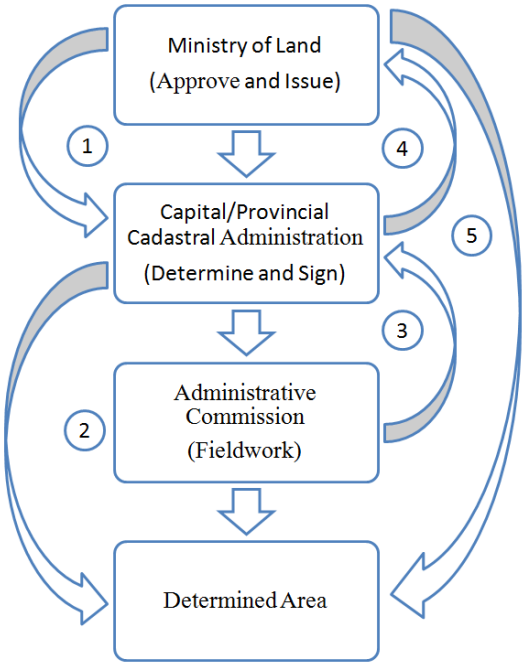
[889] Sub-decree on Procedure of Establishing Cadastral Index Map and Land Register, art. 9; Circular on Procedural Implementation of Establishing Cadastral Index Map and Land Register, 3–5.
[890] Sub-decree on Procedure of Establishing Cadastral Index Map and Land Register, art. 11; Circular on Procedural Implementation of Establishing Cadastral Index Map and Land Register, 6.
[891] Sub-decree on Procedure of Establishing Cadastral Index Map and Land Register, art. 12; Circular on Procedural Implementation of Establishing Cadastral Index Map and Land Register, 6.
[892] Sub-decree on Procedure of Establishing Cadastral Index Map and Land Register, art. 12; Circular on Procedural Implementation of Establishing Cadastral Index Map and Land Register, 6.
[893] Prakas on Power Delegation to Capital/Provincial Governor and As Chairman of Capital/Provincial Cadastral Commission for Deciding Land Disputes in Cadastral Commission Mechanism, No. 32/PRK/DNS/GSCH (2010).
[894] Circular on Procedural Implementation of Establishing Cadastral Index Map and Land Register, 7.
[895] Ibid.
[896] Sub-decree on Procedure of Establishing Cadastral Index Map and Land Register, art. 13.
[897] Ibid.
[898] Ibid., art. 14.
[899] Ibid., art. 14; Circular on Procedural Implementation of Establishing Cadastral Index Map and Land Register, 9.

However, if there is an objection as mentioned above, or land is still in dispute, such a dispute must be resolved by CC or court before proceeding with registration.[901] Issuance of certificate or title cannot be made over disputed land unless it is solved.[902] The following figure shows the administrative process of systematic land registration in Cambodia.

Figure 26: The process of systematic land registration



Source: Author

c). Achievement of Land Registration in Cambodia

Cambodia had two ways of land registration, sporadic and systematic land registration. The sporadic land registration was exercised in 1989, while the systematic land registration started in 2002. [903] Since 1989, the sporadic land registration has proceeded with a slow course because Cambodia faced a limited capacity at the initial reform, together with the bureaucratic process and unofficial fees slowed down the issuance of certificates to

[900] Sub-decree on Procedure of Establishing Cadastral Index Map and Land Register, art. 14.
[901] Ibid.
[902] Circular on Procedural Implementation of Establishing Cadastral Index Map and Land Register, 9.
[903] Acker, *Hitting a Stone with an Egg?*, 37; Hap, "The Implementation of Cambodia's Laws on Land Tenure," 24 and 49.

land possessors. [904] Around 4.5 million application forms were filed; the government could issue 448,277 certificates from 1989 to 1995 and 70,357 certificates from 1995 to 2000. [905] In total, there were 518,258 certificates was issued to applicants, around 12 percent out of 4.5 million application forms. [906] As of August 2014, the sporadic land registration could issue 605,897 titles to the applicants. [907]

The systematic land registration was introduced in 2002, but it could achieve more titles than the sporadic land registration system. As of 2009, the donor-funded LMAP could issue 1.3 million titles to local residents. [908] The LASSP continued to register land with a number of donors, except the World Bank. [909] As of August 2014, the systematic land registration could achieve 2,510,414 titles. [910]

Together with the implementation of the governmental Edict 01 concerning the cut-off of affected land from ELCs on May 7, 2012 to August 2014, this action could achieve and issue 561,572 titles to affected land possessors. [911] In total, the current land registration could issue 3,677,883 titles as of August 2014. [912] The following table shows the result of land registration in Cambodia since the initial 1989 land reform.

Figure 27: The result of land registration in Cambodia

Registration System	Result of Titles
Sporadic Land Registration (since 1989)	605,897
Systematic Land Registration (since 2002)	2,510,414
Old Policy, New Action (since 2012)	561,572
Total	3,677,883

Source: Ministry of Land, Report on Total Result as of August-2014, September 11, 2014

[904] Markussen, "Property Rights, Productivity, and Common Property Resources," 2280; Adler, Porter, and Woolcock, "Legal Pluralism and Equity," 3; Hughes, "Cambodia," 71; Trzcinski and Upham, "Creating Law from the Ground Up," 64.
[905] Chan, Tep, and Acharya, *Land Tenure in Cambodia*, 30; Acker, *Hitting a Stone with an Egg?*, 37; Markussen, "Property Rights, Productivity, and Common Property Resources," 2280.
[906] Acker, *Hitting a Stone with an Egg?*, 32; Chan, Tep, and Acharya, *Land Tenure in Cambodia*, 30; Hap, "The Implementation of Cambodia's Laws on Land Tenure," 26.
[907] Ministry of Land Management, Urban Planning, and Construction, *Report on Total Result of August-2014 Activities and Ongoing Action Plan*, 3.
[908] Inspection Panel, *Cambodia: Land Management and Administration Project*, xxvi; Trzcinski and Upham, "Creating Law from the Ground Up," 63; Bugalski and Pred, "Formalizing Inequality," 3.
[909] Thiel, "Donor-Driven Land Reform in Cambodia—Property Rights, Planning, and Land Value Taxation," 228; Ministry of Land Management, Urban Planning, and Construction, *Report on Total Result of August-2014 Activities and Ongoing Action Plan*, 8.
[910] Ministry of Land Management, Urban Planning, and Construction, *Report on Total Result of August-2014 Activities and Ongoing Action Plan*, 3.
[911] Ibid.
[912] The Author calculated this number from the report of the Ministry of Land. See: Ibid.

Cambodia has more 10 million parcels estimated for land registration.[913] Thus, a large amount of land areas remains unregistered, which may be subject to growing competing claims disputes over the three categories of land – state public land, state private land, and individual private land, if there will not have an appropriate institution for resolving these types of land disputes. The next section will demonstrate competing claim disputes and growing concern if there will not have a proper action in advance.

d). Cadastral and Registration Fee

Registration of immovable property relates to various fees that relevant to cadastral service such as fee for land survey, fee for various cadastral services, and land tax. If the cadastral service is not transparent; if there is a high official or "unofficial" fee, people will try to avoid land registration and not use the registration system. This section will describe the fee for land survey, fee for cadastral service, and land tax, which is set by law and regulation in Cambodia.

i. Fee for Land Survey

Land survey is part of cadastral service that the state; especially, the responsible Ministry of Land must provide for local residents. The fee for land survey was determined by the Inter-ministerial *Prakas* of the Ministry of Economics and Finance and the Ministry of Land on May 28, 2002.[914] However, this inter-ministerial *Prakas* was changed by the decision of the Ministry of Land on December 21, 2006 (hereinafter called the "2006 Cadastral Service Fee Decision").[915]

According the 2006 Cadastral Service Fee Decision, the fee of land survey for the sporadic land registration is not too expensive. The bigger the land is, the cheaper the fee is. However, the landowner will pay for the expense of travel, stay, and food for cadastral officials if his or her land is 50 km or more from the cadastral office.[916] The following table shows the fee of land measurement.

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[913] The current land registration is achieved around 3,6 million parcels. Cambodia has more than 10 million parcels for registration. See: Ibid.; Hap, "The Implementation of Cambodia's Laws on Land Tenure," 83; Thiel, "Donor-Driven Land Reform in Cambodia—Property Rights, Planning, and Land Value Taxation," 228.

[914] Inter-ministerial Prakas on Income Determination of Cadastral Service Expense [ប្រកាសអន្តរក្រសួងស្តីពីការកំណត់ចំណូលពីសេវាកម្មសេវាសុរិយោដី] (2002).

[915] Decision on Provision of Cadastral Service [សេចក្តីសម្រេចស្តីពីការផ្តល់សេវាសុរិយោដី] (2006).

[916] Ibid.

Figure 28: The expense on land measurement in land registration

Expense on Land Measurement	
Land Size	Expense Per Hectare
Less than 10 ha	30,000 riel
10 ha - 50 ha	15,000 riel
51 ha - 300 ha	10,000 riel
301 ha - 1,000 ha	8,000 riel
More than 1,000 ha	6,000 riel

Source: Ministry of Land, Decision on Provision of Cadastral Service, 2006

Note: US$ 1 = 4,000 riel.

The fee for land survey in systematic land registration is much cheaper than that of the sporadic land registration.[917] The cheap fee of systematic land registration may be attributed to the fact that this system is sponsored by multiple donors.[918] The following table shows the fee for land survey in the systematic land registration.

Figure 29: The fee of land survey per square meter

Systematic Land Registration	
Types of Land	Price Per Square Meter
Rural Agriculture Land	1 riel
Rural Residential Land	10 riel
District/Near-by Provincial Town Land	20 riel
Provincial/Near-by Phnom Penh Land	50 riel
Phnom Penh Capital Land	100 riel

Source: Ministry of Land, Decision of Provision of Cadastral Service, 2006

Note: US$ 1 = 4,000 riel.

ii. Fee for Cadastral Service

In addition to the expense for land survey, local residents will pay various expenses relating to the use of

[917] Ibid.
[918] Inspection Panel, *Cambodia: Land Management and Administration Project*, xiv.

cadastral service such as issuance, change, transfer, or certification of their property. The following figure will show various expenses for cadastral services.

Figure 30: Various expenses paid for cadastral services

Cadastral Service Expenses					
Issuance of Title or Authentication Per Unit	Expense Per Type of Land				
	Agricultural or Possessed Land	Residential Land			
		Phnom Penh, Preah Sihanouk, Kandal, and Siem Reap		Besides These Areas	
	All Provinces/Cities	Rural	City	Rural	City
Title or Certificate of Land	10,000 riel	50,000 riel	350,000 riel	50,000 riel	200,000 riel
Transfer of Land (partial or whole)	50,000 riel	100,000 riel	200,000 riel	100,000 riel	120,000 riel
Consolidation of Land	100,000 riel	120,000 riel	150,000 riel	120,000 riel	150,000 riel
Division, but not Transfer of land	50,000 riel	100,000 riel	200,000 riel	80,000 riel	100,000 riel
New Demarcation of Land Border	30,000 riel	35,000 riel	40,000 riel	30,000 riel	35,000 riel
Authentication of Deed (Mortgage)	15,000 riel	18,000 riel	20,000 riel	15,000 riel	18,000 riel
Receipt of Land	15,000 riel	18,000 riel	20,000 riel	15,000 riel	18,000 riel
Letter of Cadastral Certification	15,000 riel	18,000 riel	20,000 riel	15,000 riel	18,000 riel

Source: Ministry of Land, Decision of Provision of Cadastral Service, 2006

Note: US$ 1 = 4,000 riel

iii. Registration and Land Tax

Tax for registration and land is crucial to stabilize the property system and avoid land dispute if it is properly implemented. Lax enforcement of tax in registration and land results in unused land and land grabbing for commercial speculation. This mirrors the enforcement of Cambodian property law in the post-war period. Cambodia has partially applied tax of registration and land in post-war land reform. Cambodia has applied three kinds of land taxes over time: (1) registration taxation, (2) unused land taxation, and (3) used land taxation.

Registration taxation was firstly applied among the three types of taxes. The government adopted Law on

Establishment of Registration Tax in 1991 (hereinafter called the "1991 Registration Tax Law").[919] In addition, the government issued the Sub-decree on Collection of Registration Tax for implementing the 1991 Registration Tax Law at the same year.[920] The 1991 Registration Tax Law applied to both movable and immovable property.[921] The registration tax for immovable property was 6%.[922]

In addition to the registration tax, the government initiated to implement a tax on unused land in 1995. To this end, the government adopted Law on 1995 Fiscal Year in 1995 (hereinafter called the "1995 Fiscal Law".)[923] The 1995 Fiscal Law allowed implementing tax on unused land.[924] To implement this law, the government issued a *Prakas* on Tax Collection of Unused Land for collecting tax on unused land in 1996.[925] Unused land tax was charged by 2 percent.[926]

Land tax moved into another important step when the government passed the Law on 2010 Fiscal Year in 2010 (hereinafter called the "2010 Fiscal Law").[927] The 2010 Fiscal Law authorized to implement a tax on immovable property.[928] The government issued a *Prakas* on Tax Collection of Immovable Property in 2010 (hereinafter called the "2010 Tax Collection *Prakas*").[929] The 2010 Tax Collection *Prakas* does not implement a tax on all immovable properties throughout the country, in that it does not cover agricultural land and property that cost less than 100,000,000 riel (US$25,000).[930] This current taxation is applied to residential land that cost over 100,000,000 riel (US$25,000), with the rate of 0,1 percent.[931]

In short, Cambodia has partially implemented land tax over time in post-war land reform.

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[919] Law on Registration Tax [ច្បាប់ស្តីពីការបង្កើតពន្ធប្រថាប់ត្រា] (1991).

[920] Sub-decree on Collection of Registration Tax [អនុក្រឹត្យស្តីពីការប្រមូលពន្ធប្រថាប់ត្រា] (1991).

[921] Law on Registration Tax, art. 2.

[922] Ibid.

[923] 1995 Fiscal Law [ច្បាប់ស្តីពីហិរញ្ញវត្ថុឆ្នាំ១៩៩៥] (1995).

[924] Ibid., art. 2.

[925] Prakas on Tax Collection of Unused Land [ប្រកាសស្តីពីការប្រមូលពន្ធលើដីមិនបានប្រើប្រាស់] (1996).

[926] Notification on Management of Unused Land Tax Collection [សេចក្តីជូនដំណឹងស្តីពីការត្រួតត្រាប្រមូលពន្ធលើដីធ្លីមិនបានប្រើប្រាស់] (1996).

[927] 2010 Fiscal Law [ច្បាប់ស្តីពីហិរញ្ញវត្ថុឆ្នាំ២០១០] (2010).

[928] Ibid.

[929] Prakas on Tax Collection of Immovable Property [ប្រកាសស្តីពីការប្រមូលពន្ធលើអចលនទ្រព្យ] (2010).

[930] Ibid.

[931] Ibid.

E. Land Dispute in Cambodia

Land reform brought both development and land disputes in post-war Cambodia. Many investors come to invest in land, in projects totaling one million hectares.[932]Simultaneously, land disputes have arisen endlessly as a consequence of this development, which affect 770,000 Cambodians as of 2014.[933]

Land registration is to ensure actual possessors to have tenure security against land grabbing. Therefore, the government has endeavored to register land, which has achieved more than 3.6 million titles.[934] At the same time, land registration has resulted in a number of competing claim disputes in Cambodia.[935] There are several kinds of actors, who are involved in land disputes ranging from individuals, the rich, the powerful, authorities, soldiers, military to the state itself.[936] Disputes are of two types: (1) land dispute between private individuals and (2) land dispute between state and individual.

1. Land Dispute between Private Individuals

Land disputes between private individuals, in this Dissertation, refers to land disputes arising between private persons. There are two types of land disputes between private individuals: (1) land grabbing and (2) overlapping/double title competing claim.

a). Land Grabbing

Land grabbing was a vexed issue in post-1989 land reform. This dispute occurred when Cambodia opened the door to the outside world and introduced the free market economy.[937] This put pressure on land; as a result, land became the target of land grabbing for commercial speculation.

Land grabbing occurred in two ways. The first way was that ordinary people started to clear state land for possession. The second way was that authorities, the rich, the powerful, or the well-connected grabbed land

[932] Ministry of Agriculture, Forestry, and Fishing, *Statistics of Registered Economic Land Concession Companies*.
[933] Ponniah, "British Lawyer Targets 'Ruling Elite' in ICC Complaint."
[934] The Author calculated this number from the report of the Ministry of Land. See: Ministry of Land Management, Urban Planning, and Construction, *Report on Total Result of August-2014 Activities and Ongoing Action Plan*, 3.
[935] Mgbako et al., "Forced Eviction and Resettlement in Cambodia," 40; Loehr, "External Costs as Driving Forces of Land Use Changes," 1036 and 1045; Un and So, "Land Rights in Cambodia," 289.
[936] Hughes, "Cambodia in 2007," 70; Thiel, "Donor-Driven Land Reform in Cambodia—Property Rights, Planning, and Land Value Taxation," 227; Mensher, "The Tonle Sap: Reconsideration of the Laws Governing Cambodia's Most Important Fishery," 808; Springer, "Illegal Evictions?," 522.
[937] Mgbako et al., "Forced Eviction and Resettlement in Cambodia," 40; Loehr, "External Costs as Driving Forces of Land Use Changes," 1036 and 1045; Un and So, "Land Rights in Cambodia," 289.

from those people for personal interest. For the former, ordinary people started to clear state land for possession was under the authorization of the 1992 Land Law, which could lead to ownership acquisition if completing a 5-year statute of limitation.[938] The 1993 election campaign urging local residents to occupy state land for ownership acquisition under the political campaign.[939] These prompted many local residents to start occupying land as much as they could.

In the meantime, authorities, the rich, powerful, or well-connected people started to grab land from those occupants for personal interest and speculation. Shaun Williams, who studied about land grabbing in Cambodia in 1999, put "[e]xpropriation of land [was] usually perpetrated by local government official (village, commune, district) and/or military officers."[940] Likewise, Bib Hughes, also studied about land grabbing in Cambodia in that time, showed the percentage of land disputes related with authorities was "22% were district governors," and "19% were local authorities."[941] This figure represented an example of how powerful people grabbed land from local residents by force, which induced land disputes throughout the country.[942] Therefore, Prime Minister Hun Sen came out to publicly warn of "peasant revolution" to his authorities and others involved in land grabbing consecutively in 1999, 2002, and 2006.[943]

b). Overlapping/Double Title Competing Claim

Overlapping/double title competing claim dispute between private individuals, in this Dissertation, refers to private land dispute between land possessors and outsiders who have overlapping claim over a land. Overlapping/double title claim dispute is often triggered by an outsider who has claimed ownership over local residents' customary land. Such a dispute often has overlapping or double titles or certificates for claiming ownership over disputed land. The outsider generally has more documents, such a title or certificate of land tenure, for claiming ownership than residing land possessors.[944]

[938] 1992 Land Law, arts. 61–76 (1992).
[939] Rabé, "From 'Squatters' to Citizens?," 3, 89, and 91.
[940] Williams, "Internally Displaced Persons and Property Rights in Cambodia," 197.
[941] Hughes, *Land Ownership Dispute in Cambodia*, 9.
[942] Williams, "Internally Displaced Persons and Property Rights in Cambodia," 197.
[943] Hun, "Intensive Cultivation, Land Management, Logging Ban, Areas of Attention in Agricultures, Fisheries, and Forestry"; see: The Cabinet of Samdech Hun Sen, "Cambodian New Vision," 2.
[944] Adler, Porter, and Woolcock, "Legal Pluralism and Equity," 3.

The Lorpeang dispute is an example of a competing claim dispute between private individuals; namely, local residents and an outsider. Longpeang land dispute happened in Tajes Commune, Kampong Tralarge District, Kampong Chhnang Province. This dispute was a competing claim over 182 hectares between the KDC private company and 82 family local residents.[945] The owner of the KDC company was the wife of the Minister of Mines and Energy (outsider), who claimed the ownership over disputed land with Lorpeang villagers, who were land possessors in the villages (local residents).

In this dispute, the KDC held land titles over overlapping land while the local residents did not have title, only customarily occupied the land and waited for land registration from the state.[946] The KDC claimed that it had bought the land from some local residents in 2007; as a result, it had land titles.[947] While the protesting local residents claimed that they had not sold the land and demanded to find who had sold the land.[948]

The dispute occurred when the company started to bulldoze land in 2007.[949] Since then, there have been several clashes and lawsuits between the parties. After clashes, the company filed criminal charges against the protesters and several protesters were imprisoned. The local residents claimed that they filed more than 100 complaints against the KDC, but were often ignored.[950]

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[945] *First Commission of National Assembly Will Hold Discussion Meeting with NGOs on Lorpeang Dispute* [តណៈកម្មការទី១នៃរដ្ឋសភានឹងជួបពិភាក្សាជាមួយសង្គមស៊ីវិលរឿងដីឡូតិ៍ឡុងពាង], dir. Radio Free Asia (RFA), September 3, 2014, radio broadcast.

[946] *Lorpeang Villagers Burned Symbolic Scarecrow to Curse Conspirators of Land Grabbing* [អ្នកភូមិឡុងពាងនៅភ្លើងដុតនិមោងជាក់បណ្តាសាអ្នកឃុបឃិតរំលោភយកដីធ្លី], dir. Radio Free Asia (RFA), July 13, 2014, radio broadcast.

[947] Chamroeun Chrann, "Kampong Chhnang Court Issues Another Summons in Land Row," *Phnom Penh Post*, May 28, 2009; LICADHO, "Cambodian Village Chief Jailed in Land Dispute with Private Company," September 29, 2009, http://www.licadho-cambodia.org/articles/20090929/99/index.html (accessed December 9, 2014).

[948] Chrann, "Kampong Chhnang Court Issues Another Summons in Land Row"; LICADHO, "Cambodian Village Chief Jailed in Land Dispute with Private Company."

[949] Sophak Chakrya Khouth, "Home Searched in KDC Row," July 24, 2014; Phnom Penh Post, "Activist Takes KDC Buyout," July 9, 2014; *KDC Company Added Work Forces on Disputed Land with Lorpeang Villagers* [ក្រុមហ៊ុនខេឌីស៊ីបន្ថែមកម្លាំងកម្មករនៅលើដីមាននំនាស់ជាមួយអ្នកភូមិឡុងពាង], dir. Radio Free Asia (RFA), July 11, 2014, radio broadcast.

[950] *Lorpeang Villagers Composed Song to Demand Justice in Land Dispute with Company* [ភាមភារយុទ្ធិតម៌ក្នុងដង្ហោះដីជាមួយក្រុមហ៊ុន], dir. Radio Free Asia (RFA), August 28, 2014, radio broadcast; *Lorpeang Warns to Re-block National Road No. 5 in order to Suspend Activity of Company* [អ្នកភូមិឡុងពាងព្រមានបិទផ្លូវជាតិលេខ៥ជាថ្មីដើម្បីឲ្យក្រុមហ៊ុនផ្អាកសកម្មភាព], dir. Radio Free Asia (RFA), July 9, 2014, radio broadcast.

Tensions between the company and local residents rose when the company proceeded with their work, while the complaints were not resolved yet. The company sped up their work by adding more workers and bulldozer to make fences on the disputed land in early July 2014.[951] The villagers prevented the activities of the company.[952] This led to a recent clash between the villagers and company workers when the villagers tried to prevent the construction of the fence, which the villagers claimed to be built on their land on July 17, 2014.[953] This clash resulted in more than 20 people injured – 13 villagers and 10 company workers.[954]

After the clash, 2 villagers were detained and more than 10 villagers were under arrest warrant, charged with property damage and intentional use of violence with aggravate circumstance on July 22, 2014. [955] The court ordered more 8 villagers to appear in court on August 5, 2014.[956] The villagers gathered to protest in front of court for release of the arrested two villagers on August 5, 2014.[957]

Having seen no effect, the Lorpeang villagers decided to seek intervention and submit a petition at Phnom Penh. The Lorpeang villagers walked to Phnom Penh for seeking intervention and submitting petitions to various top state institutions on August 12, 2014.[958] On the way to Phnom Penh, the authority blocked the

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951 *KDC Company Added Work Forces on Disputed Land with Lorpeang Villagers*; *Lorpeang Villagers Composed Song to Demand Justice in Land Dispute with Company*.

952 *Lorpeang Warns to Re-block National Road No. 5 in order to Suspend Activity of Company*.

953 *More than 20 People Injured in Clash Between Lorpeang Villagers and Company Workers* [មនុស្សជាង២០នាក់របួសក្នុងពេលប៉ះទង្គិចគ្នារវាងអ្នកភូមិឡពាងនិងកម្មករក្រុមហ៊ុន], dir. Radio Free Asia (RFA), July 17, 2014, radio broadcast.

954 Ibid.; *Company's Fence Workers in Lorpeang Village Submit Petition for Justice Seeking* [កម្មករស៊ីឈ្នួលធ្វើរបងក្រុមហ៊ុននៅភូមិឡពាងដាក់ញត្តិឲ្យជួយរកយុត្តិធម៌], dir. Radio Free Asia (RFA), August 30, 2014, radio broadcast.

955 *Company's Fence Workers in Lorpeang Village Submit Petition for Justice Seeking*; *Two Villagers Detained and More than Ten Faced with Arrest Warrant in Lorpeang Land Dispute* [ពលរដ្ឋ២នាក់ជាប់ឃុំ និង ជាង១០នាក់ទៀតប្រឈមនឹងចាប់ខ្លួនរឿងទំនាស់ដីធ្លីនៅឡពាង], dir. Radio Free Asia (RFA), July 22, 2014, radio broadcast.

956 *Kampong Chhnang Court Orders 8 Villagers to Appear in Court on Lorpeang Land Dispute* [តុលាការខេត្តកំពង់ឆ្នាំងកោះហៅពលរដ្ឋ៨នាក់ទៀតចូលបំភ្លឺរឿងទំនាស់ដីនៅភូមិឡពាង], dir. Radio Free Asia (RFA), July 30, 2014, radio broadcast.

957 *Lorpeang Villagers Demand Court to Release Two Detained Villagers* [អ្នកភូមិឡពាងទាមទារឲ្យតុលាការដោះលែងអ្នកភូមិ២នាក់], dir. Radio Free Asia (RFA), August 5, 2014, radio broadcast.

958 *Lorpeang Villagers Composed Song to Demand Justice in Land Dispute with Company*; *Lorpeang Villagers Walk to Protest in Phnom Penh* [អ្នកភូមិឡពាងបន្តឡើងមកតវ៉ានៅភ្នំពេញដោយថ្មើរជើង], dir. Radio Free Asia (RFA), August 13, 2014, radio broadcast.

villagers from entering into Phnom Penh.[959] Thus, this led to another clash, which resulted in four villagers left unconscious and three villagers arrested.[960]

However, the five were released on bail on August 29, 2014.[961] For the Lorpeang dispute, 6 land protesters were imprisoned and other 11 protesters were charged since the dispute occurred.[962] Today, this land dispute is in chronic dispute, and affected citizens seek interventions in Phnom Penh by putting various petitions to the Prime Minister, Cabinet, Ministry of Justice, Ministry of Land, Parliament, and various embassies for helping to resolve their dispute.[963]

In short, land grabbing and overlapping/double title competing claim dispute often involve some degree of abuse of power, wealth or authority in some quarter.

2. Land Dispute between State and Individual

Apart from land dispute caused by grabbing and overlapping/double title competing claim dispute, Cambodia faces another type of land dispute between the state and its citizens. The Dissertation divides land disputes between state and citizens into two forms: (1) land dispute caused by state reclamation and (2) land dispute caused by state expropriation for development.

a). Land Dispute Caused by State Reclamation

Land dispute caused by state reclamation, in this Dissertation, refers to dispute over entitlement of ownership acquisition between state and land possessor. This type of land disputes arises from under the retroactive, cut-off date, and penal provisions of the 2001 Land Law. These provisions allows the state to

[959] *6 Lorpeang Villagers who Walked to Protest in Phnom Penh Fell Sick* [អ្នកភូមឡូពាន១៦នាក់ដែលដើរមកតវ៉ាពេញផ្លាវរឿងដីកំពុងឈឺខ្លួន], dir. Radio Free Asia (RFA), August 13, 2014, radio broadcast; Phnom Penh Post, "KDC Land Fight Comes Close to Phnom Penh," August 14, 2014.

[960] *Lorpeang Villagers - Four Fainted and More Three Arrested by Police Blocking Entering into Phnom Penh* [អ្នកភូមិឡូពាន៤នាក់សន្លប់ និង ៣នាក់ទៀតត្រូវខាប់ខ្លួនដោយប៉ូលីសពាំនមិនឲ្យមកតវ៉ាពេញ], dir. Radio Free Asia (RFA), August 12, 2014, radio broadcast.

[961] *Company's Fence Workers in Lorpeang Village Submit Petition for Justice Seeking.*

[962] *Lorpeang Villagers Burned Symbolic Scarecrow to Curse Conspirators of Land Grabbing*; *Lorpeang Warns to Re-block National Road No. 5 in order to Suspend Activity of Company*.

[963] *Lorpeang Villagers Composed Song to Demand Justice in Land Dispute with Company.*

reclaim or take possessed land from land possessors without paying compensation and further discharge criminal penalty.[964]

The 2001 Land Law imposes a retroactive clause that applies to previously occupied land, which is deemed state public land, regardless of the length of possession.[965] In this context, if the authority finds any possessor on state land, which is likely to be state public land, the authority will reclaim it.[966]

Likewise, the 2001 Land Law imposes an ultimatum over the new start of land occupation, after this law took effect on August 30, 2001, which is the cut-off date of new possession.[967] Since then, every new possession, regardless of any type of land, is considered "illegal possession."[968] Therefore, the state authority can reclaim it.[969]

Apart from the provisions that allow state authority to reclaim land from land possessor, the 2001 Land Law puts an imperative clause, which is a strong penalty on land possessor, who is thought to be illegal possessor on state land. As mentioned above, the authority will, if finds the land possession illegal, take land and destroy improvements without paying any compensation.[970] Furthermore, the land possessor will be faced with criminal charge.[971]

Therefore, the state authority will not register any land possession, which deems to be state public land. The arrangement of the land registration system has excluded or excised any area that likely to be a dispute-prone zone.[972] In such a case, the state authority has often reclaimed the excluded or excised areas as the state land and granted for development.[973] For instance, the Boueng Kak area was excluded or excised from the systematic land registration, and the state authority reclaimed the ownership and granted for redevelopment, which induced a

[964] 2001 Land Law, arts. 18 and 43 (2001).
[965] Ibid.
[966] Ibid.
[967] Ibid., arts. 17, 18, 29 and 43.
[968] Ibid.
[969] Ibid.
[970] Ibid., art. 43.
[971] Ibid., arts. 43 and 259.
[972] Adler, Porter, and Woolcock, "Legal Pluralism and Equity," 3; Trzcinski and Upham, "Creating Law from the Ground Up," 64; Bugalski and Pred, "Formalizing Inequality," 3–4.
[973] Mohammed Bechechi, and Lars Lund, *Cambodia Land Management and Administration Project (LMAP)*, Enhanced Review Report, July 13, 2009, 8; Adler, Porter, and Woolcock, "Legal Pluralism and Equity," 3; Trzcinski and Upham, "Creating Law from the Ground Up," 64.

chronic dispute between the state and land possessors.[974] The excise of dispute-prone or unclear border area from titling has placed more than 2,600 families under thread of eviction.[975]

In short, the 2001 Land Law authorizes the state to retroactively reclaim possessed land from local residents, which is thought to be state public land. Such a provision is contradictory to the general principle of law. Cambodia has fallen into "regulatory taking" dispute, in which some provisions of property laws resulting in taking of properties without just compensation.

b). Land Dispute Caused by State Expropriation for Development

Apart from land disputes caused by state reclamation via land registration, Cambodia faces land disputes caused by state expropriation for development, which has provoked social tensions in post-war Cambodian peace.[976] Cambodia re-privatized land ownership in post-1989 land reform; thus, the need of land for social development became necessary.[977] Therefore, the government adopted the principle of "eminent domain" in its post-conflict legislation.[978] The principle of eminent domain was enshrined in several laws such as the 1989 Constitution, 1992 Land Law, 1993 Constitution, 2001 Land Law, and 2010 Expropriation Law.[979] The following section will describe the legal framework, mechanism, and procedure for land expropriation under Cambodian law.

i. Legal Framework for Land Expropriation in Cambodia

The ownership right over residence and land is fully and strongly protected under the 1993 Constitution.[980] The constitution provides the guarantees that all land takings is allowed only for "public use," while affected landowners are provided with due process of law and just compensation in advance, as stated in the article 44 of the 1993 Constitution:

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[974] Agence Kampuchea Press (AKP), "Cambodia Clarifies World Bank's Concern over Boeung Kak's Eviction," March 11, 2011, http://www.akp.gov.kh/?p=3453 (accessed April 6, 2011).
[975] Inspection Panel, *Cambodia: Land Management and Administration Project*, vii; Bugalski and Pred, "Formalizing Inequality," 3.
[976] Feinberg, "The Epidemic of Petit Corruption in Contemporary Cambodia," 283; Mgbako et al., "Forced Eviction and Resettlement in Cambodia," 40.
[977] See: Decision Concerning Policy on Farmers (1989); Decision Concerning Policy on Land Management and Use (1989).
[978] 1992 Land Law (1992); Constitution of Kingdom of Cambodia (1993); 2001 Land Law (2001).
[979] Constitution of State of Cambodia, art. 18 (1989); 1992 Land Law, art. 3; Constitution of Kingdom of Cambodia, art. 44; 2001 Land Law, art. 5; Law on Expropriation, art. 4 (2010).
[980] The Constitution of the Kingdom of Cambodia art. 44 (1993).

> The expropriation of ownership from any individual shall be exercised only if the public interest as required as prescribed by law and be required to pay fair and just compensation in advance.[981]

In addition to the supreme law of the land, Cambodia passed the new land law in 2001. The provision of the power of eminent domain is repeated in the Article 5 of this law.[982] In compliance with the constitutional requirement, The Cambodian government passed the Law on Expropriation in 2010 (hereinafter "2010 Expropriation Law," which is procedural law governing aspect of land takings in Cambodia.[983] The 2010 Expropriation Law provides procedure and mechanism for expropriation.[984] Article 4 of the 2010 Expropriation Law provides a clear definition of the term "expropriation" that:

> Expropriation refers to a taking of ownership or real rights of immovable property of individual physical person, private and public legal entity such as land, building, and crops for construction, rehabilitation, and expansion of public physical infrastructure that serve national and public interest with payment of fair and just compensation in advance.[985]

In land expropriation, owner of immovable property rights is crucial for entitlement to compensation. Thus, the 2010 Expropriation Law expresses the definition of "owner" as:

> Owner of immovable property or real rights refers to individual physical person, private and public legal entity such as owner, possessor, and interested person living on land affected by expropriation project.[986]

The 1993 Constitution as well as the 2001 Land Law authorizes land expropriation only for "public use," but fails to define it. Therefore, the 2010 Expropriation Law defines the "public use" in two senses:

> (1) Common or public interest refers to the use of land or property by the public or the public or state agency.
> (2) Requirement of national interest refers to as follows:
> - The construction, rehabilitation, maintenance, or expansion of buildings necessary for national defense or security;
> - The occupation of land or property is made by national policy for defending territorial integrity.[987]

Article 4 mentions the "public physical infrastructure" project, but does describe what it is. Therefore,

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[981] The 1993 Constitution requires to have a separate procedural law governing land expropriation. See: Constitution of Kingdom of Cambodia, art. 44.
[982] 2001 Land Law, art. 5 provides that "[n]o person shall be deprived of his/her ownership unless such a deprivation is made for public interest. An expropriation must be exercised in compliance with forms and procedures provided by law and regulations and after the payment of fair and just compensation in advance."
[983] Law on Expropriation.
[984] Ibid.
[985] Ibid., art. 4.
[986] Ibid.
[987] Ibid.

Article 5 enumerates the specific development projects that serve "public use."[988] These projects are authorized for implementing the power of eminent domain.

The 2010 Expropriation Law also describes the authorized persons who can implement the expropriation project. The project implementers include state, enterprise, public institutions, contractor, or investor.[989] Article 7 puts a mandatory term that "only state who can exercise expropriation for public and national interest." [990] Expropriation can be made only if it is satisfied with project as prescribed in Article 5.[991] Article 9 further restricts that "immovable property, which is expropriated, is used only in authorized public use as stated in this law and cannot be left without development or transfer to private individual for private use.[992]

In short, Cambodian expropriation law is in a narrow sense of public use as the concept of the 1993 Constitution.

ii. Mechanism and Procedure of Land Expropriation

Expropriation mechanisms consist of two main bodies involved. The first is an Expropriation Committee, which is established and led by representatives of the Ministry of Economics and Finance and representatives of other ministries and institutions concerned.[993] The Expropriation Committee will have a Sub-Expropriation Committee act as an "implementing body," which is established and led by capital/provincial governors and other subordinate officials.[994] The second is a Grievance Redress Committee, which is established and led by representatives of the Ministry of Land and representatives of ministries and institutions concerned.[995]

The two bodies play a crucial role in administrative stages; namely, implement the project and resolve grievance prior to proceeding to court.[996] At initial redress, the Expropriation Committee will review grievance of the affected citizens.[997] If affected citizens disagree with the decision of the Expropriation Committee, they can file a complaint to the Grievance Redress Committee.[998] If the citizens are dissatisfied with the decision of the

[988] Ibid., art. 5.
[989] Ibid., art. 4.
[990] Ibid., art. 7.
[991] Ibid.
[992] Ibid., art. 9.
[993] Ibid., art. 12.
[994] Ibid., art. 13.
[995] Ibid., art. 14.
[996] Ibid., art. 32.
[997] Ibid.
[998] Ibid., art. 33.

Grievance Redress Committee, they can file a complaint to court for judicial review.[999]

Expropriation procedure is bureaucratic in Cambodia. Expropriation can be made only if it is approved by the central government.[1000] Ministries or state institutions have right to propose an expropriation project.[1001] The Expropriation Committee is responsible for arranging expropriation project proposal for submission to the government for check and decision.[1002]

The 2010 Expropriation Law sets out a number of safeguards in a pre-dispute mechanism in Cambodia. Before proposing an expropriation project, the Expropriation Committee must conduct a public consultation and survey of affected property, property owner, and other interested persons in advance.[1003] Following the collection of enough information, the Expropriation Committee will make a report and submit to the expropriation project proposal to the central government for approval.[1004]

Upon the approval, the Expropriation Committee will announce the expropriation project, including the purpose of project, compensation, period of complaint, to the affected property owners.[1005] The project-affected property owners can file a complaint to review the purpose of the development project within 30 days to the Grievance Redress Committee.[1006] However, affected citizens are banned not to file a complaint for review in a number of big development projects such as roads, bridges, railroads, connection and distribution of water and electricity system, kerosene pipers, sewage pipe, drainage system, and irrigation system.[1007] The Grievance Redress Committee will investigate the complaint within 30 days, makes a report, and submit it to the central government for decision.[1008]

Relevant to compensation, the 2010 Land Expropriation Law requires that expropriation can be made only if compensation is paid in advance.[1009] Compensation is calculated by market value or replacement value assessed by an independent agency chosen by the Expropriation Committee.[1010] The calculation of market

[999] Ibid., art. 34.
[1000] Ibid., art. 15.
[1001] Ibid.
[1002] Ibid.
[1003] Ibid., art. 16.
[1004] Ibid.
[1005] Ibid., art. 17.
[1006] Ibid., art. 18.
[1007] Ibid.
[1008] Ibid.
[1009] Ibid., 19.
[1010] Ibid., art. 22.

compensation is made on the date of the announcement of the expropriation project.[1011] Although the 2010 Expropriation Law provides procedure and mechanism, for example, expropriation committees, compensation assessment, and grievance redress committee; however, none of these have been established yet.[1012] The process of these mechanisms is under a separate sub-decree, which is so far in a draft.

In contrast to these formal requirements, the Cambodian government has, in practice, created ad-hoc commission to handle taking disputes on a case-by-case basis. There is no uniform practice in Cambodia. Current practice of land takings renders many forced evictions and relocations of local land occupants without undergoing appropriate redress and court order.[1013] The following section will demonstrate actual practice of land expropriation and dispute resolution under the existing redress mechanism in Cambodia.

3. Aspect of Land Taking Practice in Cambodia

The exercise for land takings for development projects occurred after Cambodia privatized land and opened the country to the outside world in 1989. The start of land privatization was also the start of the need of land for social development became necessary. Then, the government left this task to the municipal/provincial governors to bear responsibility for expropriating land when it served public interest.[1014] The practice was made by an ad-hoc commission to evaluate land and set a fixed price for affected people, without right to appeal.[1015] As a consequence, many forced evictions occurred without undergoing appropriate redress and compensation since 1990s.

Since 1993, many donors and investments flooded into in Cambodia. This led to the pressure of land taking for donor-funded or investment projects. Various development projects proceeded with different procedures in compliance with the donors/investors. There are three kinds of land takings for development: (1) land expropriation for public interest, (2) land taking for urban renewal, and (3) land concession for agro-industrial purpose. This Dissertation divides the development projects into two types in Cambodia: (1) donor-funded development project and (2) non-donor-funded development project.

[1011] Ibid.
[1012] Law on Expropriation.
[1013] By 2011, the total evicted households reached to 30,009 families, around 150,045 persons were forcibly evicted from the Phnom Penh city. See: Sahmakum Teang Tnaut, *Displaced Families: Phnom Penh 1990-2011*.
[1014]Ministry of Public Works and Transport, *Great Mekong Subregion: Road Improvement Project in Cambodia*, Full Resettlement Plan, August 2002, 24.
[1015]Ibid.

a). Donor-funded Project

Land taking for donor-funded project often serves public interest. Land is taken for constructing road, school, and other public utilities that serve general people, which are mostly under donor support.[1016] Having seen that the exercise of land takings affected land tenure, a number of donors require their internal policies applied to their funded development projects.

The requirements are to guarantee that affected property owners, reckless of land tenure status, are entitled to compensation and require to arrange resettlement policy prior to removing affected citizens out of their land. Currently, not all donors require their internal policies in their funded development projects, only the Asian Development Bank (ADB), World Bank (WB), and Japan International Cooperation Agency (JICA).[1017]

For instance, the construction of National Road No. 1 was made in 1999 funded by the ADB.[1018] This project affected 1,026 households.[1019] This case showed how an administrative system worked in making decision in Cambodia. The government created an ad-hoc formed as an inter-ministerial commission for this project.[1020] The inter-ministerial commission was mainly responsible for the project-related issues and grievances over the project process as well as compensation.[1021]

In compliance with the ADB's internal policy, the inter-ministerial commission conducted the social impacts and compensation reports for project-affected citizens and submitted them to the central government in two times.[1022] The first report was submitted to the Ministry of Economics and Finance for decision, but it was rejected because it was expensive to pay compensation for affected citizens and left the inter-ministerial

[1016] See the construction of National Road 1 and rehabilitation of the railway station, which was under the support of the Asian Development Bank.
[1017] Asian Development Bank (ADB), *Capacity Building for Resettlement Risk Management*, Final Report, November 2007, 9.
[1018] Mekong Department, *Resettlement Audit: Phnom Penh To Ho Chi Minh City Highway Improvement Project*, January 2006, 1; Asian Development Bank (ADB), *Capacity Building for Resettlement Risk Management*, 9.
[1019] Mekong Department, *Resettlement Audit: Phnom Penh To Ho Chi Minh City Highway Improvement Project*, 24–25.
[1020] See: Prakas on Creation of Inter-ministerial Committee to Inspect and Assess Impacts on Construction, Houses and Land of People Along National Road 1, Phnom Penh-Bavit [ប្រកាសស្តីពីការបង្កើតគណៈកម្មការអន្តរក្រសួងដើម្បីត្រួតពិនិត្យ និង តាមតម្លៃ ផលប៉ះពាល់សំណង់ផ្ទះសំបែង និង ដីធ្លីរបស់ប្រជាពលរដ្ឋនៅតាមដងផ្លូវជាតិលេខ១ ឆ្ពោះពេញបាទិត], No. 098 SHV HK (1999).
[1021] Asian Development Bank (ADB), *Compensation and Valuation in Resettlement: Cambodia, People's Republic of China and India*, Capacity Building for Resettlement Risk Management (Philippines, November 2007), 55; Asian Development Bank (ADB), *Capacity Building for Resettlement Risk Management*, 16.
[1022] Mekong Department, *Resettlement Audit: Phnom Penh To Ho Chi Minh City Highway Improvement Project*, 5–6 and 19.

commission to reassess the compensation.[1023] The inter-ministerial commission conducted a second assessment excluding a number of affected landowners within the corridor of impacts, which resulted in no compensation.[1024]

The recent case is the Railway Improvement Project, which is also funded by the ADB and the government of Australia.[1025] This project affected 4,174 households.[1026] At least 499 households filed complaints about project impacts to the inter-ministerial commission.[1027] The inter-ministerial commission resolved 331 cases of these households in 2011, while the remainder were still being reviewed without processing to court.[1028]

On November 21, 2011, over 150 households submitted a complaint to the office of the special project facilitator of the ADB for help resolve their issues. The special project facilitator found that complaint eligible on January 11, 2012 and further requested the inter-ministerial commission to deal with affected citizens.[1029] So far, a number of affected property owners protest and demand restoration of livelihoods from the ADB.[1030]

In short, some aspects of due process can be achieved under the donor-funded projects.

b). Non-Donor-Funded Project

A number of other donors, including investors do not impose internal policy in their development projects. The projects can follow differently from the donor-funded projects. Most of these types are projects by the government, private, or government-private projects such as urban renewal and land concessions.[1031] These projects do not have a permanent framework to form ad-hoc commission.[1032] An ad-hoc commission can be formed of a mix of members from the local authority and private partners when dispute happens. As a

[1023] Asian Development Bank, *Capacity Building for Resettlement Risk Management*, Country Report - Cambodia (Philippines, November 2007), 13; Mekong Department, *Resettlement Audit: Phnom Penh To Ho Chi Minh City Highway Improvement Project*, 22.
[1024] Asian Development Bank, *Capacity Building for Resettlement Risk Management*, 13.
[1025] Natalie Bugalski and Joycelin Medallo, *Derailed: A Study of Resettlement Process and Impacts of the Rehabilitation of the Cambodian Railway*, 2012, 1.
[1026] Ibid., 2.
[1027] Ibid., 57.
[1028] Ibid.
[1029] Ibid., 62.
[1030] Dara Mech, "ADB Protest Land Meeting, Few Results," *Cambodian Daily*, June 27, 2014; Sophak Chakrya Khouth, "Evictees Take Protest to ADB," *Phnom Penh Post*, June 27, 2014.
[1031] Asian Development Bank (ADB), *Capacity Building for Resettlement Risk Management*, 9.
[1032] Asian Development Bank, *Capacity Building for Resettlement Risk Management*, 26.

result, a number of projects result in forced eviction and relocation of local residents; especially, under the investment projects for urban renewal and land concessions.

Local possessors are easily vulnerable to forced eviction by allegation of illegal occupation of state land or land belonging to a third party.[1033] Many informal dwellers, for example, have been evicted from their land in the Phnom Penh city for renewal projects since 1990.[1034] The authority evicted 3,100 families from 1990 to 1996, 9,200 families from 1997 to 2003, and 1,480 families as of 2008.[1035] By 2011, the total evicted households reached to 30,009 families, around 150,045 persons were forcibly evicted from the Phnom Penh city.[1036]

Most important of all, land concessions for economic or agricultural purpose, which is well-known as economic land concession (ELC), is a vexed issue and major source of land disputes in Cambodia today.[1037] ELC is granted to private companies in thousands of hectares for economic or agricultural purposes.[1038] The purpose of ELC is to promote Cambodian economics and create job opportunity for local residents.[1039] However, the granted ELC often overlaps land occupied by local residents, which provokes disputes and forced evictions of local residents, although the laws require the granting of ELC be made on registered state private land.[1040]

The ELC started when Cambodia opened the country to the outside world.[1041] However, based on the statistics, the government granted ELC of 11,000 hectares to a private company in 1995.[1042] As of the

[1033] Springer, "Violence, Democracy, and the Neoliberal 'Order,'" 152.
[1034] Mgbako et al., "Forced Eviction and Resettlement in Cambodia," 42–43.
[1035] Mark Grimsditch and Nick Henderson, *Tenure Insecurity and Inequality in Cambodian Land Sector* (Bridges Across Borders Southeast Asia, Centre on Housing Rights and Evictions, 2009), 11; Kris Olds, Tim Bunnell, and Scott Leckie, "Forced Evictions in Tropical Cities: An Introduction," *Singapore Journal of Tropical Geography* 23, no. 3 (November 1, 2002): 247.
[1036] Sahmakum Teang Tnaut, *Displaced Families: Phnom Penh 1990-2011*.
[1037] Loehr, "External Costs as Driving Forces of Land Use Changes," 1044.
[1038] 2001 Land Law, arts. 59 and 61 (2001); See: Sub-decree on Economic Land Concession, No. 146 ANK.BK (2005).
[1039] Sub-decree on Economic Land Concession.
[1040] Loehr, "External Costs as Driving Forces of Land Use Changes," 1039; Sub-decree on Economic Land Concession.
[1041] Instruction on Implementation of Policy on Management and Use of Land, NO. 03/SNN (1989); 1992 Land Law, art. 10 (1992).
[1042] Sothat Ngo and Sophal Chan, *Does Large Scale Agricultural Investment Benefit the Poor?*, July 2010, 7; Sothat Ngo and Sophal Chan, *Economic Land Concessions and Local Communities*, February 2012, 4.

government suspended ELC in 2012, the granted land areas of ELC covered more than 1 million hectares.[1043] Majority of these land areas frequently overlapped land occupied by local residents, which led land disputes and clashes resulting in eruption of violence among land possessors, authorities, and developers. [1044] Today, ELC has affected approximately from 400,000 to 700,000 Cambodians.[1045] This renders Cambodia in the crisis of land disputes. The following section will study the institutional responsibility, due process, and effectiveness for land dispute resolution under the existing redress mechanism.

F. Institutional Responsibility for Land Dispute Resolution

Efficient and effective institutions are a prerequisite to prevention of land disputes. Each institution has high responsibility to fulfill its obligation provided by law and regulation. Responsible institutions are also crucial to make affected citizens be able to accept redress, failure of which results in on-street protest and political intervention seeking.

In this sense, institutional responsibility is an incremental step to establishing due process and justice for affected citizens in competing claim disputes. If responsible institutions fail to fulfill their obligation, social consequences will surely follow, as is the case in Cambodia. This Dissertation will raise two cases - aspect of land taking practice in Cambodia. The purpose of studying these cases is to view responsible institutions and due process of law in the context of active disputes.

1. Borei Keila Land Dispute

The Borei Keila land dispute was a dispute over urban renewal. It was one of many urban renewal disputes in post-war Cambodia. Many urban renewal projects removed and evicted land possessors from home and land without appropriate redress and compensation.[1046] This section takes the dispute over Borei Keila as an example of the urban renewal disputes in post-war Cambodia.

[1043]Ministry of Agriculture, Forestry, and Fishing, *Statistics of Registered Economic Land Concession Companies*; *Land Disputes Are Vexed Topic for Politicians in Campaign of 2013 Election*, dir. Voice of America (VOA), October 17, 2012, radio broadcast.
[1044] Loehr, "External Costs as Driving Forces of Land Use Changes," 1044.
[1045]LICADHO, "Five Shooting Incidents at Land Dispute Protests in the Past Two Months Show Alarming Increase in Use of Lethal Force," *Media Statement*, January 26, 2012.
[1046] Sahmakum Teang Tnaut, *Displaced Families: Phnom Penh 1990-2011*.

a). Dispute in Snapshot

The Borei Keila land dispute was a dispute over the redevelopment of a 14-hectare site in the center of Phnom Penh capital that affected 1,776 families, which was alleged of slum dwellers or illegal possessors on state land.[1047] The Borei Keila residents came to occupy the building and area in post-Khmer Rouge period.[1048] The Phnom Penh authority tried to remove these families from the site several times; however, the families protested against the evictions.[1049]

Facing consecutive strong protests, the government decided to choose the Borei Keila for onsite redevelopment under a so-called "land sharing project" in 2003.[1050] The authority found a private partner to redevelop the Borei Keila area by contract for constructing 10 apartment buildings for affected residents in consideration of some portion of land in this area.[1051]

However, the company built only 8 apartment buildings and took the rest by removing all remaining house owners to remote areas.[1052] This led to a forced eviction which occurred in early January, 2012 when the company together with authorities came to bulldoze 300 houses.[1053] After the forced eviction, some affected residents were relocated to live in a remote resettlement site without enough amenities.[1054] The rest, who did not accept the site, have protested and demanded that the company reconstruct two more apartments as required in the contract.[1055]

[1047] LICADHO, *HIV/AIDS Families Evicted from Borei Keila*, Briefing Paper, June 26, 2009, 1; Ilham Malik and Hannah Twine, *Observations of the Tuol Sambo Community (a Borei Keila Resettlement*, June 21, 2012, 1; Rabé, "From 'Squatters' to Citizens?," 156.

[1048] Rabé, "From 'Squatters' to Citizens?," 150–52.

[1049] Grimsditch and Henderson, *Tenure Insecurity and Inequality in Cambodian Land Sector*, 11; Olds, Bunnell, and Leckie, "Forced Evictions in Tropical Cities," 247; Rabé, "From 'Squatters' to Citizens?," 1; Mgbako et al., "Forced Eviction and Resettlement in Cambodia," 42.

[1050] LICADHO, *HIV/AIDS Families Evicted from Borei Keila*, 1; Malik and Twine, *Observations of the Tuol Sambo Community (a Borei Keila Resettlement*, 1; Rabé, "From 'Squatters' to Citizens?," 156.

[1051] Rabé, "From 'Squatters' to Citizens?," 155; See: Amnesty International, *Cambodia: Borei Keila - Lives at Risk*, May 1, 2009; *Seven Months On, Many Borei Keila Evictees Remain Homeless*, dir. Voice of America (VoA), August 6, 2012, radio broadcast.

[1052] Cambodian Center for Human Rights, *The Continuing Borei Keila Tragedy*, CCHR Case Study Series, May 2012, 1; Housing Rights Task Force, *Legal Analysis: The Case of Evictions in Borei Keila*, March 2012, 7.

[1053] Cambodian Center for Human Rights, *The Continuing Borei Keila Tragedy*, 1; Housing Rights Task Force, *Legal Analysis: The Case of Evictions in Borei Keila*, 7.

[1054] Ratana Uong, "Borei Keila Evictees Plead Case," *Phnom Penh Post*, July 5, 2012; Sophak Chakrya Khouth and Shane Worrel, "Cambodian Government Imprisons Second Land Activist in Two Days," *Phnom Penh Post*, September 6, 2012.

[1055] Uong, "Borei Keila Evictees Plead Case"; Khouth and Worrel, "Cambodian Government Imprisons Second Land Activist in Two Days."

b). Analysis over Institutional Responsibility of Borei Keila Case

This section will discuss the institutional responsibility of dispute resolution over the Borei Keila case. The analysis focuses on institutional responsibility to maintain due process between parties involved in the dispute and to view the entitlement of ownership acquisition among land occupants, developers, and state under Cambodian property laws.

i. Governing Laws and Responsible Authority

Borei Keila was the state's land sharing project.[1056] The government declared a policy on slum upgrading at place in 2003.[1057] This policy was complied with the Sub-decree on Social Land Concession adopted in 2003.[1058] The 2003 Social Land Concession Sub-decree provided that the state could grant social land concession to landless people for residential or household farming purpose.[1059] Within 5-year occupation, the resident could acquire ownership over the conceded land.[1060]

The slum upgrading policy would be expected to benefit all informal or slum dwellers in cities and throughout the country.[1061] At the first stage, the government implemented the first pilot project in four main areas in Phnom Penh: Borei Keila, Dey Krahorm, Railway A, and Railway B, of which the Borei Keila area was the first project.[1062]

The government chose Phan Imex Construction Company Ltd. as a private partner for redeveloping complex apartments for Borei Keila land sharing project.[1063] The government accepted the proposal from the company to divide this area into three parts.[1064] First, the company would construct the 10 apartment buildings on 2 hectares for the Borei Keila residents.[1065] Second, the company would receive 2.6 hectares for

[1056] LICADHO, *HIV/AIDS Families Evicted from Borei Keila*, 1; Malik and Twine, *Observations of the Tuol Sambo Community (a Borei Keila Resettlement*, 1; Rabé, "From 'Squatters' to Citizens?," 156.
[1057] Rabé, "From 'Squatters' to Citizens?," 1; LICADHO, *HIV/AIDS Families Evicted from Borei Keila*, 1.
[1058] Rabé, "From 'Squatters' to Citizens?," 1; See: Amnesty International, *Cambodia: Borei Keila - Lives at Risk.*
[1059] Sub-decree on Social Land Concession, arts.1 and 2 (2003).
[1060] Ibid., art. 18.
[1061] Rabé, "From 'Squatters' to Citizens?," 1.
[1062] Ibid.
[1063] See: Contract on Constructing 10 Buildings with 6 Floors on 2-hectare Land Area in Borei Keila Location (2004); Rabé, "From 'Squatters' to Citizens?," 156; Housing Rights Task Force, *Legal Analysis: The Case of Evictions in Borei Keila*, 4.
[1064] Rabé, "From 'Squatters' to Citizens?," 155.
[1065] Ibid.; See: Amnesty International, *Cambodia: Borei Keila - Lives at Risk*; *Seven Months On, Many Borei Keila Evictees Remain Homeless.*

commercial development for its own as consideration.[1066] The remaining land area, 9.52 hectares, would revert to the state.[1067]

The government authorized the Phnom Penh municipality and local authorities to overlook the implementation of the land sharing project with the community and company.[1068] The three parties, the governor of Prampi Makara District, the community committee, and the Phan Imex Company, signed a formal contract for redevelopment of the Borei Keila site on January 5, 2004.[1069] Under the contract, the company agreed to invest $ 7,133,901 for the construction of 10 apartment buildings of six floors each for a total of 1,776 families.[1070]

ii. Satisfaction of Contractual Requirement

According to the contract, the company would complete the construction in two stages. First, the company would complete 3 apartment buildings within 30 months from the start of construction work.[1071] Second, the company would continue to construct other 7 apartment buildings at the later stage.[1072]

The company finished construction of the commercial units on its own 2.6 hectare plot of land, and the first three apartment buildings (buildings A, B, and C) for Borei Keila residents in 2007.[1073]As a result, a number of 394 families moved into the three new buildings by the lottery, held at the municipality.[1074] Furthermore, the municipal governor celebrated this ceremony in a televised inauguration.[1075] On the same day, the governor announced ongoing construction of the next seven buildings, while the remaining families were

[1066]Rabé, "From 'Squatters' to Citizens?," 155; See: Amnesty International, *Cambodia: Borei Keila - Lives at Risk*; *Seven Months On, Many Borei Keila Evictees Remain Homeless*; Housing Rights Task Force, *Legal Analysis: The Case of Evictions in Borei Keila*, 4.
[1067]Rabé, "From 'Squatters' to Citizens?," 155; See: Amnesty International, *Cambodia: Borei Keila - Lives at Risk*.
[1068] Rabé, "From 'Squatters' to Citizens?," 156.
[1069]See: Contract on Constructing 10 Buildings with 6 Floors on 2-hectare Land Area in Borei Keila Location (2004); Rabé, "From 'Squatters' to Citizens?," 156; Housing Rights Task Force, *Legal Analysis: The Case of Evictions in Borei Keila*, 4.
[1070]See: Contract on Constructing 10 Buildings with 6 Floors on 2-hectare Land Area in Borei Keila Location; Rabé, "From 'Squatters' to Citizens?," 156; See: Cambodian Center for Human Rights, *Yesterday's Eviction at Borei Keila Fails to Respect the "Three Pillars" of Business and Human Rights*, January 4, 2012.
[1071]Contract on Constructing 10 Buildings with 6 Floors on 2-hectare Land Area in Borei Keila Location; Rabé, "From 'Squatters' to Citizens?," 156–57.
[1072]Contract on Constructing 10 Buildings with 6 Floors on 2-hectare Land Area in Borei Keila Location; Rabé, "From 'Squatters' to Citizens?," 156–57.
[1073]Rabé, "From 'Squatters' to Citizens?," 164–65; LICADHO, *HIV/AIDS Families Evicted from Borei Keila*, 1; Housing Rights Task Force, *Legal Analysis: The Case of Evictions in Borei Keila*, 5.
[1074]Rabé, "From 'Squatters' to Citizens?," 164.
[1075]Ibid.

awaiting apartments.[1076]

iii. Breach of Contractual Requirement Inducing Dispute

The land sharing project was interrupted when the company completed 8 apartment buildings and declared bankruptcy, unable to construct another 2 apartment buildings for Borei Keila residents in 2010.[1077] Furthermore, the Phan Imex company requested the government to own the remaining two buildings. The company owner sent this request to the Prime Minister in April 2010.[1078] Together, the Phnom Penh governor sent a letter to the Prime Minister in favor of the company owner's request.[1079] Then, the Prime Minister approved the request on January 11, 2011.[1080] By then, 1343 families of the Borei Keila residents received apartments in the 8 buildings, but the 384 remaining families did not receive apartments.[1081]

The remaining families, who were eligible to obtain an ownership right in these apartment buildings under the social land concession, became victims of forced eviction and relocation. The company, together with combined forces of over 100 police officials, military police, company employees, and security guards exercised a forced removal of existing Borei Keila residents from their homes January 3, 2012.[1082] As a consequence, more than existing 200 homes were demolished.[1083] The clash left several Borei Keila residents wounded while one police chief was injured on his head.[1084] At the end of clash, ten residents were arrested and detained by accusing of acts of violence and obstruction to public officials on January 5, 2012.[1085]

[1076]Ibid.

[1077]*Borei Keila Land Dispute Is Contractual Dispute* [ទំនាទបុរីកីឡាជាទំនាទកិច្ចសន្យា], dir. Radio Free Asia (RFA), January 16, 2012, radio broadcast; *Borei Keila Insists Phnom Penh Authority to Urge Phan Imex to Construct 10 Apartment Buildings* [អ្នកបុរីកីឡានទូចឲ្យអាជ្ញាធរភ្នំពេញបំរុញឲ្យក្រុមហ៊ុនជានអ៊ីមិចសង់អគារក្រៃចំនួន], dir. Radio Free Asia (RFA), October 10, 2014, radio broadcast.

[1078]The company constructed 8 apartment buildings by raising two main reasons. The first reason, the company lost more than 3 million dollars, in total 11 million dollars, over the contract, 7 million dollars. See: Housing Rights Task Force, *Legal Analysis: The Case of Evictions in Borei Keila*, 7.

[1079]*Borei Keila Land Dispute Is Contractual Dispute.*

[1080]Ibid.

[1081]Housing Rights Task Force, *Legal Analysis: The Case of Evictions in Borei Keila*, 7.

[1082]Cambodian Center for Human Rights, *The Continuing Borei Keila Tragedy*, 1; Housing Rights Task Force, *Legal Analysis: The Case of Evictions in Borei Keila*, 7.

[1083]Cambodian Center for Human Rights, *The Continuing Borei Keila Tragedy*, 1.

[1084]Amnesty International, *Urgent Action: Detained Victims of Forced Eviction Escape*, February 23, 2012, 1; Housing Rights Task Force, *Legal Analysis: The Case of Evictions in Borei Keila*, 7.

[1085]Amnesty International, *Urgent Action: Detained Victims of Forced Eviction Escape*, 1; Housing Rights Task Force, *Legal Analysis: The Case of Evictions in Borei Keila*, 7.

iv. Resolution Process of the Borei Keila Dispute

The Borei Keila dispute involved in a contract for land transfer, even if it was not registered yet.[1086] Therefore, the court had jurisdiction to resolve this dispute, according to the division of institutional jurisdiction of land disputes in Cambodia.[1087] However, the 2004 contract of the Borei Keila land sharing project provided for conciliation first before proceeding with a course of legal action in court.[1088]

Although the 2004 contract provided contracted parties to resolve their dispute by mutual negotiation, peaceful negotiation did not happen as stated in the contract.[1089] The dispute happened when the company owner declared the company was bankrupt and requested to be owner of the remaining two buildings to the government.[1090] Likewise, the responsible authority for the project sent a corresponding letter to ask the Prime Minister for approving the request in favor of the company owner.[1091] This resulted in a forced eviction of the remaining Borei Keila residents on January 3, 2012.[1092]

After the forced removal from residing place, the evictees were sent to the new relocation sites, 25 km to 45 km from the city.[1093] A number of evictees agreed to accept land at the new relocation site provided by the company, while others did not accept land continued to protest and lived in tents near their previous homes.[1094] The remaining Borei Keila residents protested and sent petitions to the authority to resolve their damage and demanded release of the eight detainees on January 11, 2012. [1095]

The authorities arrested 30 protesters, including 7 children, and took them away to the Prey Speu

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[1086] *Borei Keila Land Dispute Is Contractual Dispute*.
[1087] See: Inter-ministerial Prakas on Determination of Duties between Courts and Cadastral Commissions Concerning Land Disputes (2003).
[1088]Contract on Constructing 10 Buildings with 6 Floors on 2-hectare Land Area in Borei Keila Location, 6 (2004).
[1089]Cambodian Center for Human Rights, *The Continuing Borei Keila Tragedy*, 1; Housing Rights Task Force, *Legal Analysis: The Case of Evictions in Borei Keila*, 7.
[1090]*Borei Keila Land Dispute Is Contractual Dispute*; *Borei Keila Insists Phnom Penh Authority to Urge Phan Imex to Construct 10 Apartment Buildings*.
[1091]*Borei Keila Land Dispute Is Contractual Dispute*.
[1092]Cambodian Center for Human Rights, *The Continuing Borei Keila Tragedy*, 1; Housing Rights Task Force, *Legal Analysis: The Case of Evictions in Borei Keila*, 7.
[1093]Uong, "Borei Keila Evictees Plead Case"; Khouth and Worrel, "Cambodian Government Imprisons Second Land Activist in Two Days."
[1094]Uong, "Borei Keila Evictees Plead Case"; Khouth and Worrel, "Cambodian Government Imprisons Second Land Activist in Two Days."
[1095]*Borei Keila Residents Accuse [Phan Imex] Company of Force to Accept Land As Condition for Release* [អ្នកបុរីគីឡាចោទក្រុមហ៊ុនថាបង្ខំឱនឲ្យយកដីជាលក្ខខណ្ឌនៃការដោះលែង], dir. Radio Free Asia (RFA), January 18, 2012, radio broadcast.

Social Affairs Center for several days.[1096] Twenty-two detainees escaped from the center on January 18, 2012.[1097] The remaining Borei Keila residents continued to protest and demand that the company to build two more apartment buildings as required under the contract.[1098]

Following a series of protests, but no effect, the Borei Keila residents filed complaint at the Phnom Penh court on February 10, 2012.[1099] The residents submitted the lawsuit to accuse the company of a breach of contract and demand that the company build two more apartment buildings and compensate each family 4 million riels ($1,000) for the loss of time and property.[1100] In the same month, the court decided to release the arrested 7 Borei Keila residents on bail on February 18, 2012.[1101]

The process over the case seemed slow since the lawsuit was filed, while the residents were waiting for resolution. The residents often protested to demand the court for a speedy trial. To this end, the residents went to gather and protest in front of the court in order to speed up their case in June 2012.[1102] However, the court official came out to promise that the court would proceed with the case by notifying the residents to come to the court.[1103] Two months later, the court summoned the representatives of the Borei Keila residents to appear in court on August 9, 2012.[1104] When the residents came and appeared in front of the court on the set date, the court declared to adjourn the hearing on the ground that the court was busy.[1105]

While waiting for resolution from the court, the company continued their construction. This provoked protests from the Borei Keila residents. The Borei Keila residents made consecutive protests and clashes. Therefore, the company owner filed a criminal charge against the protester on the count of "incitement to

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[1096] *Police Arrest 30 Borei Keila Residents* [ប៉ូលីសចាប់ខ្លួនអ្នកបុរីកីឡា៣០នាក់], dir. Radio Free Asia (RFA), January 11, 2012, radio broadcast.
[1097] Housing Rights Task Force, *Legal Analysis: The Case of Evictions in Borei Keila*, 8.
[1098] *Borei Keila Residents Accuse [Phan Imex] Company of Force to Accept Land As Condition for Release*.
[1099] *Borei Keila Residents Sue Phan Imex to Court* [អ្នកបុរីកីឡាផ្តើមប្តឹងក្រុមហ៊ុនផានអ៊ីមិចនៅតុលាការ], dir. Radio Free Asia (RFA), February 10, 2012, radio broadcast.
[1100] Ibid.
[1101] *Court Decides to Release 7 Borei Keila Residents* [តុលាការសម្រេចដោះលែងអ្នកបុរីកីឡា៧នាក់], dir. Radio Free Asia (RFA), February 18, 2012, radio broadcast.
[1102] *Borei Keila Residents React to Delay of Court* [អ្នកបុរីកីឡាប្រតិកម្មនៅនឹងការពន្យារពេលរបស់តុលាការ], dir. Radio Free Asia (RFA), August 9, 2012, radio broadcast.
[1103] Sophak Chakrya Khouth, "Case of Borei Keila Evictees Delayed," *Phnom Penh Post*, August 10, 2012; *Borei Keila Residents React to Delay of Court.*
[1104] Khouth, "Case of Borei Keila Evictees Delayed"; *Borei Keila Residents React to Delay of Court.*
[1105] Khouth, "Case of Borei Keila Evictees Delayed"; *Borei Keila Residents React to Delay of Court.*

commit a crime” on August 29, 2012.[1106] Three days later, the court summoned a protester to appear in court on August 31, 2012.[1107] The court charged the protester of incitement and detained on September 6, 2012.[1108] Currently, the Borei Keila residents protest for resolution.

2. Boeung Kak Land Dispute

The Boeung Kak land dispute occurred after the Borei Keila case. However, the Boeung Kak land dispute was relevant to the Borei Keila land dispute because the residents of the Boeung Kak were also alleged of slum dwellers or illegal possessors living on state public land. In this context, the Boeung Kak residents would be a would-be project under the onsite slum upgrading policy of the government in 2003.[1109] However, the failure of Borei Keila land sharing project resulted in forced evictions of other would-be project sites in the city.[1110]

Above all, the Boeung Kak land dispute was a special dispute, as referred in this Dissertation, that related to the types of land disputes caused by state reclamation (land registration) and land reclassification (state land) under Cambodian property laws. Such a feature, one of many examples, is worthwhile to notice and study. Therefore, this Dissertation puts forward this case for study.

a). Dispute in Snapshot

The Boeung Kak dispute was a dispute between affected residents and Phnom Penh authorities following a government lease in the Boeung Kak area of 133 hectares for a 99-year contract with Shukaku. Inc., a private company belonging to a senator from the ruling party, to develop commercial hub.[1111] Such a lease affected around 4,252 families who had lived in the development zone.[1112] These families were evicted from the land in order to pave the way for development. A number of land possessors, who were forced to leave, accepted meager compensation, while other residents protested and demanded onsite development. The remaining

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[1106] Channyda Chhay, “Borei Keila Protester Summonsed to Court,” *Phnom Penh Post*, August 31, 2012.
[1107] Ibid.
[1108] Khouth and Worrel, “Cambodian Government Imprisons Second Land Activist in Two Days.”
[1109] Rabé, “From ‘Squatters’ to Citizens?,” 1; LICADHO, *HIV/AIDS Families Evicted from Borei Keila*, 1.
[1110] For example, Dey Krahorm community, Reak Reay Community, and a number of communities were alleged of state land.
[1111] Thiel, “Donor-Driven Land Reform in Cambodia—Property Rights, Planning, and Land Value Taxation,” 234; Hughes, “Cambodia in 2007,” 70; Un and So, “Land Rights in Cambodia,” 303; Mccargo, “Cambodia in 2013,” 77.
[1112] Contract on Boeung Kak Area Lease of Sangkat Srah Chork, Khan Daun Penh, Phnom Penh Capital for Commercial, Cultural, Tourism, Residential, and Resort Hub [កិច្ចសន្យាស្តីពីការជួលទីតាំងបឹងកក់ស្ថិតនៅសង្កាត់ស្រះចក ខណ្ឌដូនពេញ រាជធានីភ្នំពេញ ដើម្បីអភិវឌ្ឍជាតំបន់មជ្ឈមណ្ឌលពាណិជ្ជកម្ម វប្បធម៌ ទេសចរណ៍ លំនៅដ្ឋាន រមណីដ្ឋាន] (2007); Hughes, “Cambodia in 2007,” 70.

residents protest against the state and company to demand for resolution.

b). Analysis of Institutional Responsibility of Boeung Kak Case

i. Background

Boeung Kak area was located in the city center of the Phnom Penh capital. Boeung Kak area had 133 hectares consisting of lake and land area. The lake area covered 90 hectares, while the land area had 43 hectares. People came and occupied the areas after the collapse of the Khmer Rouge regime.[1113] During the late 1990s, the area became a popular location for foreign tourists, and many guesthouses were constructed on stilts at the edge or above the water of the lake.[1114] The area around the lake was fully settled, and owners improved their homes consecutively.[1115]

ii. Start of Dispute

The Boeung Kak area, which was in the heart of Phnom Penh capital, was under the systematic land registration.[1116] The Phnom Penh Administration Commission announced the Srah Chok commune, in which Boeung Kak area located in, for the systematic land registration on March 31, 2006.[1117] People were waiting for the systematic land registration. However, Administration Commission excluded the Boeung Kak area from titling on the grounds of "unclear," or "unknown" status.[1118] However, the Boeung Kak area was listed as lying in the "development zone"[1119] of the state during 30-day public display from January 4 to February 2, 2007.[1120]

[1113] Bridges Across Borders Cambodia, "Boeung Kak," n.d., http://babcambodia.org/stopevictions/eviction/Boeung_Kak.htm (accessed April 5, 2011).
[1114] Inspection Panel, *Cambodia: Land Management and Administration Project*, 25–26; Bugalski and Pred, "Formalizing Inequality," 4.
[1115] Inspection Panel, *Cambodia: Land Management and Administration Project*, 26; Bugalski and Pred, "Formalizing Inequality," 4.
[1116] Agence Kampuchea Press (AKP), "Cambodia Clarifies World Bank's Concern over Boeung Kak's Eviction"; Bugalski and Pred, "Formalizing Inequality," 4.
[1117] Agence Kampuchea Press (AKP), "Cambodia Clarifies World Bank's Concern over Boeung Kak's Eviction"; Bugalski and Pred, "Formalizing Inequality," 4.
[1118] Agence Kampuchea Press (AKP), "Cambodia Clarifies World Bank's Concern over Boeung Kak's Eviction"; Bugalski and Pred, "Formalizing Inequality," 4.
[1119] The government developed a master plan to develop of the Phnom Penh city as the "Pearl of Asia" in 2003. The master plan enlarged the areas of city into 30 kilometers in circle and zoned many areas as development areas. See: Marie Tricaud Pierre, *Schema Directeur de Phnom Penh: Paysage Composition Urbaine Plan (Vert et Blueu)*, 2005.
[1120] Agence Kampuchea Press (AKP), "Cambodia Clarifies World Bank's Concern over Boeung Kak's Eviction"; Bugalski and Pred, "Formalizing Inequality," 4.

Under these circumstances, the Phnom Penh authority, who obtained delegated power from the central government, signed a 99-year contract with Shukaku. Inc., a private development company, to lease 133 hectares of the Boeung Kak areas for development on February 6, 2007.[1121] The Boeung Kak residents requested the Phnom Penh Administration Commission to register their land but were denied because the area was declared as "state public land" and in the "development zone" of the state.[1122]

However, the long-term lease of the state public land was allowed only by 15 years under Cambodian property law.[1123] Therefore, the government reclassified the Boeung Kak area from the state public land into the state private land on August 7, 2008.[1124] The Phnom Penh authority set a fixed amount of compensation for affected residents to accept without negotiation.[1125] Around 2000 families, as confirmed by city hall, accepted the compensation, while the rest rejected and demanded market value compensation, and protested against the development project.[1126]

iii. Institutional Responsibility of Complaint Resolution

The dispute arose when the authority issued an eviction order to pave the way for the company to fill in the lake with sand, while grievance and compensation were yet unresolved, on August 26, 2008.[1127] The Boeung Kak residents filed a complaint to challenge against the forced eviction order and stop the company

[1121] Contract on Boeung Kak Area Lease of Sangkat Srah Chork, Khan Daun Penh, Phnom Penh Capital for Commercial, Cultural, Tourism, Residential, and Resort Hub (2007); Bugalski and Pred, "Formalizing Inequality," 1.
[1122] Agence Kampuchea Press (AKP), "Cambodia Clarifies World Bank's Concern over Boeung Kak's Eviction"; Bugalski and Pred, "Formalizing Inequality," 1.
[1123] Sub-decree Rule and Procedure of State Public Reclassification of State and Public Legal Entity, art. 18 (2006).
[1124] Sub-decree on Reclassification of Boeung Kak Area from State Public Property into State Private Property [អនុក្រឹត្យស្តីពីការធ្វើអនុបយោគតំបន់បឹងកក់ពីក្នុងព្យសម្បត្តិសាធារណៈរបស់រដ្ឋមកជាក្នុងព្យសម្បត្តិឯកជនរបស់រដ្ឋ] (2008); Thiel, "Donor-Driven Land Reform in Cambodia—Property Rights, Planning, and Land Value Taxation," 235.
[1125] The government provided three options, as compensation policy, for all affected citizens to choose without negotiation. The first option was the government would compensate each household amount of 8,000 USD and 2 million riel. The second option was that the government provided a flat (4m x 12m) in Khan Dangkor, together with monetary compensation of 2 million riel. The third option was on-site development—people were requested for temporary stay in designated places prepared by the Capital Hall and waited for the completed construction. See: Phnom Penh City Hall Instant message, "Press Release - People Living in Boeung Kak Development Area," instant message, December 21, 2010.
[1126] Phnom Penh City Hall, "Press Release - People Living in Boeung Kak Development Area," December 21, 2011, http://www.phnompenh.gov.kh/news---564.html (accessed April 3, 2011).
[1127] Thiel, "Donor-Driven Land Reform in Cambodia—Property Rights, Planning, and Land Value Taxation," 234.

from filling in the lake at the Phnom Penh court in September 2008.[1128] However, the court denied the complaint on the grounds that it was an unregistered land dispute on September 22, 2008.[1129] The residents challenged the denial of complaint to the appellate court, but again the dismissed the complaint on December 25, 2008.[1130]

Therefore, this land dispute fell into the Phnom Penh Cadastral Commission.[1131] Affected residents submitted complaints to the National Assembly and the Council of Ministers, but were simply ignored.[1132] The disputes rested in the delegated project authority, the Phnom Penh authority, for negotiating and resolving dispute.

Protests led to clashes and suppression by the authority. Many times the protests occurred, many times the suppression and arrests were carried out.[1133] The clash erupted into violence when the authorities and the development company came to bulldoze 8 houses of the Boeung Kak residents.[1134] At least, one person was seriously injured on September 16, 2011.[1135]

Following the clash, the Boeung Kak residents filed a complaint against the authorities to court for property destruction. However, the authorities also filed against the residents on the count of defamation because during the clash, the citizens cursed the authorities.[1136] The court took action on the complaint of the authorities, while ignoring the affected citizens' complaint by convening the affected citizens under the charge of defamation to appear in court on October 18, 2011.[1137] However, the court adjourned the hearing because

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[1128] Inspection Panel, *Cambodia: Land Management and Administration Project*, 30–31; Amnesty International, *Eviction and Resistance in Cambodia: Five Women Tell Their Stories*, 2011, 56; Mgbako et al., "Forced Eviction and Resettlement in Cambodia," 54–55.

[1129] Inspection Panel, *Cambodia: Land Management and Administration Project*, 30–31; Amnesty International, *Eviction and Resistance in Cambodia*, 56.

[1130] Mgbako et al., "Forced Eviction and Resettlement in Cambodia," 55.

[1131] Inspection Panel, *Cambodia: Land Management and Administration Project*, 30–31; Amnesty International, *Eviction and Resistance in Cambodia*, 56.

[1132] Amnesty International, *Eviction and Resistance in Cambodia*, 56.

[1133] *Authority Uses Violence to Suppress the Resident of Boeung Kak, 11 Arrested*, dir. Radio Free Asia (RFA), April 21, 2011, radio broadcast.

[1134] *Police Cooperates with Company to Bulldoze 8 Houses of Boeung Kak Residents*, dir. Radio Free Asia (RFA), September 16, 2011, radio broadcast.

[1135] Ibid.

[1136] *The Court Adjourns the Hearing of Boeung Kak Residents Due to Many Supporters* [**តុលាការលើកសវនាការអ្នកភូមិបឹងកក់ដោយសារតែមានអ្នកគាំទ្រច្រើន**], dir. Radio Free Asia (RFA), October 18, 2011, radio broadcast.

[1137] Ibid.

many affected citizens protested outside the court.[1138] Protests and charges continue today.

3. Reflection of Studied Cases

The studied cases, in this Dissertation, provide a broad picture of land disputes caused by land competing claims and resolution process in Cambodia. These cases show that customary land tenure is vulnerable to allegation of slum or illegal occupation on the state land or state belonging to the third party. The taking of occupied land is often made by fixed compensation under market value.

The current taking and redress mechanism does not maintain due process and fair trial for parties. Affected people often protest to receive negotiations. Moreover, negotiations do not stand on equal footing, which often render in failure and clash. Likewise, the redress mechanism (both ADR and judicial institutions) cannot maintain fair hearing for affected parties. The redress mechanism, especially, court deals with criminal dispute, while neglecting constitutionality of taking action and decision and entitlement of ownership acquisition between parties. As a consequence, land taking often result in forced evictions and involuntary resettlements of affected citizens to remote areas without enough facilities.

In short, the current taking and redress mechanism cannot guarantee due process of law and access to justice for all in land dispute.

G. Current Situation of Land Disputes and Institutional Responsibility

Cambodia has multiple ADR and judicial institutions, formal and informal, set at place for preventing, protecting, and resolving land disputes. However, these institutions are not efficient and effective to curb with prevalence of land disputes. Although the government suspended ELC granting and exercised the "Old Policy, New Action," which was called the "leopard-skin" policy through which affected land were cut off since 2012, this action overlooked many land disputes; as exemplars of Boeung Kak and Borei Keila land disputes.[1139] Therefore, a number of land disputes are still chronic.

The failure of institutional responsibility results in political intervention seeking and resorting to *ultra vires* or collective actions such as demonstration, protest, road blockading, and car-wheel burning to protect their land. Recently, when affected citizens run for intervention seeking at the Phnom Penh capital, some

[1138] Ibid.
[1139] Measure To Strengthen and Increase Efficiency of ELC Management, 01 BB (2012).

provincial authorities blocked them from leaving the provinces, as the case of Kratie land dispute on August 18, 2014.[1140] Therefore, the Prime Minister came out to make a public blame on responsible authorities, both local and national levels, for sluggishness (laziness) to resolve disputes until affected citizens ran for intervention at the Phnom Penh capital and tried to block them.[1141]

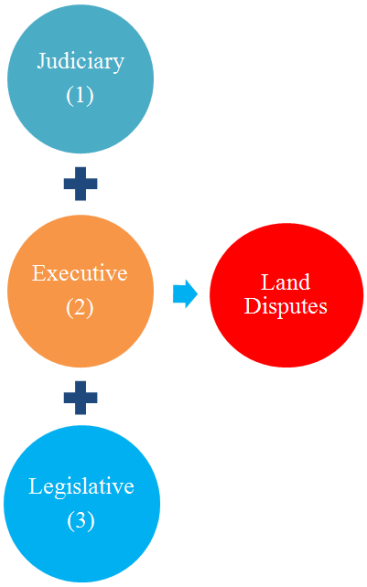
The development of institutional responsibility for resolving land was beyond the expectation after Cambodia had agreed to end political deadlock and formed the legitimate National Assembly on July 22, 2014.[1142] The institutional responsibility over land dispute resolution further extended to the National Assembly institution. The National Assembly, upon the political agreement, was divided into various committees, in which the "first committee"[1143] was responsible for receiving complaints and investigating land disputes in parallel with the judicial and executive branches. However, this committee did not have right to make decision.[1144] The decision rested in the judicial or ADR institutions.[1145]

The first committee of the National Assembly received more than 40 complaints from the land dispute-affected citizens as of September 17, 2014.[1146] The first committee made a field visit and investigation a number of cases.[1147] Resolution is only compromise between parties.[1148] However, independence and tenure of investigating incumbents are not guaranteed under law. Recently, an investigator was removed from the position, while the other was psychologically forced to self-resignation after the investigation of land dispute in Kampong Speu province, where involved in the tycoon, who was the senator in early December 2014.[1149]

[1140] Vong and Ponniah, "The Buck Stops Elsewhere"; Aun and Hul, "Officials Trade Blame Over Kratie Land Dispute."
[1141] Vong and Ponniah, "The Buck Stops Elsewhere"; Aun and Hul, "Officials Trade Blame Over Kratie Land Dispute."
[1142] *Agreement on Political Settlement Between Cambodia People's Party and Cambodia Nation Rescue Party*.
[1143] The full name is the First Committee in charge of Human Rights, Complaint Reception and Investigation, and National Assembly-Senate Relations.
[1144] *First Committee of National Assembly Meets NGOs to Discuss Lorpeang Land Dispute* [គណៈកម្មការទី១នៃរដ្ឋសភាទទួលពិគាក្សាជាមួយសង្គមស៊ីវិលរឿងដីធ្លីឡូពាង], dir. Radio Free Asia (RFA), September 3, 2014, radio broadcast.
[1145] Ibid.
[1146] "More Than 40 Complaints Reached the First Committee of the National Assembly" [បណ្តឹងរឿងដីធ្លី ជិត ៤០ បានទៅដល់ដៃរដ្ឋសភា], *Radio France Internationale (RFI)*, September 17, 2014, radio broadcast.
[1147] *First Committee of National Assembly Meets NGOs to Discuss Lorpeang Land Dispute*.
[1148] Ibid.
[1149] *Kampong Speu Disputed Villagers Regret for Resignation of Hun Sen's Younger Sister* [អ្នកមានបញ្ហាដីនៅកំពង់ស្ពឺសោកស្តាយចំពោះការលាលែងតំណែងរបស់ប្អូនស្រីលោក ហ៊ុន សែន], dir. Radio Free Asia (RFA), December 8, 2014, radio broadcast.

In short, Cambodian government endeavors to prevent, protect, and resolve land disputes by establishing consecutive mechanisms from judicial, executive, and legislative institutions to deal with land disputes. However, redress mechanisms, especially, ones under the executive and legislative branches, do not have a clear governing rule and faces conflict of interest. Furthermore, multiple institutions further add confusion, complexity, and less responsibility. If Cambodia has a clear, simple, and single institution responsible for land dispute resolution, social consequences may be likely to decrease. The following figure shows the evolution and joint hands to fight against land disputes in Cambodia.

Figure 31: The development and joint forces to fight against land disputes in Cambodia



Source: Author

H. Chapter Summary

Cambodia underwent many political turbulences and civil wars. These destroyed human resources, institutions, especially, caused property system in confusion. Post-war government re-established the property system by consecutive enactment of property laws in compliance with the change of political and economic regime. Cambodian property laws were drafted by different donors, which rendered post-war property system in conflict and confusion.

The swift change of post-war property laws, we could say, was beyond the institutional capacity to under the concept of these laws. The 2001 Land Law authorizes land possession to be transformed into ownership within 5-year statute of limitation. The 2007 Civil Code authorizes land possession to be transformed into ownership within 10-, or 20-year statute of limitation in reliance on integrity of land occupant. In this context, the 5-year statute of limitation under the 2001 Land Law is interpreted to be applied for the first registration (the principle of possession). While the 10-, or 20-year statute of limitation under the 2007 Civil Code is interpreted to applied for the second or consecutive registration (the principle of adverse possession). As a result, the principle of adverse possession, which is prohibited under the 2001 Land Law, is authorized under the 2007 Civil Code.

Furthermore, ownership under Cambodian property laws could be different from a number of property jurisdictions. Most jurisdictions determine "ownership" as "registered property." However, ownership, under Cambodian property laws, refers to both registered and unregistered property. Ownership is transformed from possession with a five-year statute of limitation under the 2001 Land Law. If one occupied land without protest within five years, one could acquire ownership. If such a land is not registered yet, it is an "unregistered ownership." Unregistered ownership is stronger protection than possession because a five-year statute of limitation is satisfied and waited for definitive title when registered. Registered ownership is exclusive.

Above all, division and relation of land ownership are unique under Cambodian property laws. Cambodian property laws divide land into three main 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 business transaction as individual private land. State public land is not subject to private ownership acquisition,

state private land is authorized. However, state public land, when loses its public use, can be reclassified as state private land. This context poses a challenge on the entitlement of private ownership acquisition on lost public-use state public land.

Land registration is a final determiner of state public land, state private land, and individual private land. Currently, the majority of Cambodian land is not registered yet. Thus, land is in overlapping status among state public land, state private land, and individual private. This results in competing claim disputes between private parties, citizens and state, which provokes post-war Cambodian peace and development.

Competing claim dispute between private parties arise from illegal land grabbing and double/ overlapping titles. In this context, an outsider, who has power or holds title, claims ownership over customary land occupied by local resident. In addition, Cambodia challenges a competing claim dispute between citizens and state caused by retroactive, cut-off date, and imperative clauses of law that authorize the state to reclaim ownership from land possessor, where deems to be state public land. Furthermore, land taking for development provokes social tensions and renders Cambodian in land crisis today.

Post-war government established consecutive redress mechanisms to deal with land disputes. However, these mechanisms are not efficient and effective to prevent, protect, and resolve land due to the political influence dominating administration. Cambodian post-war politics, although the 1993 Constitution embodies the principle of power separation and democracy, is not transparent. Such a politics influences the whole public administration. As a result, public administration bears responsibility in hierarchical structure rather than legal obligation.

In this context, Cambodia has introduced decentralization and deconcentration to local government in 2001 and 2008, this body lacks local autonomy in practice. Administrative ADR mechanisms are arranged under administrative territorial extension. Lack of local autonomy and hierarchical responsibility have impeded institutional reform for speedy, efficient, and effective process and resolution.

Current redress mechanism fails to maintain due process between parties in competing claim disputes. Administrative ADR institutions face conflict of interest in resolving competing claim dispute between the state and land possessor. The court deals with only criminal action, neglecting administrative dispute over

taking action and decision, and entitlement of ownership acquisition between local residents and third party, or state.

Cambodian redress mechanism fails to deal with the entitlement right of ownership acquisition, which give rise to forced eviction and involuntary relocation of land possessors with a mere meager compensation in justification of such a removal. This violates the constitutional protection clause of ownership rights under Cambodian 1993 Constitution. The denial of land registration by the state authority is considered as a taking of legitimate unregistered ownership under Cambodian property laws.

Therefore, the resolution of ownership acquisition entitlement and maintenance of due process between competing claim parties are a pre-requisite step in ending land disputes in post-war Cambodia. In this context, only an independent body, who is far from conflict of interest, can achieve this end.

Chapter III Comparative Study of Institutional Responsibility in Land Takings in America and Japan

The previous chapters have covered Cambodian post-war politics, administration, and property law, especially, the institutional responsibility, protection, and procedure in land taking and dispute resolution. For the purpose of this Chapter will make a comparative study with American and Japanese jurisdictions.

The scope of comparison is limited to post-colonial America and post-war Japan over land taking practice. The purpose is to learn and understand the concept and policy of both countries in arranging institutional mechanisms, responsibility, protection, and procedure to deal with land taking and dispute resolution.

This Chapter is divided into three important sections. The first section will conceptualize practice of land takings in America. The second section will conceptualize Japanese system. The last section will make a comparative analysis of the three countries.

A. Land Taking in America

This section will cover the background and practice of land taking in America, and examine one case in particular detail.

1. Background of Land Taking in America

America had a breadth of experiences in exercising land takings for social development. This practice occurred since America was under the British colony.[1150] The then practice was subject to various laws that

[1150] Scheiber, "Property Law, Expropriation, and Resource Allocation by Government," 234; Arden Reed Pathak, "Comment: The Public Use Doctrine: In Search of a Limitation on the Exercise of Eminent Domain for the Purpose of Economic Development," *Cumb. L. Rev.* 35 (2004): 178; Duane L. Ostler, "Bills of Attainder and the Formation of the American Takings Clause at the Founding of the Republic," *Campbell L. Rev.* 32 (Winter 2010): 228.

authorized such a power.[1151] Such a practice was under the responsibility of delegated commissioners to negotiate and evaluate the compensation with affected citizens.[1152]

The exercise of land takings for public use was not extensive yet in the colonial period. The colonial government expropriated land for constructing buildings, municipal improvements, and roads.[1153] Beside these, the government also took private property for encouraging economic growth by delegating the taking power to private individuals or companies, whose activities served or benefitted the whole community.[1154] In the colonial period, some exercises of land takings, for example of land takings for road sometimes leading to un-compensated to affected citizens.[1155]

The exercise of land takings increased and changed remarkably in post-revolution period. The newly independent states began to take land for large-scale public projects in an extensive way.[1156] Post-revolutionary practice routinely followed the colonial practice, but extending compensation for property, which was taken for these public works.[1157]

Having seen some practices of land takings faced the problem of taking purpose and compensation, the Framers, had considered property rights essential to the concept of liberty in America, rethought about the

[1151] Scheiber, "Property Law, Expropriation, and Resource Allocation by Government," 234; Ostler, "Bills of Attainder and the Formation of the American Takings Clause at the Founding of the Republic," 229; Manfredo, "Comment: Public Use & Public Benefit," 676.
[1152] Ely, ""That Due Satisfaction May Be Made," 7; Scott M. Reznick, "Land Use Regulation and the Concept of Takings in Nineteenth Century America," *The University of Chicago Law Review* 40, no. 4 (July 1, 1973): 854; Hudson, "Eminent Domain Due Process," 1294.
[1153] Fawcett, "Eminent Domain, the Police Power, and the Fifth Amendment," 494; Ely, ""That Due Satisfaction May Be Made," 12; Ostler, "Bills of Attainder and the Formation of the American Takings Clause at the Founding of the Republic," 229; Manfredo, "Comment: Public Use & Public Benefit," 676–77.
[1154] James W. Ely, *Property Rights in the Colonial Era and Early Republic* (Taylor & Francis, 1997), 78; Lenhoff, "Development of the Concept of Eminent Domain," 600; Harrington, "'Public Use' and the Original Understanding of the So-Called 'Takings' Clause," 1253–54; William Michael Treanor, "The Origins and Original Significance of the Just Compensation Clause of the Fifth Amendment," *Yale L.J.* 94, no. 3 (1985): 695.
[1155] Hart, "Land Use Law in the Early Republic and the Original Meaning of the Takings Clause," 1101; John F. Hart, "Takings and Compensation in Early America: The Colonial Highway Acts in Social Context," *The American Journal of Legal History* 40, no. 3 (July 1, 1996): 253–54; Morton J. Horwitz, *The Transformation of American Law, 1780-1860* (Harvard University Press, 1977), 63–64; William Michael Treanor, "The Original Understanding of the Takings Clause and the Political Process," *Colum. L. Rev.* 95, no. 4 (1995): 785; Treanor, "The Origins and Original Significance of the Just Compensation Clause of the Fifth Amendment," 694–95.
[1156] Ely, *Property Rights in the Colonial Era and Early Republic*, 79.
[1157] Harrington, "'Public Use' and the Original Understanding of the So-Called 'Takings' Clause," 1253; Ely, *Property Rights in the Colonial Era and Early Republic*, 79–80.

purpose of land takings.[1158] As a result, the Framers shifted the practice of land taking from economic endeavors to the protection of individual rights from governmental intrusions.[1159]

Having seen the lack of protection clause of individual rights under the Federal Constitution, America amended the first ten amendments to the Federal Constitution in 1791, which was called the "Bill of Rights."[1160] The Bill of Rights provided the fundamental protection of individual rights and constrained the governmental sovereign power over the people.[1161] Among those rights, the clause prohibited the arbitrary exercise of taking power by the government was also included in the Bill of Rights. This clause rested in the Fifth Amendment, which stipulated:

> No one shall be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.[1162]

This constitutional clause was called the "taking clause." The taking clause of the Fifth Amendment restricted the government to take private property only for the "public use" while affected property owners were paid "just compensation."[1163]

In addition to the Fifth Amendment, the Fourteenth Amendment imposed the requirement of "due process of law" on state and local governments to follow the procedures and provide the protection of affected citizens while taking their property in 1868.[1164] The Fourteenth Amendment of the federal Constitution provided:

[1158] Rusty D. Crandell, "Comment: Arizona's 'Public Use' Debate: Statutory and Constitutional Limitations on the Power to Take Private Property," *Ariz. St. L.J.* 38 (Winter 2006): 1169–70; Sturtevant, "Note: Economic Development as Public Use," 304–5.

[1159] Hart, "Land Use Law in the Early Republic and the Original Meaning of the Takings Clause," 1101; Pathak, "Comment: The Public Use Doctrine," 179.

[1160] Garrett Power, "Regulatory Takings: A Chronicle of the Construction of a Constitutional Concept," *BYU J. Pub. L.* 23 (2009): 225; Manfredo, "Comment: Public Use & Public Benefit," 677; Block, "Casenote: Takings Claims," 75.

[1161] Power, "Regulatory Takings," 225; Michael H. Schill, "Intergovernmental Takings and Just Compensation: A Question of Federalism," *U. Pa. L. Rev.* 137, no. 3 (January 1, 1989): 833–34; Crandell, "Comment: Arizona's 'Public Use' Debate," 1170.

[1162] Constitution of the United States, Amendment V (1789).

[1163]Cormack, "Legal Concepts in Cases of Eminent Domain," 222; Jackson, "What Is Property?," 94–95.

[1164] Power, "Regulatory Takings," 226; Lenhoff, "Development of the Concept of Eminent Domain," 600; Westbrook, "Administrative Takings," 743; Nathan S. Chapman and Michael W. NcConnel, "Essay and Feature: Due Process as Separation of Powers," *Yale L.J.* 121 (May 2012): 1726.

> Nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.[1165]

The clause of the Fourteenth Amendment was called the "due process clause." The due process clause bound the government to the procedural protection for the affected citizens.[1166] Furthermore, each state has similar constitutional or statutory laws governing eminent domain.[1167]

In order to guarantee the uniform practice of compensation and avoid suffering to affected citizens, the federal government adopted the Uniform Relocation Assistance and Real Property Acquisition Policies for Federally Assisted Programs Act in 1970.[1168] The primary purpose of this Act was to guarantee that the displaced persons did not suffer from disproportionate injuries from the development project.[1169] Furthermore, America codified its procedures of land takings in the Uniform Law Commissioners' Model Eminent Domain Code in 1974.[1170]

2. Procedure of Land Taking in America

The practice of the eminent domain power in America is generally referred to as "condemnation," or simply "taking." America indicates clearly the persons who are authorized for taking land. In general, the authorized persons are local, state, federal government, and public or quasi-public corporation. [1171] These bodies are called the "condemnor." Citizens, who are affected by the taking action, or condemnation, are called the "condemnee."

[1165] Constitution of the United States, Amendment XIV.
[1166] Peter J. Rubin, "Square Pegs and Round Holes: Substantive Due Process, Procedural Due Process, and the Bill of Rights," *Colum. L. Rev.* 103, no. 4 (May 1, 2003): 842–43.
[1167] Bauer, "Notes & Comments: Government Takings and Constitutional Guarantees," 272.
[1168] Uniform Relocation Assistance and Real Property Acquisition Policies and Federally Assisted Program Act (1970).
[1169] Abraham Bell, "Private Takings," *The University of Chicago Law Review* 76, no. 2 (April 1, 2009): 357.
[1170] Uniform Law Commissioners' Model Eminent Domain Code (1974).
[1171] Brent Nicholson and Sue Ann Mota, "From Public Use to Public Purpose: The Supreme Court Stretches the Takings Clause in Kelo v. City of New London," *Gonz. L. Rev.* 41 (2006 2005): 81; Cavazos, "Beware of Wooden Nickels," 687; Joris Naiman, "Judicial Balancing of Uses for Public Property: The Paramount Public Use Doctrine," *BC Envtl. Aff. L. Rev.* 17 (1989): 896.

In accordance with the Uniform Relocation Act and Uniform Eminent Domain Code, the condemnor must make "every reasonable and diligent effort to acquire property by negotiation."[1172] The condemnor negotiates with the condemnee on the fair and free market value. The condemnor, prior to starting to negotiate with affected property owners, evaluates the affected property in order to determine the amount that would constitute "just compensation."[1173] The affected property owner or representative can accompany the appraiser during the evaluation of the affected property.[1174]

After the affected property is evaluated, the condemnor will establish the amount to be the "just compensation" in a written statement and submit it to the affected property owner as an offer to negotiate for acquiring the property.[1175] Both parties will negotiate on the evaluated price. Negotiation is always based on market principles.[1176] If the negotiation cannot reach an agreement, the condemnor may proceed to file a complaint to court.[1177]

Before the condemnor can file the claim to court, the condemnor must show he or she has made most diligent effort to acquire the affected property by negotiation with the landowner owner first.[1178] The law requires the condemnor to adopt the condemnation authorization before submitting the claim in court.[1179]

Under the Model Eminent Domain Code, condemnation authorization is a legal requirement of the land taking process prior to initiating eminent domain proceedings in court that shows the effort and attempt of

[1172]David Callies, "Compulsory Purchase of Land: Fair Notice, Hearing and Relocation Standards," (Nagoya University, 2006), 2; Uniform Law Commissioners' Model Eminent Domain Code, Article II, Section 202.
[1173]Callies, "Compulsory Purchase of Land," 3; Uniform Law Commissioners' Model Eminent Domain Code, Article II, Section 202.
[1174]Callies, "Compulsory Purchase of Land," 3; Uniform Law Commissioners' Model Eminent Domain Code, Article II, Section 202.
[1175]Callies, "Compulsory Purchase of Land," 3; Uniform Law Commissioners' Model Eminent Domain Code, Article II, Section 203.
[1176]Callies, "Compulsory Purchase of Land," 3; Uniform Law Commissioners' Model Eminent Domain Code, Article II, Section 203.
[1177]Callies, "Compulsory Purchase of Land," 4; By Steven a. Hemmat, "Comment: Parks, People, and Private Property: The National Park Service and Eminent Domain.," *Envtl. L.* 16 (Summer 1986): 946.
[1178] Uniform Law Commissioners' Model Eminent Domain Code, § 306.
[1179] David Callies, "Compulsory Purchase of Land: Fair Notice, Hearing and Relocation Standards," (Nagoya University, 2006), 7; Uniform Law Commissioners' Model Eminent Domain Code, Article III, Section 309 The condemnation authorization refers to a written order, ordinance, or statement authorizing the taking of requested property. Carlos A. Kelly, "How to Obtain an Order of Taking," *Fla. Bar J.* 80 (October 2006): 66.

the condomnor in acquiring the affected property.[1180] The law requires a written statement of the proposed public use, the basis in statute, the location and extent of the property, and the necessity of the use of property for public use.[1181]

The condemnor will file a claim at the court where the property is located.[1182] The complaint filing is to apply for an order of possession from the court in order to legally acquire the property.[1183] The law requires the condemnor to deposit not less than the appraisal of just compensation at the court. [1184] Such a doing is to guarantee that the affected property owners will receive compensation after the court's decision.

The eminent domain proceedings employ normal civil proceedings.[1185] The preliminary proceeding for a public hearing is made on the "effect, the necessity, and the extent of the taking" in compliance with the legal procedure and public use.[1186] The public hearing is conducted in a way that encourages interested parties to participate in the proceedings.[1187] The public hearing is done at the "location reasonably proximate to the property" where the affected owners can appear in court and give a reasonable opportunity to be heard.[1188]

The condemnor cannot force the property owners to surrender possession of property before condemnation proceedings are complete.[1189] Preemtive coercive actions are forbidden under the law.[1190] The condemnor may not require a person lawfully occupying property to move from a dwelling, business or farm

[1180] Callies, "Compulsory Purchase of Land," 7; Uniform Law Commissioners' Model Eminent Domain Code, § 310; Kelly, "How to Obtain an Order of Taking," 66.
[1181] Callies, "Compulsory Purchase of Land," 7; Uniform Law Commissioners' Model Eminent Domain Code, § 310; Kelly, "How to Obtain an Order of Taking," 66.
[1182]Callies, "Compulsory Purchase of Land," 7; Uniform Law Commissioners' Model Eminent Domain Code, § 402.
[1183] Callies, "Compulsory Purchase of Land," 3; Uniform Law Commissioners' Model Eminent Domain Code, Article II, Section 204 and Article VI, Section 601.
[1184] Callies, "Compulsory Purchase of Land," 3; Uniform Law Commissioners' Model Eminent Domain Code, Article II, Section 204 and Article VI, Section 601.
[1185] Hudson, "Eminent Domain Due Process," 1287.
[1186]Callies, "Compulsory Purchase of Land," 4; Hudson, "Eminent Domain Due Process," 1287.
[1187] Hudson, "Eminent Domain Due Process," 1287.
[1188]Callies, "Compulsory Purchase of Land," 5.
[1189] Callies, "Compulsory Purchase of Land," 3; Uniform Law Commissioners' Model Eminent Domain Code, Article II, Section 204 and Article VI, Section 601.
[1190] All coercive actions are forbidden under the Eminent Domain Code, as put Article II, Section 207: In order to compel an agreement on the price to be paid for the property, a condemnor may not advance the time of condemnation, defer negotiations or condemnation and the deposit of funds in court for the use of owner, nor take any other action coercive in nature. See: Uniform Law Commissioners' Model Eminent Domain Code, Article II, Section 207.

operation except for an emergency.[1191] In such a case, the condemnor notifies the condemnee in writing at least 90 days before the date of removal.[1192]

The entire eminent domain process in America is often time-consuming, but is said to "fully protect the due process rights of property owners and act as a serious deterrent to eminent domain abuse."[1193] In short, procedure of land taking in American system provides a strong protection of property owners against arbitrary takings.

3. Practice of Land Takings under Judicial Protection of Property Rights

The judicial system plays an important role in protecting property rights in America.[1194] Most land takings involve judicial process in America, as David Callies put:

> Compulsory purchase in the United States largely involves a judicial process. Consequently, many of the relevant hearing and notice requirements are framed in the context of court pleadings and related documents, court hearings, and evidentiary requirements relating to the twin U.S. Constitutional requirements of due process of law and just compensation.[1195]

The court decides both civil and administrative issues in a land taking case. The court decides not only compensation, but also the constitutionality of the land taking.[1196] The court will decide taking disputes based on the requirements of the state and federal constitutions – "due process," "just compensation," and "public use."[1197] These requirements are the principal pillars for judges to make their decisions in taking disputes. This section will cover the breadth of experiences of American judges to make decisions on taking issues based on the constitutional requirements.

[1191] Callies, "Compulsory Purchase of Land," 3; Uniform Law Commissioners' Model Eminent Domain Code, Article II, Section 205.
[1192] Callies, "Compulsory Purchase of Land," 3; Uniform Law Commissioners' Model Eminent Domain Code, Article II, Section 205.
[1193] Hudson, "Eminent Domain Due Process," 1287.
[1194] Reznick, "Land Use Regulation and the Concept of Takings in Nineteenth Century America," 855; Callies, "Compulsory Purchase of Land," 2; Sax, "Takings, Private Property and Public Rights," 176; Westbrook, "Administrative Takings," 722; Harrington, "'Public Use' and the Original Understanding of the So-Called 'Takings' Clause," 1298; Scheiber, "Property Law, Expropriation, and Resource Allocation by Government," 235; Hudson, "Eminent Domain Due Process," 1291.
[1195] Callies, "Compulsory Purchase of Land," 2.
[1196]Marissa Lum, "A Comparative Analysis: Legal and Cultural Aspects of Land Condemnation in the Practice of Eminent Domain in Japan and America," *Asian-Pacific L. & Pol'y J.* 8 (Spring 2007): 473.
[1197] Reznick, "Land Use Regulation and the Concept of Takings in Nineteenth Century America," 855; Berger, "Public Use, Substantive Due Process and Takings: An Integration," 844.

a). The Due Process Clause

The due process clause, provided in the Fifth and Fourteenth Amendments to the US Constitution, is relevant to takings.[1198] The clause protects the constitutional fundamental rights of life, liberty, or property against arbitrary takings.[1199] The constitutional due process clause creates an entitlement to notice and opportunity for hearing when a taking of life, liberty, or property occurs.[1200] In this regard, the due process clause ensures that no taking is made without a hearing, which is under the control of an impartial and effective decision maker or judge.[1201]

Judges have played an important role in interpreting the due process clause to weigh up and balance private rights and government actions in taking. In this sense, judges will use substantive due process to check and scrutinize the "validity of government regulations and regulatory activities" and "the legitimacy of the government's ends and rationality of the means chosen to achieve them."[1202] As stated in *Mathews v. Eldridge* (1976):

> Identification of the specific dictates of due process generally requires consideration of the three distinct factors: first, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal or administrative burdens that additional or substitute procedural requirement would entail.[1203]

The courts give considerable weight to the elements of due process of law protecting private rights and governmental action in three aspects.[1204]

[1198] Haley, "Balancing Private Loss against Public Gain to Test for a Violation of Due Process or a Taking without Just Compensation," 319.
[1199] Evelyn R. Sinaiko, "Due Process Rights of Participation in Administrative Rulemaking," *Calif. L. Rev.* 63, no. 4 (July 1, 1975): 887–88; Peter J. Rubin, "Square Pegs and Round Holes: Substantive Due Process, Procedural Due Process, and the Bill of Rights," *Colum. L. Rev.* 103, no. 4 (May 1, 2003): 841; Eduardo M. Penalver and Lior Jacob Strahilevitz, "Judicial Takings or Due Process," *Cornell L. Rev.* 97 (2012 2011): 324; Walston, "Constitution and Property," 381.
[1200] Easterbrook, "Substance and Due Process," 86; Lawrence, "Do 'Creatures of the State' Have Constitutional Rights?," 112.
[1201] Penalver and Strahilevitz, "Judicial Takings or Due Process," 324; John V. Orth, *Due Process of Law: A Brief History* (University Press of Kansas, 2003), 8–9.
[1202] Berger, "Public Use, Substantive Due Process and Takings: An Integration," 846.
[1203] Easterbrook, "Substance and Due Process," 88.
[1204] Penalver and Strahilevitz, "Judicial Takings or Due Process," 324; Easterbrook, "Substance and Due Process," 88; Lawrence, "Do 'Creatures of the State' Have Constitutional Rights?," 112–13; Haley, "Balancing Private Loss

b). The Just Compensation Clause

In addition to due process clause, the just compensation clause is another clause for binding the government. The constitution requires a taking could be made only if "just compensation" is paid to affected property owner.[1205] Just compensation becomes the core of government practice and judicial intervention in protecting private rights in America.

Land taking with compensation was practiced in America since the era of British colony. [1206] The Constitution only adopted the earlier principle. Several states started to adopt the compensation requirement in the post-revolutionary era.[1207] The Vermont Constitution of 1777 and the Massachusetts Constitution of 1780, for example, mandated that the taking of private property required "reasonable compensation."[1208] Likewise, the Northwest Ordinance of 1787 required paying "full compensation" for the property loss or damage by public works.[1209]

These norms were the precursors of the Fifth Amendment of the Federal Constitution. The Fifth Amendment of the US Constitution required paying "just compensation" to an affected property owner. The constitutional concept of "just compensation" was defined as the "full payment" for affected property at the market value.[1210]

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against Public Gain to Test for a Violation of Due Process or a Taking without Just Compensation," 331; Stoebuck, "Police Power, Takings, and Due Process," 1058; Gus Bauman, "Supreme Court, Inverse Condemnation and the Fifth Amendment: Justice Brennan Confronts the Inevitable in Land Use Controls," *Rutgers L.J.* 15 (1984 1983): 23; Hudson, "Eminent Domain Due Process," 1307.

[1205] William A. Fischel and Perry Shapiro, "Takings, Insurance, and Michelman: Comments on Economic Interpretations of 'Just Compensation' Law," *J. Legal Stud.* 17, no. 2 (June 1988): 269.

[1206] Scheiber, "Property Law, Expropriation, and Resource Allocation by Government," 234; Pathak, "Comment: The Public Use Doctrine," 178; Ostler, "Bills of Attainder and the Formation of the American Takings Clause at the Founding of the Republic," 228.

[1207] By Duane L. Ostler, "Restorating Due Process as the Essential First Step in Every Takings Case," *Loy. J. Pub. Int. L.* 13 (Fall 2011): 5; Ely, *Property Rights in the Colonial Era and Early Republic*, 81.

[1208] Ostler, "Restorating Due Process as the Essential First Step in Every Takings Case," 5; Ely, *Property Rights in the Colonial Era and Early Republic*, 81; Treanor, "The Original Understanding of the Takings Clause and the Political Process," 790; Treanor, "The Origins and Original Significance of the Just Compensation Clause of the Fifth Amendment," 701.

[1209] Ely, *Property Rights in the Colonial Era and Early Republic*, 81; Treanor, "The Original Understanding of the Takings Clause and the Political Process," 790; Treanor, "The Origins and Original Significance of the Just Compensation Clause of the Fifth Amendment," 701.

[1210] Benjamin Barros, "Defining 'Property' in the Just Compensation Clause," *Fordham L. Rev.* 63 (1995): 1882; Geoffrey, "Irreversible Development and Eminent Domain," 243; Epstein, "Physical and Regulatory Takings," 101.

The court participated in creating various precedents as the requirements to give meaning to the constitutional "just compensation." [1211] One important case was the *Oslon v. United States* in 1934.[1212] The court decided this case by clarifying the "just compensation" concept.[1213] The Supreme Court stated that the affected property owner was "entitled to be put in as good as a position pecuniarily as if his property had not been taken."[1214]

The Court has also stressed that "[j]ust compensation includes all elements of value that inhere in the property, but it does not exceed market value fairly determined," although "[c]onsiderations that may not reasonably be held to affect market value are excluded."[1215] The Court has established that a property owner was owed "the market value of the property at the time of the taking contemporaneously paid in money."[1216] The owner was entitled to receive as compensation "what a willing buyer would pay in cash to a willing seller" at the time of the takings of property.[1217]

c). The Public Use Clause

Land takings must serve the public use requirement in America. A taking of private land is permissible only if it serves public use.[1218] The concept of land takings for "public use" existed in America since the colonial period.[1219] The exercise of land takings was made for both public use and economic purpose in that time.[1220] However, such exercise was changed in post-revolutionary era. The Framers considered

[1211] Powell, "The Psychological Cost of Eminent Domain Takings and Just Compensation," 227; Geoffrey, "Irreversible Development and Eminent Domain," 243.
[1212] Olson v. United States, 292 US 246 (U.S. Sup. Ct. 1934).
[1213] Ibid.
[1214] Jeffrey T. Powell, "Psychological Cost of Eminent Domain Takings and Just Compensation," *Law & Psychol. Rev*. 30 (2006): 218; "Condemnations, Implicit Benefits, and Collective Losses: Achieving Just Compensation through 'Community,'" *Harv. L. Rev*. 107, no. 3 (January 1, 1994): 697; Bauer, "Notes & Comments: Government Takings and Constitutional Guarantees," 266 and 273.
[1215] "Condemnations, Implicit Benefits, and Collective Losses," 697–98.
[1216] Powell, "Psychological Cost of Eminent Domain Takings and Just Compensation," 218; Paul Niemann and Perry Shapiro, "Efficiency and Fairness: Compensation for Takings," *Int'l Rev. L. & Econ*. 28, no. 3 (September 2008): 157; Bauer, "Notes & Comments: Government Takings and Constitutional Guarantees," 276.
[1217] Powell, "Psychological Cost of Eminent Domain Takings and Just Compensation," 218; Schill, "Intergovernmental Takings and Just Compensation," 835; Chang, "An Empirical Study of Compensation Paid in Eminent Domain Settlements," 212; Bauer, "Notes & Comments: Government Takings and Constitutional Guarantees," 273.
[1218] Berger, "Public Use, Substantive Due Process and Takings: An Integration," 844.
[1219] Scheiber, "Property Law, Expropriation, and Resource Allocation by Government," 234; Pathak, "Comment: The Public Use Doctrine," 178.
[1220] Ely, *Property Rights in the Colonial Era and Early Republic*, 78; Pathak, "Comment: The Public Use Doctrine," 178; Fawcett, "Eminent Domain, the Police Power, and the Fifth Amendment," 494.

property rights essential to the concept of liberty in America; therefore, they shifted the taking practice from economic endeavors to the protection of individual rights from governmental intrusions.[1221]

The principle, too, was incorporated into the "Bill of Rights" in 1791.[1222] The Bill of Rights provided the fundamental principle of individual right protection and restriction of the governmental sovereign power over the people. [1223] The public use requirement is stated in the Fifth Amendment.[1224]

The constitutional "public use" requirement was narrowly construed in early decisions. The American court, acted as the protector of individual life, liberty, and property, began to limit on governmental takings by a narrow interpretation of the constitutional "public use."[1225] Only if the public possessed a right to use the facility or the service, the government could justify the exercise of the eminent domain power.[1226]

A narrow definition of public use still existed after the turn of the century.[1227] Land takings that the community gained some general indirect benefit did not justify the exercise of eminent domain power.[1228] Land taking for the construction of public theaters and hotels was yet to justify the eminent domain power.[1229] The Supreme Court reaffirmed the term "public use" in *Mt. Vernon Cotton Co. v. Alabama Power Co* in 1916.[1230] The term "public use" meant the "use by the public."[1231]

[1221] Hart, "Land Use Law in the Early Republic and the Original Meaning of the Takings Clause," 1101; Pathak, "Comment: The Public Use Doctrine," 179.
[1222] Manfredo, "Comment: Public Use & Public Benefit," 677.
[1223] Power, "Regulatory Takings," 225.
[1224]Cormack, "Legal Concepts in Cases of Eminent Domain," 222; Jackson, "What Is Property?," 94–95; Manfredo, "Comment: Public Use & Public Benefit," 677.
[1225] Fawcett, "Eminent Domain, the Police Power, and the Fifth Amendment," 495; Harrington, "'Public Use' and the Original Understanding of the So-Called 'Takings' Clause," 1257; Manfredo, "Comment: Public Use & Public Benefit," 677; Sturtevant, "Note: Economic Development as Public Use," 206; Alex Hornaday, "Note: Imminently Eminent: A Game Theoretic Analysis of Takings Since Kelo V. City of New London," *Wash & Lee L. Rev.* 64 (Fall 2007): 1626.
[1226] Fawcett, "Eminent Domain, the Police Power, and the Fifth Amendment," 495; Harrington, "'Public Use' and the Original Understanding of the So-Called 'Takings' Clause," 1255; Manfredo, "Comment: Public Use & Public Benefit," 676–77.
[1227] Harrington, "'Public Use' and the Original Understanding of the So-Called 'Takings' Clause," 1256; Fawcett, "Eminent Domain, the Police Power, and the Fifth Amendment," 496; James W. Ely, "Post-Kelo, Reform: Is the Glass Half Full or Half Empty?," *Supreme Court Economic Review* 17, no. 1 (February 1, 2009): 130.
[1228] Fawcett, "Eminent Domain, the Police Power, and the Fifth Amendment," 495; Manfredo, "Comment: Public Use & Public Benefit," 676; Ely, "Post-Kelo, Reform," 130.
[1229] Fawcett, "Eminent Domain, the Police Power, and the Fifth Amendment," 496.
[1230] Mt. Vernon Cotton Co. v. Alabama Power Co., 240 US 30 (U.S. Sup. Ct. 1916).

In short, the constitutional requirements of due process, just compensation, and public use exist. The judiciary plays a crucial role in developing various doctrines for limiting the use of the taking power and protecting property rights against excessive regulatory takings. As a result, many governmental regulations, which deemed as regulatory takings, were challenged in court and declared unconstitutional in the violation of the constitutional requirements in 1970-90s.[1232]

4. Case Study: Kelo v. New City of London

The taking decision by the US Supreme Court in the case of *Kelo v. City of New London* in 2005 was widely criticized.[1233] The Supreme Court decided that the taking of private land for economic redevelopment satisfied the requirement of a constitutional "public use."[1234] After the decision, many scholars and commentators argued that it violated the constitutional public use requirement.[1235] As a consequence, many states amended their constitutions and eminent domain laws to ban land taking for economic (re)development.[1236]

Although Kelo lost the case, Kelo received judicial protection and did enjoy due process of law. In other respects, the Kelo case is similar to the land taking of Borei Keila and Boueng Kak cases described above. Kelo and the legislative reaction to it are thus useful signposts for the improvement of the Cambodian

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[1231] Crandell, "Comment: Arizona's 'Public Use' Debate," 1172; Harrington, "'Public Use' and the Original Understanding of the So-Called 'Takings' Clause," 1256; Nicholson and Mota, "From Public Use to Public Purpose," 84; Sturtevant, "Note: Economic Development as Public Use," 205.

[1232] Robert I. McMurry, "Just Compensation or Just Invalidation: The Availability of a Damages Remedy in Challenging Land Use Regulations," *UCLA L. Rev.* 29 (1982 1981): 715; S. Keith Garner, "'Novel' Constitutional Claims: Rent Control, Means-Ends Tests, and the Takings Clause," *Calif. L. Rev.* 88, no. 5 (October 1, 2000): 1566; Claeys, "That '70s Show," 867.

[1233] Kelo v. New London, 545 US 469 (U.S. Sup. Ct. 2005).

[1234] Crandell, "Comment: Arizona's 'Public Use' Debate," 1170; *Kelo v. New London*, 545 US 469; Megan James, "Comment: Checking the Box Is Not Enough: The Impact of Texas Rice Land Partners, Ltd. v. Denbury Green Pipeline-Texas, Llc and Texas's Eminent Domain Reforms on the Common Carrier Application Process," *Tex. Tech L. Rev*. 45 (Summer 2013): 977; Claeys, "That '70s Show," 869.

[1235] Crandell, "Comment: Arizona's 'Public Use' Debate," 1170.

[1236] David Fagundes, "Property Rhetoric and the Public Domain," *Minn. L. Rev*. 94 (February 2010): 652–53; Nadler and Diamond, "Eminent Domain and the Psychology of Property Rights," 714; Sandefur, "Backflash So Far," 711; Cavazos, "Beware of Wooden Nickels," 697; Robert McNamara, "Eminent Domain in the United States: Public Use, Just Compensation, & 'the Social Compact': Article: Stacking the Deck: New York's Unique Approach to Eminent Domain," *Albany Government Law Review* 4 (2011): 295; Marc Mihaly and Turner Smith, "Kelo's Trail: A Survey of State and Federal Legislative and Judicial Activity Five Years Later," *Ecology L.Q.* 38 (2011): 703 and 726; Ely, "Post-Kelo, Reform," 133.

system. This section will analyze the due process of law and disputed points of Kelo for extracting learning points for improving Cambodian practice.

a). Background of Story

The court summarized the facts of the case as follows:

> The city of New London sits at the junction of the Thames River and the Long Island Sound in southeastern Connecticut.[1237] The city of New London was in the condition of "distressed municipality" for several decades.[1238] The city's unemployment rate was higher.[1239] Furthermore, in 1996, the Federal Government closed the Naval Undersea Warfare Center located in the Fort Trumbull area, which had employed over 1,500 people.[1240] This made the city's unemployment rate was nearly double.[1241]
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> These conditions prompted the state and local governments start to think and revitalize the economics of the city of New London.[1242] Therefore, the city council designated the New London Development Corporation (NLDC) as the development agency to rejuvenating this area.[1243] The NLDC estimated that this redevelopment project would create more than 1,000 jobs and tax revenues in the area.[1244]
>
> The state authorized a $5.35 million bond issue to support the NLDC's planning activities and a $10 million bond issue toward the creation of a Fort Trumbull State Park in January 1998.[1245] The city also allowed the development corporation to expropriate private land for this project.[1246] The pharmaceutical company Pfizer.Inc. announced to build a $300 million research facility on the New London Mills site, which was adjacent to the Fort Trumbull area in February 1998.[1247]
>
> The city council of New London gave the initial approval to prepare a development plan for the Fort Trumbull area in April 1998.[1248] After receiving the initial approval from the city council, the NLDC continued its planning activities and held a series of neighborhood meetings about the

[1237] Nadler and Diamond, "Eminent Domain and the Psychology of Property Rights," 718; Nicholson and Mota, "From Public Use to Public Purpose," 91; *Kelo v. New London*, 545 US at 473.
[1238] Kelo v. City of New London, (2004) 268 Conn. 1 (Supreme Court); Nadler and Diamond, "Eminent Domain and the Psychology of Property Rights," 718; Crandell, "Comment: Arizona's 'Public Use' Debate," 1173.
[1239] Nicholson and Mota, "From Public Use to Public Purpose," 91; Charles E. Cohen, "Eminent Domain After Kelo v. City of New London: An Argument for Banning Economic Development Takings," *Harv. JL & Pub. Pol'y* 29 (2005): 492.
[1240] *Kelo v. New London*, 545 US at 473; Nicholson and Mota, "From Public Use to Public Purpose," 91; Sturtevant, "Note: Economic Development as Public Use," 228; Alisa Hardy, "Comment: More Than Just a Plot of Land: Ohio's Rejection of Economic Development Takings," *Cap. U.L. Rev.* 38 (Fall 2009): 89.
[1241] *Kelo v. New London*, 545 US at 473.
[1242] Nadler and Diamond, "Eminent Domain and the Psychology of Property Rights," 718; Nicholson and Mota, "From Public Use to Public Purpose," 91; *Kelo v. New London*, 545 US at 473.
[1243] Nicholson and Mota, "From Public Use to Public Purpose," 91; Mihaly and Smith, "Kelo's Trail," 1224; Lawrence Baum, "Linking Issues to Ideology in the Supreme Court," *Journal of Law and Courts* 1, no. 1 (March 1, 2013): 89.
[1244] Nadler and Diamond, "Eminent Domain and the Psychology of Property Rights," 718; Crandell, "Comment: Arizona's 'Public Use' Debate," 1173; Damon Y. Smith, "Participatory Planning and Procedural Protections: The Case for Deeper Public Participation in Urban Redevelopment," *St. Louis U. Pub. L. Rev.* 29 (2009): 253.
[1245] *Kelo v. New London*, 545 US at 473; Nicholson and Mota, "From Public Use to Public Purpose," 92.
[1246] Kelo v. City of New London, (2004) 268 Conn. 1 (Supreme Court).
[1247] Nadler and Diamond, "Eminent Domain and the Psychology of Property Rights," 718; Nicholson and Mota, "From Public Use to Public Purpose," 92; *Kelo v. City of New London*, (2004) 268 Conn. 1; Mihaly and Smith, "Kelo's Trail," 1224.
[1248] *Kelo v. City of New London*, (2004) 268 Conn. 1; Nicholson and Mota, "From Public Use to Public Purpose," 91.

process.[1249] The council authorized the NLDC to submit its plan to the relevant state agencies for review in May 1998.[1250] Upon obtaining the state-level approval, the NLDC finalized an integrated development plan focused on 90 acres of the Fort Trumbull area.[1251]

The city council formally conveyed the New London Mills site to Pfizer. Inc. in June 1998. A consulting team was appointed for the environmental impact assessment and preparing the development plan in July 1998. Six alternative plans for the project area were considered as part of the required environmental impact evaluation.[1252]

The development corporation board approved the development plan in early 2000.[1253] The development plan encompasses seven parcels. Parcel 1 is designated for a waterfront conference hotel at the center of a "small urban village" that will include restaurants and shopping. Parcel 2 will be the site of approximately 80 new residences organized into an urban neighborhood and linked by public walkway to the remainder of the development, including the state park. Parcel 3, which is located immediately north of the Pfizer facility, will contain at least 90,000 square feet of research and development office space. Parcel 4A is a 2.4-acre site that will be used either to support the adjacent state park, by providing parking or retail services for visitors, or to support the nearby marina. Parcel 4B will include a renovated marina, as well as the final stretch of the riverwalk. Parcels 5, 6, and 7 will provide land for office and retail space, parking, and water-dependent commercial uses.[1254]

Then, the NLDC submitted a plan to city council, and the city council approved the plan in January 2000, and designated the NLDC as its development agent in charge of implementation.[1255] The city council also authorized the NLDC to purchase property or to acquire property by exercising eminent domain in the city's name.[1256]

In assembling the land needed for this project, the city's development agent has purchased property from willing sellers and used the power of eminent domain to acquire the remainder of the project from unwilling owners in exchange for just compensation.[1257] The NLDC successfully negotiated and purchased most of the real estate in the 90-acre area, but failed with nine owners of private parcels, including Susette Kelo.[1258]

Thus, the NLDC used the power of eminent domain to acquire properties within the development area whose owners had not been willing to sell them in October 2000.[1259] In November 2000, the NLDC filed complaint to Connecticut Superior Court for the condemnation of the existing property.[1260] However, in December 2000, the plaintiffs brought the counter-action challenging the

[1249] *Kelo v. New London*, 545 US at 473.
[1250] *Kelo v. City of New London*, (2004) 268 Conn. 1; *Kelo v. New London*, 545 US at 474.
[1251] *Kelo v. New London*, 545 US at 474.
[1252] *Kelo v. City of New London*, (2004) 268 Conn. 1.
[1253] Lum, "A Comparative Analysis," 475; Sturtevant, "Note: Economic Development as Public Use," 228; Baum, "Linking Issues to Ideology in the Supreme Court," 89.
[1254] *Kelo v. New London*, 545 US at 474; Nicholson and Mota, "From Public Use to Public Purpose," 92–93.
[1255] *Kelo v. New London*, 545 US at 475; Nadler and Diamond, "Eminent Domain and the Psychology of Property Rights," 718.
[1256] *Kelo v. New London*, 545 US at 475; Nadler and Diamond, "Eminent Domain and the Psychology of Property Rights," 718; Kelly, "The Public Use Requirement in Eminent Domain Law," 16.
[1257] *Kelo v. New London*, 545 US 469; Nadler and Diamond, "Eminent Domain and the Psychology of Property Rights," 718; Crandell, "Comment: Arizona's 'Public Use' Debate," 1173; Cavazos, "Beware of Wooden Nickels," 689; Sturtevant, "Note: Economic Development as Public Use," 229; Hardy, "Comment: More Than Just a Plot of Land:," 89.
[1258] Lum, "A Comparative Analysis," 475; Kelo v. New London, 545 US 469, 475 (U.S. Sup. Ct. 2005); Nadler and Diamond, "Eminent Domain and the Psychology of Property Rights," 718; Nicholson and Mota, "From Public Use to Public Purpose," 93; Crandell, "Comment: Arizona's 'Public Use' Debate," 1173; Hardy, "Comment: More Than Just a Plot of Land:," 89.
[1259] Kelo v. City of New London, (2004) 268 Conn. 1 (Supreme Court); Nadler and Diamond, "Eminent Domain and the Psychology of Property Rights," 718; Nicholson and Mota, "From Public Use to Public Purpose," 93.
[1260] *Kelo v. New London*, 545 US at 475; Nicholson and Mota, "From Public Use to Public Purpose," 93.

condemnations.[1261]

b). Judicial Redress Process

Kelo fought against the expropriation from the lower court to the Supreme Court. The nine landowners brought lawsuit against the city when it attempted to exercise the power of eminent domain in the District Court of Connecticut in 2000.[1262] Both parties appealed against the judgment to the Supreme Court of Connecticut in 2002.[1263] Finally, the case reached the Supreme Court for decision in 2005.[1264]

The disputed points of the Kelo case showed remarkable and learnable points in the field of eminent domain power, or taking. In this case, the dispute rested in four main points of the taking power. The first was the delegation of eminent domain power to the development corporation. The second was legal dispute on the status of land under expropriation for the development project. The third was the purpose and necessity of land taking for public use. The fourth was the Equal Protection clause of the Fourteenth Amendment.[1265] The court found for the city on all these points, including taking purpose and rejected the Kelo's claim.[1266] The most important point of dispute was whether the land taking for economic redevelopment served the constitutional public use requirement.[1267] This led to the most controversial discussion.

c). Legal Side-Effects of Kelo Case

Many scholars and commentators have viewed the decision of the Kelo case by the Supreme Court as a violation of the US Constitution because they reasoned that the US Constitution banned taking of private land to give to another private person. Most scholars were concerned that the government could use the court, based on such a decision, for taking private land that it could not do by the executive power.[1268] Likewise, a

[1261] *Kelo v. City of New London*, (2004) 268 Conn. 1; Nicholson and Mota, "From Public Use to Public Purpose," 93; Crandell, "Comment: Arizona's 'Public Use' Debate," 1173; Mihaly and Smith, "Kelo's Trail," 1224.
[1262] *Kelo v. City of New London*, (2004) 268 Conn. 1; *Kelo v. New London*, 545 US at 475–76.
[1263] Kelo v. City of New London, (2004) 268 Conn. 1 (Supreme Court).
[1264] The Supreme Court of United States upheld the decision of the Supreme Court of Connecticut. Thus, the Dissertation put both of them together.
[1265] *Kelo v. City of New London*, (2004) 268 Conn. 1.
[1266] Ibid.
[1267] Crandell, "Comment: Arizona's 'Public Use' Debate," 1173; Mihaly and Smith, "Kelo's Trail," 1224.
[1268] Julia D. Mahoney, "Kelo's Legacy: Eminent Domain and the Future of Property Rights," *The Supreme Court Review* 2005, no. 1 (January 1, 2005): 106; Cavazos, "Beware of Wooden Nickels," 695.

private person could persuade the government to take land for them.[1269]

After the Kelo decision, there were controversial discussions about the protection of private property against takings in America.[1270] The Kelo decision made private property rights rest on the edge of infringement.[1271] In response, the majority of states amended their eminent domain laws and constitutions to ban the taking of private property for economic (re)development.[1272] This is possible in the American context because the US Constitution operates to constrain, not to enable, state power, and the several states may impose additional constraints on their own authority.

In terms of taking power, both federal and state governments have authority to exercise taking power. However, the federal government has less authority than the state government. The fifty states have a large amount of power over controlling and regulating land use. The states have delegated this power by statutes to their local governments (cities, counties, villages, towns) for controlling an effective land use. In this context, American land use control and taking powers largely rest on state and local governments.

While state laws typically encourage negotiated settlements, when negotiation fails, the condemnor will file a claim directly to court for acquiring the property. The court will decide the case based on the constitutional requirements of takings and compensation.

For this reason, America has breadth of experience of land taking practice by court proceedings. Disputes over land takings are in the hand of the court for decision. American courts have developed case law on land takings to curb arbitrary land takings by application of strict rules interpretation of constitutional requirements of due process, public use, and compensation clauses.

[1269]Mahoney, "Kelo's Legacy," 106; David Schultz, "Evaluating Economic Development Takings: Legal Validity Versus Economic Viability," *Alb. Gov't L. Rev.* 4 (2011): 188; Ilya Somin, "Controlling the Grasping Hand: Economic Development Takings after Kelo," *Supreme Court Economic Review* 15, no. 1 (February 1, 2007): 183.
[1270] Robert K. Fleck and F. Andrew Hanssen, "Repeated Adjustment of Delegated Powers and the History of Eminent Domain," *Int'l Rev. L. & Econ.* 30, no. 2 (June 2010): 99; Nadler and Diamond, "Eminent Domain and the Psychology of Property Rights," 714; Sandefur, "Backflash So Far," 711; Crandell, "Comment: Arizona's 'Public Use' Debate," 1170.
[1271] Mahoney, "Kelo's Legacy," 104.
[1272] Fagundes, "Property Rhetoric and the Public Domain," 652–53; Nadler and Diamond, "Eminent Domain and the Psychology of Property Rights," 714; Sandefur, "Backflash So Far," 711; Cavazos, "Beware of Wooden Nickels," 697; McNamara, "Eminent Domain in the United States," 295; Mihaly and Smith, "Kelo's Trail," 703 and 726; Ely, "Post-Kelo, Reform," 133.

However, American courts have flirted with a broad interpretation of "public use" in several cases, including *Kelo v. New City of Landon.*[1273] The decision provoked a controversy over constitutional protection of property rights in America. Many scholars and commentators consider it violative of the constitution or property rights are on the verge of infringement.[1274] As a result, a majority of states have amended their laws on eminent domain to ban land taking for economic purpose.[1275] Although Kelo lost the case, the transparency of the decision-making process left a clear record of events, with provides commentators – and Cambodian policy makers – with a rich body of information and argument to reflect upon when contemplating improvements to land taking mechanisms.

B. Land Taking in Japan

While the American system of land taking relies on private negotiations backed up immediately by resort to court proceedings, the corresponding process in Japan provides for an intermediate administrative procedure, monitored ultimately by judicial review. This section will cover the background, practice, and case study of Japanese taking, again for the purpose of drawing useful hints for improvement of the Cambodian system.

1. Background of Land Taking in Japan

Land takings have been a feature of Japanese law since the country opened itself to the outside world and introduced private property rights. The comprehensive privatization of land ownership was made in the Meiji Restoration. The Meiji government made a substantial reform of land regime by issuing the decree no. 50 to cancel the previous ban of land transaction and formal recognizance of land possession and land transaction in 1872.[1276]

[1273] John P. Hoehn and Kwami Adanu, "What Motivates Voters' Support for Eminent Domain Reform: Ownership, Vulnerability, or Ideology?," *Int'l Rev. L. & Econ.* 37 (March 2014): 90; Manfredo, "Comment: Public Use & Public Benefit," 674; Baum, "Linking Issues to Ideology in the Supreme Court," 90.

[1274] Nicole Stelle Garnett, "The Neglected Political Economy of Eminent Domain," *Mich. L. Rev.* 105, no. 1 (October 1, 2006): 103; Crandell, "Comment: Arizona's 'Public Use' Debate," 1170.

[1275] Fagundes, "Property Rhetoric and the Public Domain," 652–53; Nadler and Diamond, "Eminent Domain and the Psychology of Property Rights," 714; Sandefur, "Backflash So Far," 711; Cavazos, "Beware of Wooden Nickels," 697; McNamara, "Eminent Domain in the United States," 295; Mihaly and Smith, "Kelo's Trail," 703 and 726; Ely, "Post-Kelo, Reform," 133.

[1276] The decree no. 50 of the Grand Council of State of Meiji era (5 nen, 2 gatsu, 25 nichi). See: 小沢道一, *Article-by-Article Explanation of Land Expropriation Law* [逐条解説土地収用法：上] (ぎょうせい, 2012), 2; André

The privatization of property ownership was a concern of the government in need of land for development such as constructing roads, dams, sewers, schools, and other public works.[1277] This led to the emergence of a land expropriation concept, and the government started to exercise compulsory acquisition of land for public works in Japan.[1278]

In response to this need, the Minster of Finance arranged the administrative orders no. 38 and no. 158 to renew the principle of land transfer by certificate and introduced the compulsory acquisition of land and compensation for affected property.[1279] In order to make this practice stronger, the Grand Council of State issued the regulation no. 132 for substituting the land transfer by certificate and previous administrative orders in 1875.[1280]

The concept of land takings was included into the Meiji Constitution in 1889.[1281] Article 27 of the Meiji Constitution provided:

> The right of property of every Japanese shall remain inviolable. Measures necessary to be taken for the public benefit shall be provided by law.[1282]

This was the first protection of property rights at the constitutional level in Japan. In response to the constitutional requirement, the Meiji government passed the first law on land expropriation, five months after the promulgation of the Meiji Constitution.[1283] This law followed the model of the Prussian land expropriation

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Sorensen, "Land, Property Rights, and Planning in Japan: Institutional Design and Institutional Change in Land Management," *Planning Perspectives* 25, no. 3 (2010): 283–84; James I. Nakamura, "Meiji Land Reform, Redistribution of Income, and Saving from Agriculture," *Economic Development and Cultural Change* 14, no. 4 (July 1, 1966): 429.

[1277]小沢道一, 逐条解說土地収用法, 2.

[1278]Ibid.

[1279]Ibid., 2–3.

[1280]It was a regulation for purchasing for public use was issued in the Meiji period 1875 (8 nen 7 gatsu 28 nichi). See: Ibid., 3.

[1281]The Constitution of Great Japanese Imperial on Meiji 1889 (22 nen, 2 gatsu, 11 nichi). See: Ibid., 4.

[1282] Sorensen, "Land, Property Rights, and Planning in Japan," 285.

[1283]The government promulgated the first law governing land expropriation (law no. 15) on 22 nen, 7gatsu, 30 nichi. See: 小沢道一, 逐条解說土地収用法, 4.

law.[1284] This law was a ground-breaking legislation governing land expropriation in pre-war Japan. However, Japanese land expropriation was amended several times before the World War II.[1285]

Japan adopted a new Constitution in 1946, which took effect one year later in 1947. According to the 1947 Constitution, Article 29 provided the power to take private land for public use:

> Property rights are inviolable.
> Property rights shall be defined by law in conformity with the need of public welfare.
> Private property can be taken only for public use, while just compensation is paid accordingly. [1286]

As a result, in compliance with this provision of the new constitutional requirement, the Japanese government made various changes and adopted various laws governing land takings in the post-war period such as the Land Expropriation Law in 1951,[1287] the Land Readjustment Law in 1954,[1288] the Law on Special Measure for Land Acquisition in 1961,[1289] and the City Planning Law in 1968.[1290]

In addition to these laws, the Japanese government adopted two guidelines on compensation for paying affected citizens by land takings for development projects. The first was the Guideline Standard for Compensation for Loss Caused by Acquisition of Land for Public Use in 1962.[1291] The second was the Guideline Standard for Compensation for Public Loss Caused by Execution of Public Project in 1967.[1292] These laws and regulations play an important role in facilitating the negotiation process in land taking for development in post-war Japan.

[1284]Sorensen, "Land, Property Rights, and Planning in Japan," 286; 小沢道一, 逐条解說土地収用法, 4.
[1285]小沢道一, 逐条解說土地収用法, 6.
[1286]This Article is translated by the author. See: The Constitution of Japan [日本国憲法], Law no. of 1947, art. 29 (JP).
[1287]Land Expropriation Law [土地収用法], NO. 219 (1951).
[1288] Land Readjustment Law [土地区画整理法], Law no. of 1954, (JP).
[1289] Law on Special Measure for Land Acquisition [公共用地の取得に関する特別措置法], NO. 150 (1961).
[1290] City Planning Law [都市計画法], Law no. of 1968, (JP).
[1291]See: Guideline Standard for Compensation for Loss Caused by Acquisition of Land for Public Use [公共用地の取得に伴う損失補償基準要綱] (1962). However, since then this guideline was revised two times: once in 1967 and the other was 2002.
[1292]See: Guideline Standard for Compensation for Public Loss Caused by Execution of Public Project [公共事業の施行に伴う公共補償基準要綱] (1967).

2. Procedure of Land Taking in Japan

Land takings are mostly made by two ways in Japan: (1) land expropriation by the Land Expropriation Law of 1951 and (2) land readjustment by the Land Readjustment Law of 1954. Land takings under both laws are broadly applied in Japan. However, the procedures under both laws proceed with different means and techniques. The following section will illustrate the procedures prescribed under both laws.

a). Procedure of Land Expropriation Law

The practice of land takings by the expropriation law of 1951 is made only for projects satisfying the public use requirement under the 1947 Constitution.[1293] The 1951 Land Expropriation Law follows the narrow view of the power of eminent domain because it allows taking land only for public use.[1294] Therefore, this law numerates the public projects in Article 3, which are authorized for land takings.[1295] Other worthwhile projects, which serve the public purpose, but are not enumerated under this law, cannot be exercised.[1296]

This law empowers certain persons for implementing these enumerated projects. According to the Land Expropriation Law, persons authorized for exercising the land taking are called the "project initiator/ developer"(*kigyousha*).[1297] This project initiator/developer can be a government organizations or public utility, such as (1) national and local public body (corporation), (2) independent legal person, (3) special legal person or quasi-public corporation, (4) public association, and (5) body for public works.[1298]

The process of land expropriation follows three main stages in Japan: (1) negotiation, (2) administrative disposition, and (3) judicial recourse as a final stage. Negotiation is the first step between the expropriating authority or authorized project developers and affected citizens.[1299] In order to negotiate, the

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[1293] Land Expropriation Law, NO. 219 art. 1 (1951); Expropriation Committee, *Outline of the Land Expropriation Proceedings* (Tokyo Metropolitan Government, 2013), 5.
[1294] Land Expropriation Law, art. 1; Expropriation Committee, *Outline of the Land Expropriation Proceedings*, 5.
[1295] Land Expropriation Law, art. 3.
[1296] Tsuyoshi Kotaka, "Japan's Land Use Law," in *Taking Land: Compulsory Purchase and Regulation in Asian-Pacific Countries*, edited by David L. Callies and Tsuyoshi Kotaka (University of Hawaii Press, 2002), 147.
[1297]与良秀雄, *Land Expropriation and City Planning Law and Tax Matters* [土地収用法・都市計画法と税務] (大蔵財務協会, 2013), 152; Kotaka, "Japan's Land Use Law," 148; Expropriation Committee, *Outline of the Land Expropriation Proceedings*, 3.
[1298]与良秀雄, *Land Expropriation and City Planning Law and Tax Matters*, 152; Kotaka, "Japan's Land Use Law," 148.
[1299] Tsuyoshi Kotaka, "Compensation System of Japan: Just Compensation Means Full Compensation" (presented at Annual International Education Conference, International Right of Way Association, June 29, 2009), 5; Kenichi

expropriating authority or project developers survey and assess land price, called a "statement of property" by an independent appraiser.[1300] Then, the expropriating authority or developer explains the purpose of the project and negotiates with the affected citizens on the compensation.[1301] If there is no protest on the project and compensation, both parties will reach and conclude the contract of compensation and title transfer.[1302]

However, if there is a protest or negotiation fails, the dispute will proceed to the administrative disposition, in which administrative agencies responsible for dealing with land taking for the development project. The administrative disposition involves in two main bodies: (1) project-recognition administrative agencies and (2) expropriation committees.[1303] The project-recognition administrative agencies can be either local government or the Minister of land, Infrastructure, and Transport (hereinafter "the Land Minister") who are responsible for authorizing "project recognition."[1304]

The expropriating authority or authorized developers will submit an application, together with a statement of property and objection, to the local government or the Land Minister for the project recognition.[1305] Upon the request, the local government or the Land Minister will check the application by

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Ogasawara and Yasuhiro Yamashita, "Land Acquisition for Public Use in Japan: System and Current Situation" (presented at JICA: Environmental and Social Considerations for Resettlement, Japan Organization for Land Acquisition and Compensation, November 30, 2010), 14; Lum, "A Comparative Analysis," 462; Kotaka, "Japan's Land Use Law," 147; 与良秀雄, *Land Expropriation and City Planning Law and Tax Matters*, 158.

[1300] André Sorensen and Carolin Funck, *Living Cities in Japan: Citizens' Movements, Machizukuri and Local Environments* (Taylor & Francis, 2007), 71; 与良秀雄, *Land Expropriation and City Planning Law and Tax Matters*, 158–59; Expropriation Committee, *Outline of the Land Expropriation Proceedings*, 7; Land Expropriation Law [土地収用法], Law no. of 1951, arts. 36–38 (JP).

[1301] Sorensen and Funck, *Living Cities in Japan*, 71; 与良秀雄, *Land Expropriation and City Planning Law and Tax Matters*, 158–59; Expropriation Committee, *Outline of the Land Expropriation Proceedings*, 7; Land Expropriation Law 1951, p. arts. 36–38.

[1302] Kotaka, "Compensation System of Japan: Just Compensation Means Full Compensation," 5; Ogasawara and Yamashita, "Land Acquisition for Public Use in Japan," 14; 与良秀雄, *Land Expropriation and City Planning Law and Tax Matters*, 159; Yasuhiro Yamashita, "Land Acquisition for Public Use in Japan" (presented at JICA : Environmental & Social Considerations for Resettlement, Japan Organization for Land Acquisition & Compensation, December 8, 2011), 25–25.

[1303] Expropriation Committee, *Outline of the Land Expropriation Proceedings*, 7; Kotaka, "Japan's Land Use Law," 148; Land Expropriation Law 1951, pp. arts. 8, 16, 47, and 52.

[1304] Kotaka, "Japan's Land Use Law," 148; 与良秀雄, *Land Expropriation and City Planning Law and Tax Matters*, 160; Expropriation Committee, *Outline of the Land Expropriation Proceedings*, 6; Land Expropriation Law 1951, p. arts. 16–17.

[1305] Kotaka, "Japan's Land Use Law," 148; 与良秀雄, *Land Expropriation and City Planning Law and Tax Matters*, 160; the details of the application. See: Land Expropriation Law 1951, art. 16.

reviewing the public use and environmental impact of the proposed project.[1306] If the requirement is satisfied, the local government or the Land Minister will authorize the project recognition.[1307] The project recognition will fix the date of compensation, eligible and interested person.[1308]

Then, the expropriating authority or project developers will submit the project recognition to the expropriation committee, an independent administrative land tribunal composed of seven members at the prefectural level.[1309] The expropriation committee will hold a hearing to handle compensation and issue an order of land acquisition and vacation.[1310] If the affected landowners are unsatisfied with the award, the landowners may appeal to the Land Minister for review.[1311] If the aggrieved party is dissatisfied with the decision of the Land Minister, he or she can appeal to court for judicial review.[1312]

b). Procedure of Land Readjustment Law

Apart from land taking under the Land Expropriation law, Japan exercises land taking under the Land Readjustment Law of 1954. Land readjustment is an urban renewal technique, which was widely used in post-war Japan.[1313] The stated purpose of the Land Readjustment Law of 1954 is to "rearrange or redesign urbanization land for healthy, safety, and welfare for better living condition."[1314]

[1306] Kotaka, "Japan's Land Use Law," 149; Expropriation Committee, *Outline of the Land Expropriation Proceedings*, 6; Land Expropriation Law 1951, p. arts. 20–25.
[1307] Kotaka, "Japan's Land Use Law," 149; Expropriation Committee, *Outline of the Land Expropriation Proceedings*, 6; Land Expropriation Law 1951, p. arts. 20–25.
[1308] Land Expropriation Law 1951, p. arts. 19–22.
[1309]Kotaka, "Japan's Land Use Law," 148; 与良秀雄, *Land Expropriation and City Planning Law and Tax Matters*, 159; Expropriation Committee, *Outline of the Land Expropriation Proceedings*, 5; Land Expropriation Law 1951, p. arts. 51–59.
[1310]Kenneth Port and Gerald Paul McAlinn, *Comparative Law: Law and the Legal Process in Japan* (Carolina Academic Press, 2003), 617; Sorensen and Funck, *Living Cities in Japan*, 265; Lum, "A Comparative Analysis," 469; Kotaka, "Japan's Land Use Law," 149; 与良秀雄, *Land Expropriation and City Planning Law and Tax Matters*, 159; Land Expropriation Law 1951, p. arts. 60–66; Expropriation Committee, *Outline of the Land Expropriation Proceedings*, 7 and 10.
[1311]Lum, "A Comparative Analysis," 470; Kotaka, "Japan's Land Use Law," 149; 与良秀雄, *Land Expropriation and City Planning Law and Tax Matters*, 158–59; Land Expropriation Law 1951, p. arts. 129 and 133.
[1312]Port and McAlinn, *Comparative Law*, 618; Lum, "A Comparative Analysis," 470; Kotaka, "Japan's Land Use Law," 149.
[1313] Gerhard Larsson, "Land Readjustment: A Tool for Urban Development," *Habitat International* 21, no. 2 (June 1997): 145; Frank Schnidman, "Land Readjustment," *Urban Land* 2 (1988): 3; Susumu Sakamoto, "Urban Redevelopment Methods in Japan," in *Japanese Urban Environment*, edited by Gideon S. Golany, Keisuke Hanaki, Osamu (New York: Pergamon, 1998), 303.
[1314]Land Readjustment Law, Law no. of 1954, art. 1 (JP); 与良秀雄, *Land Expropriation and City Planning Law and Tax Matters*, 341; Sakamoto, "Urban Redevelopment Methods in Japan," 308.

The Land Readjustment Law of 1954 authorizes a wider range of implementing bodies than the Land Expropriation Law of 1951. The bodies authorized to exercise land readjustment are individuals, private corporations, landowners' associations, public corporations, administrative agencies.[1315]

The exercise of land readjustment depends on types of development projects and approving authority. The approval of land readjustment projects are made by two levels of administrative authority. If the land readjustment projects are made by individual, land readjustment cooperative, and land readjustment corporation, the project approval is made by the local government; namely, the prefecture and municipality respectively. If the land readjustment projects are made by the local government, the project approval is made by the Land Minister.[1316]

3. Practice of Land Taking in Japan

As noted above, and as in the American context, the expropriation process begins in Japan with negotiation. If successful, a case will end a voluntary agreement with individual land owners.

a). Practical Aspect of Land Taking in Japan

It is said that land takings largely depend on mutual negotiation among developers, landowners, and other interested parties in Japan.[1317] Land expropriation does not follow the full set of procedures as stated in the Land Expropriation Law of 1951, as Tsuyoshi Kotaka (2002) put:

> In general, land acquisition for public projects is not done by procedure under the Land Expropriation Law but by mutual negotiation among project initiator, the landowner, and interested parties.[1318]

Expropriating authority or authorized developers make efforts to negotiate with affected property owners in order to acquire land for development projects.[1319] Although there are exceptions, Japan rarely

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[1315] 与良秀雄, *Land Expropriation and City Planning Law and Tax Matters*, 326–27; Schnidman, "Land Readjustment," 2; Land Readjustment Law 1954, art. 3; Larsson, "Land Readjustment," 146; Sakamoto, "Urban Redevelopment Methods in Japan," 311.
[1316] 与良秀雄, *Land Expropriation and City Planning Law and Tax Matters*, 326–27; Land Readjustment Law 1954, art. 3.
[1317] Kotaka, "Compensation System of Japan: Just Compensation Means Full Compensation," 5; Ogasawara and Yamashita, "Land Acquisition for Public Use in Japan," 14.
[1318] Kotaka, "Japan's Land Use Law," 147.
[1319] Sorensen and Funck, *Living Cities in Japan*, 71.

invokes eminent domain power to force property owner from land as authorized under the law.[1320] In practice, Japan proceeds with a principle of consensus, as Kenneth L. Port and Gerald Paul McAlinn (2003) expressed:

> It is often argued that Japanese government proceeds by consensus. Therefore, the theory goes, the government rarely invokes eminent domain doctrine. This seems to be accurate as there few reported eminent domain cases.[1321]

Instead of using a forced power under the eminent domain, Japan establishes and regulates a persuasive and flexible method for land taking by the public contribution in development projects for public utilities under its legal system, as Susumu Sakamoto (1998) asserted:

> The notion of an eminent domain requires widespread public support and the clear understanding of the urgency of the project, although it is rarely used. The Japanese government has sought to establish a more flexible redevelopment system which would compel the residents to comply with a reasonable contact.[1322]

However, when the negotiation does not reach agreement, Japan turns its procedures to legal procedure as stated in the law.[1323] The administrative agencies will mediate the disagreement.[1324]

b). Factor Contributing to Practice through Negotiation

Most land takings in Japan conclude in mutual negotiation among the expropriating authority, authorized developers, and property owners.[1325] This could be possible depending two contributing principles: (1) compensation and (2) institutional responsibility.

i). Compensation

Compensation is a first fundamental factor that makes negotiation applicable between expropriators and affected property owners in Japan. Japanese taking practice can guarantee just compensation for affected property owners. Therefore, disputes are relatively less. There are two kinds of compensation in Japan: (1) compensation for exclusive development and (2) compensation for inclusive development.

[1320] Port and McAlinn, *Comparative Law*, 607; Sakamoto, "Urban Redevelopment Methods in Japan," 316.
[1321] Port and McAlinn, *Comparative Law*, 607.
[1322] Sakamoto, "Urban Redevelopment Methods in Japan," 316.
[1323] Lum, "A Comparative Analysis," 462.
[1324] Ibid.
[1325] Kotaka, "Compensation System of Japan: Just Compensation Means Full Compensation," 5; Ogasawara and Yamashita, "Land Acquisition for Public Use in Japan," 14.

The first kind is compensation for exclusive development, which refers to any land taking that removes or relocates property owners from the development project. However, project-affected property owners are provided with "just compensation" for their property on market value.[1326]

Just compensation is a standard practice in land takings under the Japanese government policies – the Guideline Standard for Compensation for Loss Caused by Acquisition of Land for Public Use of 1962 and the Guideline Standard for Compensation for Public Loss Caused by Execution of Public Project of 1967.[1327] The standard is applied throughout the country.[1328]

In the Japanese context, just compensation refers to the "full compensation," in which the value of the expropriated property is calculated on the "full market value" between buyers and sellers.[1329] Japan exercises the "comparable sales method" in order to determine the market value of the affected properties taken for development projects.[1330] The method of comparable sale is to seek the actual price of the affected property in comparison to nearby assets.[1331] The calculation of market compensation is made between the projection recognition and determination of disagreement, depending on the changing rate.[1332]

In addition to full market compensation for the affected property, Japan provides subsidiary compensation and assistance for affected property owners. Affected landowners will be provided with secondary compensation for removal and relocation.[1333] Moreover, current practice provides assistance to reconstruct the livelihoods of the affected relocatees.[1334]

[1326] The Constitution of Japan, Law no. of 1947, art. 29 (JP); Land Expropriation Law, Law no. of 1951, Chapter VI (JP).
[1327] See: Guideline Standard for Compensation for Loss Caused by Acquisition of Land for Public Use [公共用地の取得に伴う損失補償基準要綱], Law no. of 1962, (JP); Guideline Standard for Compensation for Public Loss Caused by Execution of Public Project (1967).
[1328] Yamashita, "Land Acquisition for Public Use in Japan," 15.
[1329] Port and McAlinn, *Comparative Law*, 616; Yamashita, "Land Acquisition for Public Use in Japan," 40; Kotaka, "Compensation System of Japan: Just Compensation Means Full Compensation," 10; Kotaka, "Japan's Land Use Law," 154.
[1330] Port and McAlinn, *Comparative Law*, 615; Lum, "A Comparative Analysis," 469.
[1331] Port and McAlinn, *Comparative Law*, 615; Lum, "A Comparative Analysis," 469; Expropriation Committee, *Outline of the Land Expropriation Proceedings*, 15.
[1332] Expropriation Committee, *Outline of the Land Expropriation Proceedings*, 15.
[1333] Yamashita, "Land Acquisition for Public Use in Japan," 38; Expropriation Committee, *Outline of the Land Expropriation Proceedings*, 77; Land Expropriation Law, Law no. of 1951, art. 77 (JP).
[1334] Michael Freeman and Oliver Goodenough, *Law, Mind and Brain* (Ashgate Publishing, Ltd., 2009), 301.

Apart from the compensation for exclusive development, Japan has another kind of compensation for affected property owners; that is the compensation for inclusive development. The inclusive development refers to a type of development in which affected property owners are not removed from their land. In this context, affected property owners stay in and benefit from the development project.

Japan has broadly applied inclusive compensation in the land readjustment project.[1335] The land readjustment project rearranges scattered and irregular plots of land into tidy plots with roads and other public utilities.[1336] A land readjustment project is a participatory development, which can proceed only if it reaches a majority of consensus from affected landowners.[1337] In this context, landowners agree to contribute their land, to some extent, up to 30 percent for the public utilities.[1338]

When the majority of consensus is reached, the local authority or project developer will expropriate the land to proceed the development project.[1339] The expert planners will pool the selected area into a single entity in compliance with the development plan and urban planning law.[1340] The urban planner will replot the original parcels into the new plots and redistribute to the original landowners.[1341] Project cost is financed by land contribution from landowners and public funds.[1342] However, landowners will be compensated based on

[1335] Larsson, "Land Readjustment," 145; Schnidman, "Land Readjustment," 3; Sakamoto, "Urban Redevelopment Methods in Japan," 303.
[1336] André Sorensen, "Conflict, Consensus or Consent: Implications of Japanese Land Readjustment Practice for Developing Countries," *Habitat International* 24, no. 1 (March 2000): 52; Sakamoto, "Urban Redevelopment Methods in Japan," 308.
[1337] Larsson, "Land Readjustment," 146.
[1338] Sorensen, "Conflict, Consensus or Consent," 52; André Sorensen, "Consensus, Persuasion, and Opposition: Organizing Land Readjustment in Japan," in *Analyzing Land Readjustment: Economics, Law, and Collective Action* (Lincoln Institute of Land Policy, 2007), 97; Sakamoto, "Urban Redevelopment Methods in Japan," 310.
[1339] Yorifusa Ishida, "The Concept of Machi-Sodate and Urban Planning: The Case of Tokyu Tama Den'en Toshi," in *Living Cities in Japan: Citizens' Movements, Machizukuri and Local Environments*, Edited by André Sorensen and Carolin Funck, 2007, 118; David W. Edgington, *Reconstructing Kobe: The Geography of Crisis and Opportunity* (UBC Press, 2011), 32.
[1340] Schnidman, "Land Readjustment," 2.
[1341] Ibid., 4; Larsson, "Land Readjustment," 146.
[1342] Sorensen, "Analyzing Land Readjustment," 90; Sakamoto, "Urban Redevelopment Methods in Japan," 317.

the contributing percentage of land to the development project.[1343] Any equivalent loss will be compensated accordingly.[1344]

Many landowners support inclusive compensation over exclusive compensation. In this context, forced taking under the Land Expropriation Law is rarely applied in Japan, while land readjustment law is such supported. As André Sorensen (2007) asserted that almost 30 percent of Japanese urban area were carried out through land readjustment as of March 2003.[1345]

ii). Institutional Responsibility

In addition to a satisfactory compensation policy, legal compliance and institutional responsibility are the central for Japanese taking success. Japanese government adopted laws and guidelines on taking and compensation for facilitating the smooth process of negotiation. Implementing institutions bear a strong accountability to implement these regulations. Local government plays an important role as actor of enforcing law, governing development permission, implementing project, and mediating dispute arising from land takings for development.[1346]

Japanese local government has high responsibility to implement and control land use law and land takings. [1347] Local government can control all development projects, in which permission or approval is required and must be complied with zoning law. [1348] This, combined with near-universal recognition of the ownership rights with a stable chain of title, establishes a strong system of development control and

[1343] Schnidman, "Land Readjustment," 2; Larsson, "Land Readjustment," 146; Sakamoto, "Urban Redevelopment Methods in Japan," 310.
[1344] Tzu-Chin Lin, "Land Assembly in a Fragmented Land Market through Land Readjustment," *Land Use Policy* 22, no. 2 (April 2005): 95; Schnidman, "Land Readjustment," 4; Sakamoto, "Urban Redevelopment Methods in Japan," 310.
[1345] That was accomplished through 11,400 projects totaling 368,313.5 hectares, including land readjustment projects before 1954 under the old law, all projects completed since 1954 under the new law, and all projects still in progress. See: Sorensen, "Analyzing Land Readjustment," 89.
[1346] David L. Callies, "Urban Land Use and Control in the Japanese City: A Case Study of Hiroshima, Osaka, and Kyoto," in *The Japanese City* (Lexington: University Press of Kentucky, 1997), 136–38; Sakamoto, "Urban Redevelopment Methods in Japan," 316; Carolin Funck, Tsutomu Kawada, and Yoshimichi Yui, "Citizen Participation and Urban Development in Japan and Germany," in *Urban Spaces in Japan: Cultural and Social Perspectives*, edited by Christoph Brumann and Evelyn Schulz (Routledge, 2012), 107.
[1347] Callies, "Urban Land Use and Control in the Japanese City: A Case Study of Hiroshima, Osaka, and Kyoto," 136–38; Sakamoto, "Urban Redevelopment Methods in Japan," 316; Funck, Kawada, and Yui, "Citizen Participation and Urban Development in Japan and Germany," 107.
[1348] Callies, "Urban Land Use and Control in the Japanese City: A Case Study of Hiroshima, Osaka, and Kyoto," 136–38; Sakamoto, "Urban Redevelopment Methods in Japan," 316.

conformity with the zoning law, which do not induce informal settlements or anarchic construction in Japan.[1349]

In addition to the high responsibility and legal compliance, local government plays a crucial role in implementing urban development projects. Local government plays an important role in persuading affected property owners to participate in the land readjustment project.[1350] For instance, in the Omiya land readjustment project, the local governments persuaded the landowners to establish organization committees to arrange land readjustment of 7,500 hectares, which was 75 percent of the urban plan between 1980 and 1990 in the Omiya area.[1351]

However, land takings, which depend on negotiation and consensus principle, faced a noticeable challenge. Negotiation to reach consensus in a land readjustment project is an arduous task for local government or authorized project initiator.[1352] This task takes a lot of time, effort, and resources.[1353]

In short, most land takings conclude in mutual negotiation among project authority, developer, and property owner. Disagreement is concluded by administrative disposition, resulting in reduced dispute in court.

4. Case Study – Construction of Nibutani Dam

This Dissertation concentrates on institutional responsibility for taking dispute resolution. Most land takings conclude in mutual negotiation with the intervention from administrative agencies, rarely proceeding to court in Japan.[1354] In this context, if one looks at judicial decisions over taking disputes, Japan does not have many cases as in the American counterpart.[1355]

In order to compare with the American system over institutional responsibility for taking dispute resolution, this Dissertation selects a sample case study of Japanese taking dispute that underwent both

[1349]Sorensen, "Analyzing Land Readjustment," 99; Callies, "Urban Land Use and Control in the Japanese City: A Case Study of Hiroshima, Osaka, and Kyoto," 136–38.
[1350] Sakamoto, "Urban Redevelopment Methods in Japan," 311.
[1351]Sorensen, "Analyzing Land Readjustment," 103.
[1352] Sakamoto, "Urban Redevelopment Methods in Japan," 311.
[1353] Ibid.
[1354] Kotaka, "Compensation System of Japan: Just Compensation Means Full Compensation," 5; Ogasawara and Yamashita, "Land Acquisition for Public Use in Japan," 14.
[1355] Port and McAlinn, *Comparative Law*, 607; Sakamoto, "Urban Redevelopment Methods in Japan," 316.

administrative and judicial disposition for study. The landmark case is the Kayano *et all.* v. Hokkaido Expropriation Committee in the Hokkaido prefecture.[1356]

a). Background

The Nibutani dam was located in the Saru River in Hokkaido's Sapporo District. The government, through the Ministry of Land and local government, initiated a plan to construct the Nibutani dam on March 23, 1978.[1357] The Minister of Land adopted the fundamental construction plan of Nibutani dam for flood control and other uses on March 24, 1983.[1358]

The construction plan of the Nibutani dam would cover 630 hectares, which affected 295 households, including Ainu indigenous people, at the area.[1359] This project led to the compulsory expropriation of land occupied by local residents. The local government, through the Hokkaido Development Bureau, negotiated with the affected landowners for acquiring land for the project in 1984.[1360]

The project authority could negotiate and reach agreement with most of landowners.[1361] However, negotiation encountered difficulties with a number of landowners, such as Shigeru Kayano, Tadashi Kaizawa, and Kiichi Kaizawa, who dissatisfied with the land acquisition and compensation offer.[1362] These landowners filed a complaint against the government concerning the land acquisition and compensation.[1363]

b). Administrative Disposition

After facing the objection from several landowners, the local government, who were responsible for implementing the project, implemented the land taking power under the Land Expropriation Law of 1951 for

[1356] Mark Levin, "Kayano *et al.v.* Hokkaido Expropriation Committee: 'The Nibutani Dam Decision,'" *International Legal Materials* 38 (1999): 394–429.
[1357] Ibid., 400.
[1358] Carl F. Goodman, *The Rule of Law in Japan* (Kluwer Law International, 2008), 254; Levin, "Kayano *et al.v.* Hokkaido Expropriation Committee," 400.
[1359] Levin, "Kayano *et al.v.* Hokkaido Expropriation Committee," 405.
[1360] Ibid., 400.
[1361] Georgina Stevens, "The Ainu and Human Rights: Domestic and International Legal Protections," *Japanese Studies* 21, no. 2 (2001): 188; Levin, "Kayano *et al.v.* Hokkaido Expropriation Committee," 400; Goodman, *The Rule of Law in Japan*, 254.
[1362] Stevens, "The Ainu and Human Rights," 188; Levin, "Kayano *et al.v.* Hokkaido Expropriation Committee," 400; Goodman, *The Rule of Law in Japan*, 254.
[1363] Stevens, "The Ainu and Human Rights," 188; Levin, "Kayano *et al.v.* Hokkaido Expropriation Committee," 400; Erik Larson, Zachary Johnson, and Monique Murphy, "Emerging Indigenous Governance: Ainu Rights at the Intersection of Global Norms and Domestic Institutions," *Alternatives: Global, Local, Political* 33, no. 1 (January 1, 2008): 68; Goodman, *The Rule of Law in Japan*, 254.

compulsory acquisition of the land from the objected property owners.[1364] The project authority submitted the application to the Land Minister for the project recognition on April 25, 1986.[1365]

The Land Minister transmitted the application to the municipal mayor on June 19, 1986 to make a public notice of the development project within two weeks at the locality.[1366] During this public notice, Tadashi Kaizawa and Kiichi Kaizawa presented an objection statement to the governor of Hokkaido by claiming the restoration of rights and compensation for the land lost by the Ainu people.[1367] However, the Land Minister approved the development project on December 16, 1986.[1368]

Following the reception of the project recognition, the project authority applied for an administrative ruling from the Hokkaido Expropriation Committee (hereinafter "Expropriation Committee") for vacating the objected landowners on November 30, 1987.[1369] The Expropriation Committee rendered the administrative rulings for acquiring land and issuing vacation order on February 3, 1989.[1370] The objected landowners filed an administrative appeal to the Land Minister for reviewing on March 4, 1989.[1371] However, the Land Minister rejected the appeal on April 26, 1993.[1372] The objected landowners continued to appeal for judicial review.[1373]

c). Judicial Resolution

Kayano, who was the representative of other objectors, filed the appeal against the administrative rulings at the Sapporo District Court for judicial review of both the expropriation committee's decision and the

[1364] Larson, Johnson, and Murphy, "Emerging Indigenous Governance," 69; Levin, "Kayano *et al.v.* Hokkaido Expropriation Committee," 400.
[1365] Stevens, "The Ainu and Human Rights," 188; Levin, "Kayano *et al.v.* Hokkaido Expropriation Committee," 400.
[1366] Stevens, "The Ainu and Human Rights," 188; Levin, "Kayano *et al.v.* Hokkaido Expropriation Committee," 401.
[1367] Levin, "Kayano *et al.v.* Hokkaido Expropriation Committee," 401.
[1368] Stevens, "The Ainu and Human Rights," 188; Levin, "Kayano *et al.v.* Hokkaido Expropriation Committee," 401.
[1369] Stevens, "The Ainu and Human Rights," 188; Levin, "Kayano *et al.v.* Hokkaido Expropriation Committee," 401.
[1370] Stevens, "The Ainu and Human Rights," 188; Levin, "Kayano *et al.v.* Hokkaido Expropriation Committee," 401.
[1371] Stevens, "The Ainu and Human Rights," 188; Andrew Daisuke Stewart, "Kayano v. Hokkaido Expropriation Committee Revisited: Recognition of Ryukyuans as a Cultural Minority Under the International Covenant on Civil and Political Rights, an Alternative Paradigm for Okinawan Demilitarization," *Asian-Pacific L. & Pol'y J.* 4 (Summer 2003): 311; Goodman, *The Rule of Law in Japan*, 254; Levin, "Kayano *et al.v.* Hokkaido Expropriation Committee," 401.
[1372] Stewart, "Kayano v. Hokkaido Expropriation Committee Revisited," 311; Goodman, *The Rule of Law in Japan*, 254.
[1373] Stewart, "Kayano v. Hokkaido Expropriation Committee Revisited," 311; Goodman, *The Rule of Law in Japan*, 254.

project authorization on October 26, 1993.[1374] In the complaint, Kayano challenged the constitutionality of administrative ruling, confiscatory administrative rulings, and project authorization, which rendered in removal order of existing landowners.[1375]

The Sapporo District Court reviewed the complaint in response to the plaintiff's claim. The court held that the expropriation was illegal on March 27, 1997.[1376] The court reasoned that the administrative agencies and rulings failed to weigh up the project's benefit and detriment to private interests, especially, the indigenous Ainu people.[1377] However, the judicial decision came late because the project was completed.[1378]

In short, dispute over the Nibutani dam provides the legal aspect of administrative dispute rather than compensation in Japan. The judicial decision over the Nibutani dam dispute is the landmark case in that the court demanded the balance of project interest between the state and private persons. The lessons for improvement of the Cambodian system are two: that the decision takes account of the interests of indigenous people who are vulnerable to development projects; and that private action and administration presented a fait accompli to the court, limiting the effectiveness of its decision.

In conclusion, land takings in Japan mostly follow two laws – the Land Expropriation Law of 1951 and the Land Readjustment Law of 1954. The 1951 Land Expropriation Law, which is exclusive development, authorizes the taking of private land for public interest such as the construction of road, dam, and airport. The 1954 Land Readjustment Law, which is inclusive development, allows the rearrangement of scattered plots of land for tidy land plots with public infrastructure and utility.

Both laws employ different methods, but achieve the same goal; namely, the public utilities. The exercise of Land Expropriation Law excludes affected citizens from the development, while the Land Readjustment Law includes the landowners in the development project. As a result, the method of Land Readjustment Law is widely supported in Japan.

[1374] Stewart, "Kayano v. Hokkaido Expropriation Committee Revisited," 311; Stevens, "The Ainu and Human Rights," 189.
[1375] Levin, "Kayano *et al.v.* Hokkaido Expropriation Committee," 401–2.
[1376] Stewart, "Kayano v. Hokkaido Expropriation Committee Revisited," 311; Stevens, "The Ainu and Human Rights," 181.
[1377] Stewart, "Kayano v. Hokkaido Expropriation Committee Revisited," 310; Levin, "Kayano *et al.v.* Hokkaido Expropriation Committee," 399.
[1378] Stevens, "The Ainu and Human Rights," 193.

Land takings largely depend on mutual negotiation among project authority, developer, and affected citizens. However, Japan will return to the legal procedures as stated by law when the negotiation fails. At this stage, the administrative agencies play an important role in mediating the disagreement before proceeding with judicial recourse.

The success of land takings though negotiation can rely on two principles in Japan: (1) compensation and (2) institutional responsibility. Most land takings can provides market/just compensation for affected property. Project authority or developer has high responsibility for implementing and following the law and exercising participatory planning and development. This leads to reduced disputes in the redress forum.

Although most cases are concluded by mutual negotiation, with the intervention of administrative agencies, a number of cases, for example of Kayano, proceed with judicial recourse. Kayano case is a landmark case that provides an essential aspect of eminent domain dispute; namely, the administrative dispute rather than civil dispute in Japan. This case follows the procedure as prescribed by law. The court abrogated the administrative rulings. This implies that with proper institutional design, courts can reinforce and realize the rights of affected residents, reducing the level of conflict in society.

C. Comparative Aspect of Practice and Redress Mechanisms in Three Studied Countries

This section will discuss aspect of practice and institutional responsibility for land taking and resolution in Cambodia, America, and Japan. The Dissertation provides, as described above, a broad overview of Cambodian, American, and Japanese systems over land taking practice and institutional responsibility for dispute resolution.

This section will compare the aspect of practice and institutional responsibility in these studied countries. The comparison will focus on points that may be useful in considering improvements to the current Cambodian system.

1. Common Point of Land Takings

The three countries share a remarkable common point on two issues: (1) authorization of taking power and (2) judicial review.

a). Authorization of Taking Power

In all three countries, the authorization of the taking power is enshrined in the constitution.[1379] Apart from the constitutional endorsement, each country develops a separate law governing taking action; for instance, American states have encoded eminent domain practice by enacting the Uniform Eminent Domain Code of 1974;[1380] Japan adopted the Land Expropriation Law in 1951,[1381] while Cambodia enacted the Law on Expropriation in 2010.[1382]

The concept of eminent domain power is the same in these three countries. Land taking can be exercisable only if it serves "public use" while affected property owners are provided for "due process of law" and "just compensation" in proportion to the loss or damage of property.[1383]

[1379] See: Constitution of the United States, Amendment V (1789); The Constitution of Japan, Law no. of 1947, Art. 29 (JP); Constitution of Kingdom of Cambodia, art. 44 (1993).
[1380] See: Uniform Law Commissioners' Model Eminent Domain Code (1974).
[1381] See: Land Expropriation Law, Law no. of 1951, (JP).
[1382] See: Law on Expropriation (2010).
[1383] See: Constitution of the United States, Amendment V; The Constitution of Japan 1947, p. Art. 29; Constitution of Kingdom of Cambodia, art. 44.

b). Judicial Review

The three countries all place the ultimate decision power in the court. The power of eminent domain is a constitutional power conferred on the executive branch. However, constitutions also constrain government not to exercise this power arbitrarily by setting out the restrictions of "public use," "just compensation," and "due process of law."[1384]

These clauses are a target under the judicial review if government violates these. If government abuses or overuses this power, court will intervene to justify the action between the state and private person. The constitutional requirements of "public use," "just compensation," and "due process of law," which are referred to in this Dissertation as the "three constitutional pillars," are to constrain government from the use of power in taking of life, liberty, and property.

In short, eminent domain in the three countries shares the same conceptual foundation, with a reviewing power in the court.

2. Differences of Three Countries' Taking System

The exercise of constitutional eminent domain in the three countries has remarkable differences in three points: (1) mechanical redress arrangement, (2) type of taking dispute, and (3) institutional responsibility for dispute resolution.

a). Mechanical Redress Arrangement

The arrangement of implementing and redress mechanisms differs in the three countries. America arranges its implementing and redress mechanism based on the constitutional eminent domain clause, while Japanese and Cambodian practice depends on legislation and administrative disposition.

i). American Land Taking Mechanism

Land taking power in America conforms to the principle of power separation under the Constitution of the United States.[1385] The United States of America is a federal system, in which the government is divided

[1384] See: Constitution of the United States, Amendment V; The Constitution of Japan 1947, p. Art. 29; Constitution of Kingdom of Cambodia, art. 44.
[1385] See: Constitution of the United States, Amendment V.

into federal and state governments. In this administrative hierarchy, the federal laws (the U.S. Constitution, laws, and treaties) are superior, (the Supreme Law of the Land) to those of the states.[1386] In this hierarchy, the Federal Constitution imposes mandatory limits on the powers of both Federal and State governments, while individual States may provide enhanced protections.

In terms of taking powers, both federal and state governments have authority to exercise taking powers. However, the federal government has less authority than state government because the federal constitution leaves this power to state and local governments where a federal interest is not directly concerned.[1387] The fifty states have a large amount of powers to take, control, and regulate land.[1388]Although America widely leaves this power to the state and local governments, but executive bodies do not have final jurisdiction over the resolution of taking disputes. The power to make the ultimate decision over taking disputes is vested in the relevant courts.[1389]

The taking mechanism is not heavily bureaucratic in America. The process of land takings and dispute resolution is simple for affected citizens to follow. In general, land takings follow the provision of constitutional requirements. Only an authorized body, as stated in law, can expropriate private land for development project. However, such a taking must be made in compliance with due process of law, and only if it serves public use while affected citizens are provided with just compensation in proportion to loss of property.

The condemnor must appraise the affected property on the market value and submit it to affected property owners for negotiation. If the parties do not reach the agreement, any disagreed party will submit the

[1386] Ibid., art. VI.
[1387] Byron Shibata, "Land-Use Law in the United States and Japan: A Fundamental Overview and Comparative Analysis," *Wash. U. J.L. & Pol'y* 10 (2002): 169.
[1388] David L. Callies, "The Compulsory Purchase of Private Land in the United States," in *Taking Land: Compulsory Purchase and Regulation in Asia-Pacific Countries*, edited by Tsuyoshi Kotaka and David L. Callies (University of Hawaii Press, 2002), 349; Shibata, "Land-Use Law in the United States and Japan," 169.
[1389] Reznick, "Land Use Regulation and the Concept of Takings in Nineteenth Century America," 855; Callies, "Compulsory Purchase of Land," 2; Sax, "Takings, Private Property and Public Rights," 176; Westbrook, "Administrative Takings," 722; Harrington, "'Public Use' and the Original Understanding of the So-Called 'Takings' Clause," 1298; Scheiber, "Property Law, Expropriation, and Resource Allocation by Government," 235; Hudson, "Eminent Domain Due Process," 1291.

claim to court for decision. In law, the condemnor, who claims for ownership acquisition for development project, is required to submit the complaint to court first.[1390]

When a complaint appears in court, an American court applies bright line rules of the constitution and law for deciding the case. The court decides both administrative and civil disputes of the takings based on the constitutional requirements. The use of bright line rules of the constitutional requirements is rigid and puts pressure on government to follow. As a result, the judicial decision legitimizes governmental taking purpose (see: Section A of this Chapter III).

In short, American court acts as both the pivotal mechanism for compulsory acquisition of private land for public use and protector of private property rights to balance such a taking.

ii). Japanese Land Taking Mechanism

In Japan, most land takings proceed through negotiation. In this context, administrative mechanisms, together with administrative guidelines on land takings, are arranged for facilitating mutual negotiation among developers, the expropriating authority, and affected citizens.[1391] Japan has a set of administrative agencies for acquiring land for development and mediating disputes. Japan has central government (Land Minister) and local governments (prefecture, municipality) act as the condemning agencies, and expropriation committee at each prefectural level for facilitating and hearing disagreements over land takings.

The Japanese land taking system mostly ends in mutual negotiation. When negotiation is likely to fail, the expropriating authority or project initiator will initiate an administrative procedure as stated in law. They will submit a request for project recognition to the Land Minister. After receiving approval, the project initiator will submit a request to the expropriation committee for compensation decision and issuance of vacation order. The expropriation committee resolves compensation and issues vacation order. Any party, who is dissatisfied with the decision of the expropriation committee, can submit an administrative appeal to the Land Minister for

[1390] See: Uniform Law Commissioners' Model Eminent Domain Code (1974).
[1391] See: Guideline Standard for Compensation for Loss Caused by Acquisition of Land for Public Use, Law no. of 1962, (JP); Guideline Standard for Compensation for Public Loss Caused by Execution of Public Project [公共事業の施行に伴う公共補償基準要綱], Law no. of 1967, (JP).

review. If the aggrieved party still disagrees with the decision of the Land Minister, he or she can appeal to court for judicial review (see: Section B of this Chapter III).

In short, the Japanese taking mechanism provides for an intermediate. An ad-hoc independent, permanent land tribunal, expropriation committee, is arranged for dealing with land taking in each prefecture.

iii). Cambodian Land Taking Mechanism

Land taking largely depends on the relevant administrative body. Land taking is in the hand of the project's own delegated ad-hoc commission. The ad-hoc commission extends its working groups from the central to lowest level of territorial administration for overseeing and implementing the project. The decision of project issues is in the hands of the central level while the local authority is the implementing body.

The project authority will negotiate with affected citizens. When a dispute occurs, the project ad-hoc commission can conciliate. If the conciliation fails, the complaint can proceed to the redress mechanism responsible for land disputes; namely, the administrative ADR and judicial institutions. The administrative ADR institutions comprise the Cadastral Commissions (CC) with three tiers (Municipal/District/*Khan*, Capital/ Provincial, and National CC), and the National Authority for Land Dispute Resolution (NALDR), which have competence to resolve unregistered disputes. The court has jurisdiction to deal with registered or contractual land disputes.

The Cambodian redress mechanism faces conflict of interest in dispute resolution over takings. Land taking for development projects is authorized at the national level, belonging to the central government with development partners and private firms. The local administrative offices or local government are only the implementing bodies for these development projects. When a dispute happens, the local administrative offices become the redress bodies, and the court is reluctant to make decisions on the taking dispute with the state due to the fear of the hierarchical responsibility after the decision-making (see: Chapter I and II of this Dissertation).

In short, Cambodian taking mechanism is primarily an administrative mechanism. The arrangement of redress mechanism falls into bureaucratic process, which impedes efficiency and effectiveness of land dispute resolution. Cambodia can learn from Japanese and American model for improving redress means.

In overall comparison, American system is judicial redress mechanism while Japanese and Cambodian systems are administrative redress mechanisms. In compliance with the theory of eminent domain, judicial redress is complied with the constitutional authority.

b). Types of Land Ownership and Taking Disputes

In addition to the difference of the mechanical arrangement of redress body, the three countries characterize with the differences of land ownership and land disputes. This section will illustrate the differences of land ownership and disputes accordingly.

i). Land Ownership under Mechanical Taking

Ownership is pre-requisite for taking. A taking is a mechanical procedure. Mechanical taking refers to a taking that can proceed with a course of clear procedural steps. Land taking proceeds with two courses of mechanical procedural steps: (1) pre-dispute mechanism and (2) post-dispute mechanism. Both mechanical steps are interlinked; when pre-dispute mechanism fails, it will lead to post-dispute mechanism. Legal compliance and ownership are a catalyst and determinant of the existence of both mechanical steps.

In legal concept, the three countries have similar provisions in terms of taking issues. However, in practice, they result in different effects. America and Japan have exercised land takings well without causing many social controversies; however, Cambodia has faced a serious violation of human rights in exercising this power. When dispute happens, affected citizens seek resolution through state institutions in America and Japan, while Cambodia seeks resolution by on-street protest, political intervention, and spiritual prayer.

Such a result depends on the mechanical arrangement of land expropriation system to prevent social consequences. Pre-dispute mechanism is a substantial procedure to avert dispute to appear in the redress forum. This could be achieved by two substantive factors: (1) legal compliance and (2) recognition of ownership. Pre-

dispute mechanism in land takings depends on mutual negotiation between expropriators and affected property owners. Mutual negotiation can be possible only if it conforms to legal provision and procedure.

Negotiation in pre-dispute mechanism can achieve a comparative market value of affected property by equal status between expropriators and affected property owners. The equal status of negotiating power relies on ownership status. America and Japan have a clean system of ownership recognition; thus, negotiation can proceed with a course of equal status between buyer and seller on market price. America and Japan mostly succeed in the pre-dispute mechanism, while Cambodia fails.

However, Cambodian system of property ownership is in a mess, and ownership of land is unclear. Furthermore, legal compliance is intermittent. In this context, negotiation is likely not to work well. Negotiation could happen in some extent, but proceeds with a course of limit and unequal footing. As a result, Cambodian exercises land takings for development resulting in protest and social tensions.

ii). Type of Land Dispute

Apart from the issue of land ownership, the three countries have different types of land dispute caused by takings. America and Japan have a tidy system of land ownership; as a result, disputes are straightforward over the constitutionality of taking and compensation issue that appear in the redress forum. The dispute over the constitutionality of taking is in the competence of court, while the dispute over compensation is in the hand of jury or expropriation committee.

Cambodian land ownership is unclear; therefore, Cambodia encounters various forms of land disputes caused by competing claims. In sum, however, Cambodia faces three major types of land disputes caused by competing claims: (1) land disputes caused by competing between individuals, (2) land disputes caused by competing claim between state and land possessors by land registration, and (3) land disputes caused by state expropriation for development (see: Chapter II of this Dissertation). The third one has same manner as that of America and Japan. These types of land disputes push Cambodia to fall into the land dispute crises waiting for appropriate resolution.

c). Institutional Independency

Apart from technical arrangement of taking mechanism and different types of land dispute, the three countries have distinct institutional responsibility arrangements in taking disputes. Taking disputes are between the state and citizens. Thus, independence of the resolver is necessary as the guarantor of equal treatment and just compensation between parties after the failure of the pre-dispute mechanism.

Each country arranges provides different procedures and mechanisms for resolving taking disputes. America leaves this decision to the court while Japan and Cambodia keep this power in the hand of administrative agencies first, with last resort to the court. Despite the different redress mechanisms, the achievement of independence, due process, and just compensation for affected citizens is noteworthy.

The overview of the three countries' institutional responsibility arrangements shows that America and Japan have simpler institutions responsible for land taking dispute resolution than Cambodia. America has made the court responsible for resolving land taking disputes. American courts apply bright line rules. The court decides both administrative and civil disputes of the takings based on the constitutional requirements.

Japan has a tidy system of stand-by administrative agencies responsible for resolving land taking disputes. An expropriation committee is located in each prefecture for facilitating and hearing disputes. If the aggrieved party disagrees with the decision of the administrative tribunal, he or she can appeal to court for judicial review. America puts the redress directly under the judiciary, while Japan places it under the executive in the first instance in order to avoid disputes in court. However, both countries achieve independency of resolvers.

Cambodian redress institutions are complex. The administrative ADR institutions are arranged in a territorial structure with policy determined at higher levels, and responsibility for execution at lower levels. This results in an upward-and-downward movement and ignorance of complaints. The court resolves only civil and criminal disputes while the resolution of administrative disputes is avoided. As a result, criminal charges are often the first result of sharp land taking disputes, while the underlying taking issues remain unresolved.

Cambodian redress institutions have been unable to achieve independency, which causes affected citizens to distrust actions by the administrative agency. Therefore, affected citizens often seek political

interventions from the Prime Minister. In order to obtain interventions from the Prime Minister, affected citizens frequently resort to *ultra-vires* or direct collective actions such as demonstration, protest, road blockading, and tire burning. Political intervention becomes a culture of land dispute resolution, overshadowing the existing official redress mechanisms in Cambodia.

In sum, American and Japanese redress mechanism responsibility is independent and far from conflict of interest, while Cambodia rest in hierarchical responsibility and loss of independency, which need addressing.

3. Comparison of Institutional Arrangement and Protection of Constitutional Rights

A constitutional taking clause is to protect the rights to life, liberty, and property from the arbitrary taking. This section will study the feasibility of taking mechanism in protection of the constitutional rights against takings.

As noted above, American taking mechanism is the judicial redress, while Japanese and Cambodian mechanisms are administrative redress, with final resort to the court. This section will analyze the feasibility of achieving (1) simplicity of redress institutions, (2) legitimacy of governmental taking power, and (3) market/just compensation under the institutional judicial or administrative arrangement.

a). Simplicity of Redress Institution

The first challenge between judicial and administrative redress institutions is the structural arrangement of resolution forum for land taking disputes. The challenge rests on the simplicity or complexity (or bureaucracy) of the redress structure, independence, conflict of interest in resolution forum. This issue is needed to address prior to redesigning a new way for Cambodia.

The three studied countries show the noticeable institutional arrangements. America uses the court structure for dealing with land takings. In structure, court has only one institution, with a common paradigm of three tiers – lower court, appeal court, and supreme court. This structure, we are able to say, is simple for affected citizens to understand and follow. For example, Kelo challenged the constitutionality of land taking purpose from the lower court to the Supreme Court of America. Likewise, Kayano challenged the expropriation to Sapporo Court for judicial review of administrative rulings of vacation.

An administrative redress mechanism may face structural issues if it is not properly arranged. Administrative redress mechanism is typically arranged in a territorial administrative structure. Such an arrangement can be made in a simple layer or multi-layers in territorial administration extension. The effect of institutional responsibility for dispute resolution can be detrimentally affected in the latter case.

If administrative redress mechanism is arranged in a simple layer or tier of territorial administration, it may not face a serious structural issue. However, if administrative redress mechanism is arranged through territorial administrative extension, the structural issue of resolution and responsibility poses a challenge. The administrative redress mechanism may fall into the bureaucratic process and produce reduced accountability, which induces the impediment of institutional efficiency and effectiveness of speedy resolution.

To clarify this argument, the comparison of administrative redress arrangement between Japan and Cambodia is noteworthy. Japan and Cambodia, as discussed above, are the administrative redress mechanisms. However, both countries arrange the redress mechanical structure for dealing with taking disputes differently. Japan arranges administrative redress structure, namely, the expropriation committee, in a simple single institution at each prefectural level. Any aggrieved party can challenge the award of the expropriation committee to the Land Minister for administrative review, and then to court for judicial review as the last resort.

Cambodia arranges the redress mechanical structure for dealing with land disputes in territorial administration extension, lying from the municipal/district/*khan*, provincial/capital and national institutions, and culminating in court for review.[1392] Such a construction can make resolution bureaucratic, inactive, and reduce accountability. These impede the efficiency and effectiveness of land dispute resolution. Recently, Cambodian Prime Minister came out and a strong public blame on the national and local authority, who responsible for land dispute resolution, to be lazy to fulfill their obligation on August 18, 2014.[1393]

In comparative aspect, the court can achieve a simpler structure than is possible under the current administrative arrangements. Administrative redress may face multi-layers of redress fora if it is arranged in

[1392] See: Sub-decree on Organization and Functioning of Cadastral Commissions (2002).
[1393] Aun and Hul, "Officials Trade Blame Over Kratie Land Dispute"; Vong and Ponniah, "The Buck Stops Elsewhere."

territorial administration, as the case of Cambodia. However, a single layer is noteworthy and preferred, as the case of Japan.

b). Legitimacy of Taking Power

Land taking is a special dispute between state and citizens. Power in taking disputes is presumptively unequal – the state or government authority and ordinary citizens. Therefore, the arrangement of redress mechanism for such a dispute is a critical issue. In this sense, the redress structure may face conflict of interest in dispute resolution process, and the legitimacy of governmental taking may be called into question.

Judicial redress can be disciplined to avoid conflict of interest more easily than the administrative environments. The administrative redress is arranged under the executive branch. Administrative agents are appointed by the executive. Therefore, the administrative redress mechanism may face a high risk of conflict of interest and hierarchical responsibility.

Judiciary, in compliance with the principle of power separation, is distinguished from the executive branch. Court is a separate institution from the executive power and has its main role for reviewing the executive institutions.[1394] In the context of power separation, court is presumably independent in construction. For example, the resolution of Kelo case under American courts and Kayano case under Japanese court is an exemplar of independent resolvers and far from the conflict of interest.

Conflict of interest is easily inferred in the case of Kayano, Borei Keila, and Boueng Kak under the administrative disposition. Kayano made administrative appeal to the Land Minister for review but was rejected. When Kayano appealed to court for judicial review, the court turned down the administrative rulings that lacked consideration of public use and detriment of project to affected citizens.[1395] This point can show that the conflict of interest between the project authority and resolution authority, which induces the lack of

[1394] Westbrook, "Administrative Takings," 725–26.
[1395] Stewart, "Kayano v. Hokkaido Expropriation Committee Revisited," 310; Levin, "Kayano Et Al. V. Hokkaido Expropriation Committee," 399.

consideration of the project side-effect. However, this could be rectified by the court after Kayano brought for judicial review.[1396]

Conflict of interest is clearly seen in the structural arrangement of Cambodian redress mechanisms in dealing with land taking disputes. The Cambodian redress mechanism is organized under territorial administration. In this context, the governor of district, province, and capital is resolver of dispute. However, when the government needs to take private land for development project, the governor of district, province, and capital becomes the implementing body under the development project.

Negotiation and resolution rests in the project authority; namely, the governor of district, province, and capital. Conflict of interest makes the negotiation stand unequal between the project authority and affected citizens. Authority often fixes compensation for affected citizens to accept almost without negotiation. Negotiation can occur only if affected citizens protest. As a result, this leads to frequent clashes. For example, the Boeung Kak and Borei Keila land disputes are exemplars of conflict of interest in taking and dispute resolution in Cambodia.

Conflict of interest cannot legitimize government takings. Instead, government is alleged of illegitimate takings and violation of human rights as protected under constitution. For example, the taking of the Boueng Kak and Borei Keila cases, the Cambodian government is alleged of illegitimate takings and violation of human rights, as protected under the 1993 Constitution.

Conflict of interest prolongs speedy and effective resolution of the cases. Frequent clashes occur between the project authority and affected citizens. If such a taking dispute appears in court, social negative consequences may be diminished and governmental taking could be legitimized. As the Kelo case, government taking of Kelo for economic redevelopment is legitimized under the judicial power as conformity to the constitutional public use requirement.[1397] Such a decision was suffered from various scholarly critiques and

[1396] Stewart, "Kayano v. Hokkaido Expropriation Committee Revisited," 310; Levin, "Kayano Et Al. V. Hokkaido Expropriation Committee," 399.
[1397] Crandell, "Comment: Arizona's 'Public Use' Debate," 1170; Kelo v. New London, 545 US 469 (U.S. Sup. Ct. 2005); James, "Comment: Checking the Box Is Not Enough," 977; Claeys, "That '70s Show," 869.

views that violated the federal and state constitutional requirements of public use.[1398] Although the decision is viewed unconstitutional, the judicial decision legitimized the state's taking.

This point shows that governmental taking is fully legitimate only if it is made through judicial recourse. Thus, conflict of interest makes negotiation and dispute resolution fail and provokes social negative consequences in Cambodia. Government taking is alleged of illegitimate taking. Therefore, Cambodia can consider its practice through judicial recourse in order to conform to the 1993 Constitution.

c). Feasibility of Due process and Just Compensation

The two constitutional requirements are due process and just compensation, which are fundamental for protecting affected citizens and restoring livelihoods after relocation. Thus, the feasibility of due process and just compensation achievement should be taken into consideration between the judicial and administrative arrangement.

Due process and just compensation are the constitutional requirement that state authority must provide for affected citizens when their land is taken for public use. Due process of land taking is made in two stages – pre-dispute and post-dispute mechanism (see: Introduction of this Dissertation). Just compensation refers to the full market value of affected property. Thus, this Dissertation puts forward the opportunity of achieving the full market value and due process maintenance in pre-dispute and post-dispute mechanism for analysis between the judicial and administrative redress arrangement in the comparative three studied countries.

The thesis gives two hypotheses for analyzing the achievement of the market/just compensation in land takings. The first hypothesis is that market/just compensation through negotiation can be achieved only if ownership is recognized and legal compliance is provided. The first hypothesis is that if ownership is recognized and the legal compliance or due process is provided, parties can negotiate compensation on equal footing. Thus, the market/just compensation can be achieved in pre-dispute mechanism. This mirrors the land takings in America and Japan that the authority or authorized developer comply with legal provisions and provide due process for affected citizens. Furthermore, both countries have a clear system of property

[1398] Garnett, "The Neglected Political Economy of Eminent Domain," 103; Crandell, "Comment: Arizona's 'Public Use' Debate," 1170; Mahoney, "Kelo's Legacy," 104.

ownership, and land price is publicly known. Thus, pre-dispute negotiation stands on equal footing between authority or developer and affected property owners. As a result, market/just compensation is achieved in the pre-dispute mechanism.

However, if a system of property ownership is in a mess and ownership of a land is unclear, and legal compliance or due process rarely exist as Cambodia, market/just compensation cannot be achieved under such a circumstance. Negotiation may not stand on an equal footing between the expropriating authority and affected citizens. The majority of land is not registered in Cambodia yet. The state authority often declares that affected citizens live on state public land when land is expropriated for a development project. Such a declaration makes affected citizens become illegal occupants not entitled to just compensation. In this context, the expropriating authority does not wish to negotiate with land possessors and fixes a sum of money, we could say to be the governmental benevolent compensation, to illegal dwellers on state public land.

The second hypothesis 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. In this sense, the independence of resolvers plays a crucial role in maintaining the due process and just compensation. In the comparative study, America leaves this stage to court while Japan leaves to an independent ad-hoc land tribunal, expropriation committee, in deal with compensation issue. As a result, the market/just compensation can be achieved at the post-dispute mechanism by an independent solver in these countries. American court also deals with constitutionality of takings, while administrative redress lacks this.

Stemming from the hypotheses, the Dissertation concludes that in the eminent domain theory, judicial redress outdoes the administrative redress in providing due process of law, just compensation, and staying far from the conflict of interest. In this context, judiciary can provide more institutional and procedural steps for guaranteeing constitutional due process and just compensation.

D. Chapter Summary

In comparative aspect, America, Japan, and Cambodia have a common point on the power of taking authorization, which is stipulated in the constitution. The constitutional requirements of takings have same tone; namely, due process of law, just compensation, and public use.

In law, the three countries have similar procedure for land takings. However, they achieve different results in practice. Affected citizens go through state institution for resolving taking disputes in America and Japan, while Cambodian affected citizens walk outside the redress mechanisms and protest on street, seek intervention, and pray for spiritual help.

The American taking system offers immediate judicial redress. Japan and Cambodia offer administrative redress in the first instance. The American and Japanese redress mechanisms have a single forum for dispute resolution, while Cambodia has a myriad of fora, which induce bureaucratic process that impedes the efficiency and effectiveness of dispute resolution.

American and Japanese practice often succeeds in pre-dispute mechanism; namely, mutual negotiation because these countries have a clear ownership, which leads to equal status of negotiation and market/just compensation is satisfied. Cambodia fails because the majority of land is unclear of land ownership recognition and due process of law is often ignored. As a result, negotiation does not stand on equal footing among developers, expropriating authority, and affected citizens.

However, if market/just compensation could not be achieved in pre-dispute mechanism, it could be achieved in post-dispute mechanism only if resolved by an independent body. In this context, judicial redress could have more opportunity to achieve market/just compensation and due process than administrative redress. In short, redress of land taking disputes through judiciary has higher creditability and legitimacy for achieving compensation and due process of law between parties than administrative redress.

Chapter IV Blueprint of Institutional Reform for Responsibility

The comparison with American and Japanese taking practice reveals that America and Japan have clear institutions responsible for resolving land taking disputes. Establishing a clear responsible institution is a crucial step for maintaining the due process of law and just compensation between parties and making affected citizens accept redress without on-street protests.

While the widespread reliance on original rights of possession poses a special problem in Cambodia, the American and Japanese taking systems show a common point in that a simple redress forum that can guarantee due process and equal treatment between parties. Cambodia has multiple, complex, and inter-dependent redress mechanisms, which cause reduced accountability and impede efficiency and effectiveness of land dispute resolution. Therefore, reform to establish clear responsibility is a pre-requisite for rehabilitation of public trust. This Chapter will provide a blueprint of reforming complex multiple land dispute resolution institutions into a single simple institution solely responsible for land dispute resolution in Cambodia.

A. Direction of Institutional Reform

Before turning to the specifics of the proposal, this section will examine more closely the necessity of moving multiple institutions into a single institution, and explore the proper parameters for such a reform.

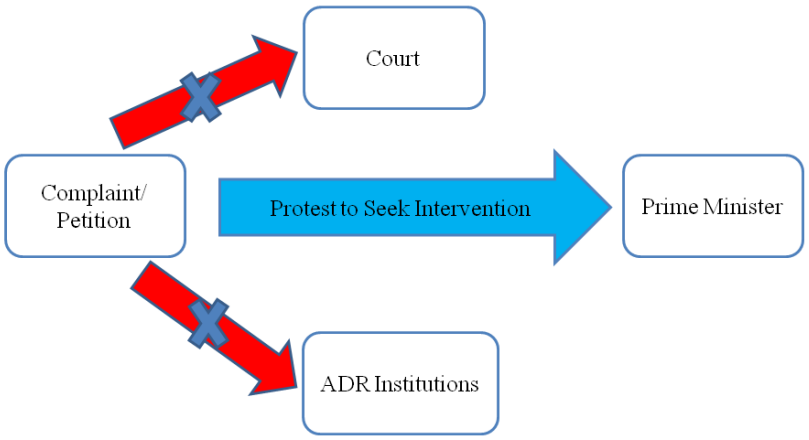
1. Necessity for Single Responsible Institution

When Cambodia reinstalled and privatized property, the failures in the initial land reform together with the lack of human resources undermined the foundations on which dispute resolution would normally take place. Today, the majority of land is not registered. Ownership of land is unclear. Land tenure is overlapping. The issues have outstripped the capacity of institutions, and of many practitioners, to deal with them in an orderly and fair-handed way.

Cambodia has multiple institutions responsible for resolving competing claims. However, none is transparent, efficient, and effective to deal with land disputes. Conflict of interest is a challenge in these institutions. In competing claim disputes, land is often taken from possessors by force, resulting in a fait accompli, without undergoing an appropriate redress and interpretation of law among stakeholders.

When, affected citizens cannot accept the resolution, they frequently look beyond the current redress institutions, protest on streets, and seek political intervention from the Prime Minister for resolving their disputes. Political intervention over land disputes overshadows the existing redress institutions. The following shows the current movement of political intervention over land disputes in Cambodia.

Figure 32: The movement and trend to resolve land dispute by political intervention



Source: Author

The demand for such extra-legal intervention can be addressed by introducing a single expert institution responsible for land dispute resolution.

2. Proposal of Creating a Single Institution for Accepting Complaints

A particular shortcoming of the existing situation is that political intervention frequently fails to achieve a final resolution of the relevant disputes. Affected citizens concentrate on the Prime Minister, National Assembly, and other top institutions as the focal point of political intervention. Although most of these institutions accept complaints or petitions, comprehensive response is relatively rare. As a result, affected citizens often seek repeated political interventions over the same land disputes.

In such a circumstance, a single institution that bears responsibility for accepting and resolving complaints or petitions would be preferred to replace the Prime Minister, the National Assembly and other state top institutions.

3. Moving Multiple Institutions to a Single Institution

Cambodia has multiple institutions responsible for land dispute resolution. Multiple institutions result in reduced accountability. The combination of multiple institutions into a single institution responsible for land disputes is prioritized for Cambodia. Thus, this Dissertation proposes the combination of the existing complex hyper-structured institutions into a simple single institution for efficient and effective resolution in a speedy and responsible way. The following figure shows the institutional reform of existing redress institutions into a single institution under this Dissertation proposal.

Figure 33: The existing redress mechanisms

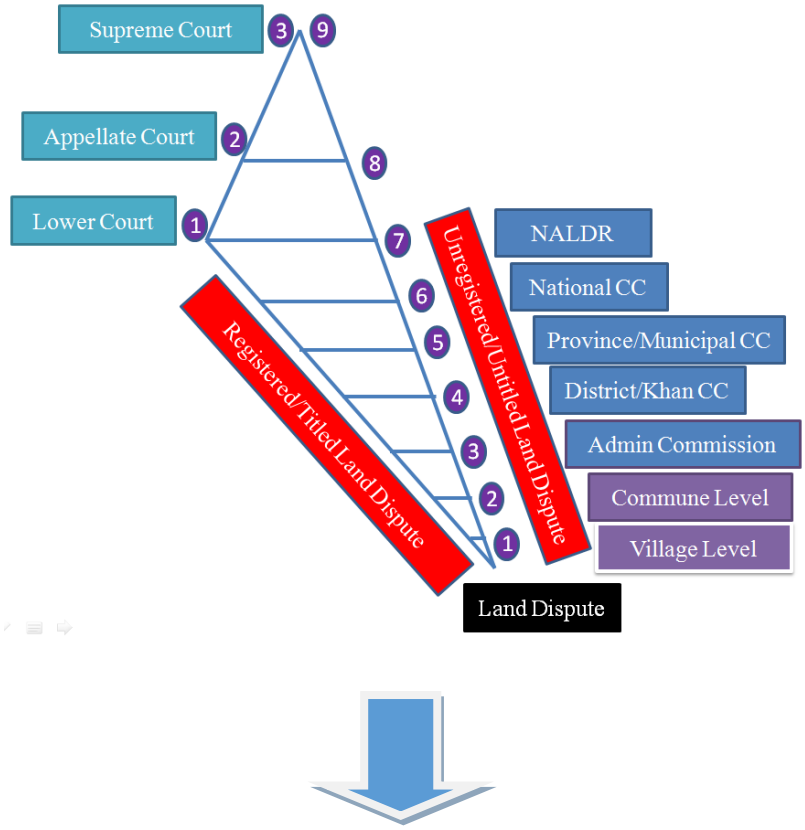
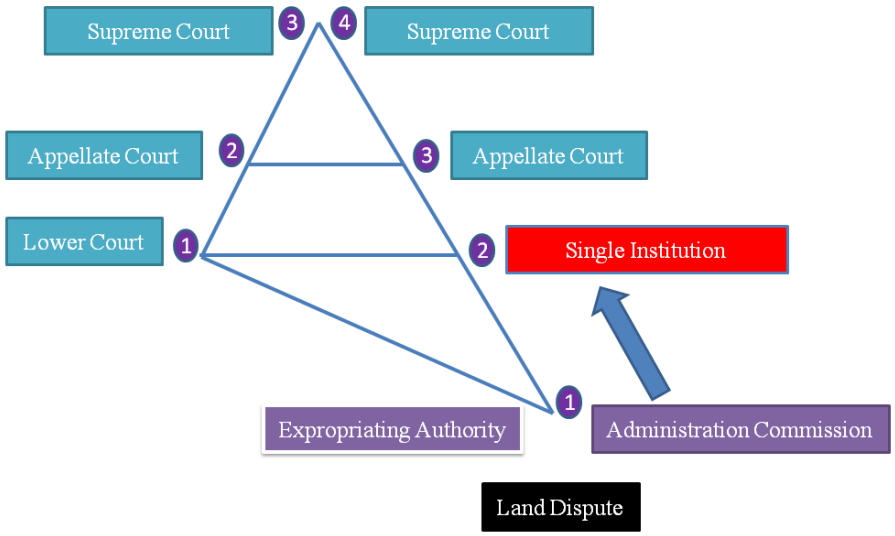


Figure 34: The institutional reform



Source: Author

The proposed single institution will bear responsibility for accepting and resolving all complaints, reckless of status of land disputes. The division of institutional jurisdiction between court and administrative ADR institutions will no longer exist under the new proposed system. As a result, the previous push-and-pull referral of complaints will not pose a challenge under a unified system.

B. Positional Dilemma of Single Institution

The movement to a single simple institution is clearly a necessary step; however, the position of this single institution, under either executive or judicial branch, poses a concern. The dilemma rests on several reasons. The anticipated benefits of introducing a single institution, either under either executive or judicial branch, are that it will: (1) not face failure as the existing institutions, (2) avoid conflict of interest, (3) promote expeditious land dispute resolution, and (4) comply with the constitutional principle of power separation and checks and balances.

In the choice between the executive or the judicial branch, the latter is favored on the basis of (1) past experience, (2) the need for clarity and consistency in the final realization of the property system, and (3) the current policy of the Cambodian government. The study of these points will clarify the grounds for this preference.

1. Learning from Past Experience of Existing Redress Mechanisms

The experience of placing the existing institutions under the executive for more than 15 years, we can say, is enough to raise doubt over the efficiency and effectiveness of the capacity of administration to deal with land disputes. The failure of the existing redress institutions gives a good lesson for studying and proposing a new way. The existing redress mechanisms characterized by three remarkable features that need addressing: (1) hierarchical constraints, (2) political intervention, and (3) an undue bias toward criminal charges.

The existing administrative ADR institutions face hierarchical constraints, which cause indecision. The existing institutions are arranged in territorial administrative extension from the district level to the national level. Moreover, members of redress bodies are top executive officials, territorial authority, and

cadastral officials, all of whom are under the executive branch. Thus, the resolvers face dominating hierarchical constraints and conflict of interest in decision-making.

Hierarchical constraints give rise to resolver indecision in dealing with land disputes between parties of different social ranks. Such disputes involve a degree of risk to the position of the decision-maker, and resolvers incline to make decisions in a way to release him/herself from involvement.[1399] As a consequence, affected citizens often feel unfairness and are unwilling to accept the result, turning instead to the Prime Minister's office for intervention.

Political intervention characterizes a general aspect of Cambodian public administration. Political intervention mirrors hierarchical power seeking for resolution. Affected citizens seek political intervention from the Prime Minister because they know that local authorities, who are subordinate officials, cannot deal with their land dispute. They know that only the Prime Minister, who is the top authority, can decide land disputes.

Political intervention has a special feature in the Cambodian context. "Intervention seeking" means "power" seeking to put pressure and bear "responsibility" for resolving land disputes. Affected citizens seek political intervention from the Prime Minister to put pressure on local authority to bear responsibility for resolving their land disputes immediately. If the Prime Minister does not respond, affected citizens seek intervention from various donors, foreign embassies, and international communities to put pressure on the central government to bear responsibility for resolution.

The deadlock in decision-making is thus a result of deference to superior within administrative hierarchies, and the vague distribution of authority among dispute resolution institutions and political actors themselves. Deadlock is ultimately caused by a failure to resolve core issues in these cases that turn on property entitlements under the civil law. If these are resolved in the first instance in their proper forum (the

[1399] If there is land dispute with social ranks, resolvers incline in several ways to release him/herself from hierarchical responsibility. First, they often forward dispute up to upper level by saying that this dispute is beyond their capacity. Second, if they decide the case, they decide in bias to higher social rank and let affected citizens to appeal to upper level. Such a doing, the resolvers know that only the top authority who can make decision. Third, they keep the case prolonged as much as possible, and sometimes, they try to hide real information about land dispute from top authority by notifying land protesters illegal occupants and opposition party members.

court), protests will decrease, and the courts will less frequently be prevailed upon to apply criminal sanctions to frustrated residents.

In short, the existing institutions face hierarchical constraints, political intervention, and criminal charges. Hierarchical constraints make resolvers indecisive to deal with land disputes; as a consequence, it gives rise to a push-and-pull referral of complaints and reduced accountability. Intervention seeking means power seeking to put pressure for responsibility for dispute resolution. Currently, political intervention is intermittent. Rather, empowerment of a single institution to bear responsibility for land dispute resolution would be effective and permanent.

2. Defects of ADR Institutional Arrangements

The problems of institutional responsibility discussed in this Dissertation are aggravated by certain features of Cambodian administrative culture, which are discussed in this section.

a). Institutional Arrangement and Administrative Structure

Existing ADR institutions operate against the backdrop of post-war Cambodian administration. The ADR institutions are arranged in territorial administration; namely, by providing this main task to local authority to bear responsibility for land dispute resolution. However, local authority lack autonomy to resolve land disputes, which render in consecutive failures even though the government makes an effort to curb with the prevalence of land disputes.

The mismatch of institutional arrangement with the public administration is a critical point, which needs attention for new institutional reform. Beore Cambodian organic laws of 2001 and 2008 introduced the concept of "local government" or "sub-national government," local government was called "local authority," or "territorial authority," which was appointed by the central government.[1400]

[1400] Blunt and Turner, "Decentralisation, Democracy and Development in a Post-Conflict Society," 76; Slocomb, "Commune Elections in Cambodia," 448, and 465–66.

Although the new laws introduce the new term and concept, the term "authority," which was called "*a-nha-thor"* in Khmer language, is still widely influential in Cambodian society.[1401] The old concept of authority has influenced the performance of new functions of local/sub-national government. The leftover or hangover effects of the authority have affected administrative reform. This section will decipher the meaning of "authority" in Cambodian context and administration, which are major factors to contribute to difficulties of post-war administrative reform.

The term "authority" denotes three meanings in Cambodian post-war administration: (1) prominence of authority, (2) authority in office, and (3) responsibility to superiors. The "authority" is in the meaning of the "prominence." The prominence of authority is deeply entrenched in Cambodia public administration. Such a prominence leads incumbent to authoritarian manner and reduced responsibility in their obligation. In Cambodian society, if one calls a man "authority," one may feel afraid and express courtesy to him/her because he/she is a "prominent person" in government. Such a mindset is deeply rooted in the Cambodian society.

In this sense, the term "authority" refers to the "power," or "power to order" granted to designated incumbent to control territory rather than to serve local residents in the Cambodian context and administration. In a word, the "authority" is the "controller" of territorial administration. The authority has a higher privilege and dominance than local residents and obtains the respect from the local residents under his/her supervision.

The "authority" is in the meaning of "in office."The prominence of authority makes designated incumbent think he/she (his/her working place) should be "in office."[1402] In this context, only "office" fits his/her "prominence." This mindset is profoundly entrenched in Cambodian public administration. The expression of "working in office" is widely known in Cambodia. It reflects the general performance of public administrator or authority, who works only "in office." Recently, the Prime Minister blamed his subordinate authorities or administrators, who were inactive to resolve land disputes, to be "lazy" and worked only "on

[1401] In Khmer language, "a-nha-thor" refers person who has/holds "a-nha," which means "order," or "state power" for controlling territory.

[1402] "Working in office" is a popular Khmer metaphor that refers to the working habit of the higher white-collars in public administration in Cambodia. Those administrative white-collars work only in office.

paper."[1403] The Khmer metaphor of "on paper" refers to working and signing papers "in office" without fieldwork.

Land dispute showcases the "authority" in the meaning of "prominence" and "in office," which has impeded the efficiency of dispute resolution in Cambodia. The prominence of authority makes designated incumbent work in office and neglects his or her obligation to prevent land disputes in his/her controlled territory. As a result, land dispute often happens between the company and local residents.

Affected residents will submit complaints to the responsible local authority. The authority, who is a prominent person, rarely goes or comes out to meet affected citizens directly. In this context, only his or her representative or assistant goes or comes out to meet and accept complaints from affected citizens by promising to submit these complaints to his or her boss, who works in office, for review, consideration, and decision.

Local authorities often keep complaints prolonged or without processing. Meanwhile, the company continues bulldozing the affected land. As a consequence, affected citizens protest and stop the company from bulldozing the land, leading to clashes. Then, affected residents go to protest in front of the local authority office to demand the local authority to resolve their complaints. The local authority comes out and promises to resolve. Sometimes, the authority does not come out. Then, the affected citizens block the road in order to make and demand the authority to come out and resolve their dispute. Such an aspect is common in Cambodia today.

The "authority" is in the meaning of the "responsibility to superior." The term "authority" is used in the communism period, who are appointed by the central government to overlook the territorial administration.[1404] "Authority" bears responsibility to those who appointed them; namely, the superiors. Thus, an authority does not much care about his or her obligation as provided by law because he/she does not have direct accountability for local people but is sensitive to superiors because the responsibility of dismissal (see Section on "neo-patrimonialism" of Chapter II of this Dissertation).

[1403] "On paper" is another Khmer metaphor that refers to a working habit of white-collars that wait for signing documents in office, without conducting physical investigation of the problem.
[1404] Blunt and Turner, "Decentralisation, Democracy and Development in a Post-Conflict Society," 76; Slocomb, "Commune Elections in Cambodia," 448, and 465–66.

In short, prominence of authority induces inaction of obligation to deal with land dispute. In the Cambodian context and administration, more the top authority is, the less the action is. Thus, later institutional reform should give a priority to less prominent officials. In this sense, resolvers should be insulated from prominence of authority. Delegation of power from the prominent authorities who enjoy security of tenure is the right direction of institutional reform for accountability.

b). ADR Theory and Property Dispute

A further mismatch of post-war institutional arrangement is the introduction of ADR methods to land dispute resolution institutions. Fifteen years of the ADR methods were introduced, but land disputes are still acute in Cambodia. Post-war land dispute resolution institutions equip with the ADR methods, namely, the conciliation.

These methods have been favored by donors in the post-war country, as an alternative to the judiciary.[1405] This idea has influenced Cambodian post-1998 institutional reform policy. Land dispute resolution institutions stand multiple in ADR methods in post-war Cambodia. The introduction of conciliation in land dispute is not appropriate to stop land dispute caused by land grabbing or arbitrary takings in Cambodia.

The ADR method can succeed in one field, but may fail in another. In general, the ADR method is mainly useful in the business dispute of private persons of relatively equal power, not the land dispute between citizens and the state, powerful, the rich, authorities, the military, and the soldier. In business disputes, both parties want to win on the one hand and want to save face by keeping mutual relations in business, on the other hand. Thus, the status of both parties rests on a mutual give-and-take position in the business dispute. Instead, property disputes have different objective and desire of claim. Both parties strongly adhere to the take-not-give or win-lose position. Both parties only want to win and own the property, without willingness to abandon. Thus, such a stance makes conciliation fail, especially, with different social ranks of disputants.

This argument can be tested by reference to the conciliation method of land dispute resolution institutions, which was introduced since 1999. However, the conciliation does not work well to stop land disputes, especially, with parties who has different social status or rank. Conciliator does not have enough

[1405] World Bank, *Legal and Judicial Reform: Strategic Direction*, 5; cited in Yuka, "Catalistic Role of Legal Assistance between Formal Law and Social Norms," 61.

authority to call for any powerful party to appear in the conciliation forum or punish any party has not appeared or avoided to participate in conciliation. Furthermore, conciliators often feel reluctant to deal with disputes. As a result, resolution is often kept prolonged or ignored without processing. If the conciliation proceeds, it is made by "political compromise," neglecting administrative sanction or criminal punishment for infringers. Thus, the ADR method in land dispute does not have an overarching deterrent ripple effect to prevent land disputes.

In short, institutionalization of the land dispute resolution does not account for the relationship of administrative, ADR, and the nature of property before putting these institutions in place. As a result, these institutions do not work effectively to deal with land disputes. An institution that has power to apply punish is appropriate for such disputes.

3. Current Government Policy

Imposition of a single expert institution should look at the past and current intentions of the government policy. The Cambodian government intended to establish a specialized court in 2006 when Cambodia initiated to establish the National Authority for Land Dispute Resolution (NALDR). The initial establishment of the NALDR was to give the "judicial power" to decide the case and could appeal to the upper court; namely, the appellate court and supreme court.[1406] The NALDR, in this sense, was in the position of a lower court. If the NALDR was equal to the lower court and stayed under the executive power, this would violate the principle of power separation under the 1993 Constitution.[1407]

Therefore, the Prime Minister wrote a letter to the chairman of the NALDR to suggest the feasibility of establishing a specialized land court to deal with land disputes in the existing judicial framework in provincial or municipal areas where land disputes were concentrated in order to avoid the withdrawal of judicial power and violation of constitutional principle of power separation.[1408] However, in order to conform to the principle of power separation, the NALDR was established as an ombudsman with competence to

[1406] See: Sen Hun, "Informing H.E Deputy Minister, Minister in Charge of the Cabinet and Chairman of the National Authority for Land Dispute Resolution," June 1, 2006.
[1407] Prime Minister voiced concerns that granting "the judicial power" to the NALDR to "affect the fundamental principle of the rule of law and free democracy prescribed in the constitution of the Kingdom of Cambodia; that is, the separation of powers between the legislative, executive, and judicial branches." See: Ibid.
[1408] Ibid.

resolve land dispute beyond the national CC; however, the challenge of the NALDR's decision was appealed to the lower court – provincial/municipal court in the same way as the decision of the national CC. This made institutional structure awkward.

At the same year, the Center for Advanced Study, cooperated with various organizations, the World Bank, and the Land Ministry, studied the process of land dispute resolution by the Cadastral Commissions (CC) in 2006.[1409] The Center for Advanced Study found that the process of CC was overly complex, which gave rise to delay, upward-and-downward movement, and denial of complaints without appropriate reasons, and reluctance of dealing with a number of land disputes.[1410] Thus, the Center for Advanced Study suggested that land disputes should have been resolved by a specialized land court, but such a move would have required action at the national level.[1411]

Recently, the Cambodian government enacted new three court laws for governing judicial institutions on July 16, 2014.[1412] These new court laws were Law on Court Organization, Law on Status of Judges and Prosecutors, and Law on Organization and Functioning of Supreme Council of Magistracy.[1413] The 2014 Court Act divides lower court as specialized court, while upper courts as specialized chamber.[1414] This law establishes four types of specialized courts; namely, civil, criminal, commercial, and labor court.[1415]

The 2014 Court Act also suggests the establishment of an administrative court under the judicial system.[1416] Such a suggestion conforms to the authorization of the 1993 Constitution that confers exclusive jurisdiction to decide disputes to the judiciary in all cases, including administrative cases.[1417] No other

[1409] Adler et al., *Towards Institutional Justice? A Review of the Work of Cambodia's Cadastral Commission in Relation to Land Dispute Resolution.*
[1410] Ibid.
[1411] Ibid., xvii.
[1412] See the date of signature of these by the King. Law on Court Organization (2014); Law on Statute of Judges and Prosecutors (2014); Law on Organization and Functioning of Supreme Council of Magistracy (2014).
[1413] Law on Court Organization; Law on Statute of Judges and Prosecutors; Law on Organization and Functioning of Supreme Council of Magistracy.
[1414] See: Law on Court Organization.
[1415] Ibid., arts. 5 and 14.
[1416] Ibid., arts. 4 and 87.
[1417] Constitution of Kingdom of Cambodia, art. 128 (1993).

institutions have judicial power.[1418] Thus, the government intends to establish an administrative court under the judicial branch as the current policy.

In short, if overlooking the past experience, the mismatch of administrative, ADR, and property theories, and the current policy of the Cambodian government, imposition of a single expert institution under the judicial branch is preferred.

C. Thresholds of Institutional Responsibility in Cambodia

The practice of land takings and institutional responsibility impose a critical issue in post-war Cambodia. This section will sum up the institutional responsibility in eminent domain practice and institutional trust in post-war institutions. In short, institutional responsibility remains a challenge on three issues, which need to be addressed: (1) loophole of eminent domain practice, (2) lack of overarching deterrent ripple-effect sanction, and (3) loss of institutional trust.

1. Loophole of Eminent Domain Practice

The power of eminent domain is a constitutional power. Therefore, it is constitutional level and theory. The purpose of the constitutional eminent domain is to protect life, liberty, or property of private person from arbitrary taking or government intrusion over private property.[1419] Therefore, eminent domain is interpreted to protect private rights rather than allowing government take.[1420]

In this sense, the constitutional eminent domain bans the governmental taking of property when is does not conform to constitutional requirements. The Constitution requires the government to be able to exercise taking of private property only if it serves "public use," while affected property owners are provided

[1418] Ibid., art. 130.
[1419] Scheiber, "Property Law, Expropriation, and Resource Allocation by Government," 235; Walston, "Constitution and Property," 381; Cavazos, "Beware of Wooden Nickels," 688.
[1420] Fawcett, "Eminent Domain, the Police Power, and the Fifth Amendment," 495; Block, "Casenote: Takings Claims," 74; Hart, "Land Use Law in the Early Republic and the Original Meaning of the Takings Clause," 1100.

with "due process of law" and "just compensation" in proportion to the loss of property.[1421] Such requirements are to prevent the government from the taking of private property in arbitrary manner and rent-seeking.[1422]

Land takings for development in Cambodia, we can say, is aimed at economic. This is a questionable foundation for eminent domain proceedings under the Constitution. Furthermore, even though the constitution and law require to deal with compensation first before forced removal of landowners; in practice, the authority exercises a forced eviction and relocation of landowner before the dispute is not resolved. Such an exercise violates the human rights protection under the 1993 Constitution. As a result, current institutions are weak to protect the constitutional rights to life, liberty, and property in Cambodia. Therefore, Cambodia needs an independent institution for protecting the equal treatment and constitutional eminent domain between parties concerned.

In short, Cambodia has arguably not exercised eminent domain power in compliance with the constitutional requirements. This issue would be clarified under a single judicial institution charged with resolution of these disputes.

2. Lack of Overarching Deterrent Ripple-effect Sanction

The current redress institutions face a critical challenge over their implementing rules; that is the overarching deterrent ripple-effects. The current redress mechanisms have not implemented overarching deterrent ripple-effect punishment over land disputes caused by land grabbing, competing claims, and taking for development. Punishment is a crucial element for ending and preventing land disputes. The dispute will not end when the punishment is loosely applied.

Endless land disputes arise in Cambodia due to the lack of overarching deterrent ripple-effect punishment of offenders. The ADR institutions resolve land disputes by conciliation as a main means for reaching an agreement. Therefore, punishment is not the target of these institutions. This technique is successful when the conciliators mediate small land disputes between ordinary citizens. However, when

[1421] Nadler and Diamond, "Eminent Domain and the Psychology of Property Rights," 716; Jr, "Note: To Compensate or Not to Compensate," 203; Berger, "Public Use, Substantive Due Process and Takings: An Integration," 844.
[1422] Scheiber, "Property Law, Expropriation, and Resource Allocation by Government," 235; Walston, "Constitution and Property," 381; Cavazos, "Beware of Wooden Nickels," 688.

disputes between ordinary citizens and the rich, powerful, soldiers, or the state itself stay chronic. If it conciliates, it ends in political compromise without sanction or punishment.[1423]

Criminal charges, imprisonment, and social consequences may decrease if judge reviews and resolves land disputes prior to erupting into clashes and violence. If a judge investigates the cause of disputes, he or she will see who the offenders are. Thus, the punishment should be applied to those offenders. Therefore, the judiciary can avert the allegation of miscarriage of justice.

In short, the ADR institutions lack a fundamental element of overarching deterrent ripple-effect punishment for preventing the prevalence of land disputes. Between the ADR and judicial institutions, the court has applied fairly punishment, despite the allegation of mischarge of justice. Implementation of punishment through judicial performance is the right way to ending land grabbing in Cambodia.

3. Institutional Trust

The third threshold issue of Cambodian practice of land takings for development is institutional trust. Currently, affected citizens do not trust in the existing redress institutions. They stop seeking resolution through the current resolution mechanisms, but seek political intervention.

Among established redress institutions in post-war Cambodia, only the Labor Arbitration Council (LAC) still attracts confidence from the public. The trust in the LAC is attributed to methods of selection and institutional responsibility of this unique institution. Arbitrators are under selection of parties. This results in independent resolvers and diversity of decision. The LAC has high responsibility to be able to arbitrate disputes within a compulsory 15-dy mandate. Therefore, the LAC is viewed as a speedy, efficient, and effective redress institution in comparison with the court and other ADR institutions in post-war Cambodia.

Learning the two different lenses of institutional trust in post-war Cambodian institutions shows that institutional trust is based on the professional diversity, method of selection, and mandatory responsibility. If comparing to the loss of institutional trust in other institution, the cause and effect are crystallized.

[1423] Tom Clements et al., "Payments for Biodiversity Conservation in the Context of Weak Institutions: Comparison of Three Programs from Cambodia," *Ecological Economics* 69, no. 6 (April 1, 2010): 1284.

The cause and effect of trust loss in land dispute resolution has institutional responsibility as primary reason. Affected citizens will trust the institutions if they bear responsibility and resolve land disputes effectively without conflict of interest. Institutional trust is undermined by political intervention for resolving land disputes rather than seeking resolution through proper legal channels.

In short, institutional trust rests on professional diversity, method of selection, and mandatory responsibility in the Cambodian context. Therefore, institutional reform to achieve these is a right direction to restoring public trust.

D. Proposal of Single Institution under Judicial Branch

The threshold issues of the current institutional responsibility and eminent domain practice show points of improvements and breaking through the dilemma of institutional imposition. The current institutions crystallize the lack of judicial review over constitutionality of takings and overarching deterrent ripple-effect punishment, which are the central milestone for preventing land disputes.

Learning from the comparison of American and Japanese redress mechanisms, and Cambodian past failure, the Dissertation concludes that judicial redress has more chance for protecting affected citizens from arbitrary takings. Therefore, this Dissertation proposes that a single expert institution be under the judicial branch. Such an imposition makes this institution become judicial institution, which is hereinafter called a "specialized court."

In short, imposition of a single expert institution under the judicial branch to becoming a "specialized court" will make Cambodia achieve a uniform practice by judiciary.

1. Feature of Specialized Court

A prospective specialized court would have two parts, namely, a specialized court and court-annexed mediation. A specialized court rests in the existing judicial structure, without a new establishment of a separate courthouse. Such a proposal is in line with the current Cambodian government policy on legal and judicial reform.

The Cambodian government passed the Law on Court Organization in 2014 (hereinafter called "2014

Court Act") to transform Cambodian the existing courts to be specialized courts.[1424] Under the 2014 Court Act, four types of specialized courts – civil, criminal, commercial, and labor – will be arranged first, while other specialized courts will be established upon necessity.[1425]

The 2014 Court Act also suggests the establishment of an administrative court under the judicial system.[1426] However, pending establishment of an administrative court, the civil chamber will bear responsibility for dealing with administrative disputes.[1427] Therefore, the Dissertation proposal will be a prospective administrative court in Cambodia in the future.

Court-annexed mediation is a special conciliation assisting body attached to the specialized court. The court-annexed mediation is also not a newly established institution. Instead, the court-annexed mediation is a combination of the current existing administrative ADR institutions, but with a delegation of power to mediate and make decision.

Such treatment would recognize fact that the current administrative ADR institutions succeeds in conciliating small land disputes between ordinary citizens. Thus, the Dissertation maintains a level of the current administrative ADR institutions at the territorial administration. However, the imposition of this court-annexed mediation at the territorial administration is also a challenge in this Dissertation proposal.

In order to avoid too many institutions and spending a lot of money and time, the logic of retaining one-level body as the court-annexed mediation rests on the review of the current territorial administration in Cambodia. The current territorial administration divides into capital, province/municipality, district/khan, commune/*sangkat*, and village. Nowadays, Cambodia has 1 capital, 24 provinces, 26 municipalities, 159 districts, 12 *khan*s, 1,406 communes, 227 *sangkat*s, and 14,139 villages.

The feasibility of court-annexed mediation will be proper to locate at the district/khan level on the grounds of three reasons. Currently, the court locates at the capital/provincial level. The next level is the municipality/district/*khan*. The municipality is the upper level of district in provincial administration. *Khan* is the lower level of the capital administration. If the court locates at the capital/provincial level, the court-

[1424] Law on Court Organization (2014).
[1425] Ibid., arts. 5 and 14.
[1426] Ibid., arts. 4 and 87.
[1427] Ibid., art. 87.

annexed mediation should locate at the district/*khan* level. The following table shows the order of the territorial administration in Cambodia.

Figure 35: The order of the territorial administration in Cambodia

<table>
<tr><td colspan="3">Territorial Administration</td></tr>
<tr><td>Capital</td><td colspan="2">Province</td></tr>
<tr><td>Khan</td><td>Municipality</td><td>District</td></tr>
<tr><td colspan="2">Sangkat</td><td>Commune</td></tr>
<tr><td colspan="3">Village</td></tr>
</table>

Source: Author

The number of district/*khan* is appropriate if compared with the number of commune/*sangkat*. Currently, the district/*khan* has 171 in total. This number, if compares to lower territorial administration, is appropriate, which cannot lead to surplus numbers of institutions and excessive costs to the national treasury.

Furthermore, Cambodia has the existing overlapping institutions at the district/*khan* level. Currently, the District/*Khan* CC and the District/*Khan Maison de la Justice* lie at the district/khan level. Both can be combined to form the court-annexed mediation at this level. If the court-annexed mediation locates at the district/khan level, it is, hereinafter, called the "district court-annexed mediation" in this Dissertation.

The power of the district-court annexed mediation is the same as that of the current National CC. In this sense, the power of the current National CC is delegated to the district-court annexed mediation in conciliating and deciding disputes. However, the district court-annexed mediation is no longer under the executive, but under the judicial branch.

2. Relation of Specialized Court and District Court-Annexed Mediation

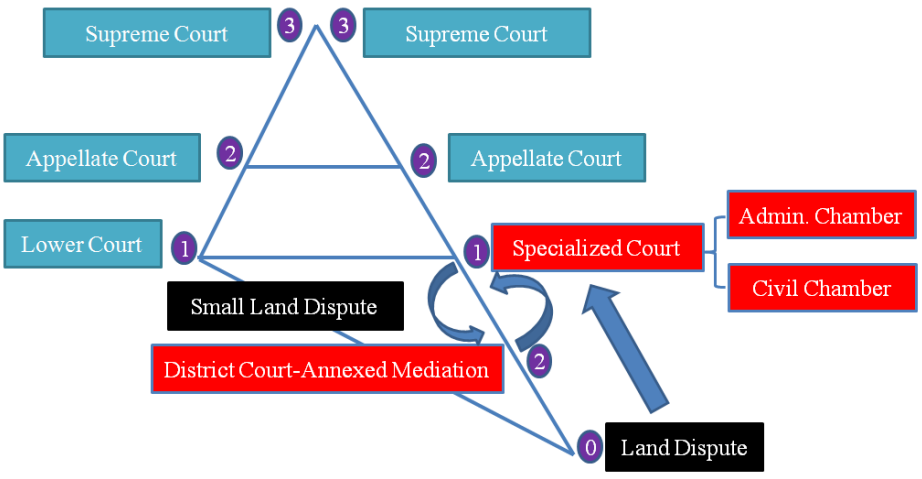
Specialized court and district court-annexed mediation have a close relation concerning institutional responsibility to resolve land disputes. In order to have a clear responsibility, the Dissertation provides power to the specialized court for accepting all complaints relevant to land disputes. Responsible judges will check any complaints, which can be mediated upon his or her discretion and send them to the district court-annexed mediation.

The district court-annexed mediation will bear responsibility for resolving the dispute within a compulsory one-year limitation. If any aggrieved party disagrees with the decision made by the district court-annexed mediation, the party can file a judicial review to the specialized court. The responsible judge will bear responsibility for resolving the dispute for the aggrieved party within another year limitation.[1428]

Taking dispute is a special dispute relevant to administrative and civil disputes. Therefore, this Dissertation proposes a specialized court with two chambers – administrative and civil depending on the type of complaints. If a complaint is made against the constitutionality of takings, administrative decision and action, or violation of due process of law, the administrative chamber, consisting of administrative judges who are specialized in administrative and constitutional law, will be responsible for addressing it.

If a complaint is made over ownership or compensation issue, the civil chamber, composed of judges who are specialized in civil law, property law, or financial experts, will be responsible for resolving it. The following figure shows the relation of the specialized court and district court-annexed mediation under the new proposed system.

Figure 36: The new proposal system in administrative territorial extension



Source: Author

(Note: Admin. = Administrative)

[1428] The author will clarify about this process in the next section of this Chapter.

In short, under the new proposal system, Cambodia will have a single expert institution; namely, the specialized court, responsible for resolving land disputes in Cambodia. The district court-annexed mediation will be attached to the specialized land, as the assisting body, for mediating small land disputes, which is subject to judicial review. In a nutshell, Cambodia will have a clean administrative system under this Dissertation proposal.

3. Procedure of Specialized Court for Restoring Trust

Specialized court becomes a crystallizing mechanism for protecting due process of law between expropriating authority, or developer, and affected citizens and for restoring public trust in Cambodian state institutions. Restoration of public trust is a primary mission for the prospective specialized court. As noted above, institutional trust rests on professional diversity, method of selection, and mandatory responsibility in the Cambodian context. Having seen such significance, this Dissertation proposes new administrative steps and special hearing for resolving land disputes caused by competing claims in Cambodia.

a). New Administrative Steps in Land Dispute Resolution

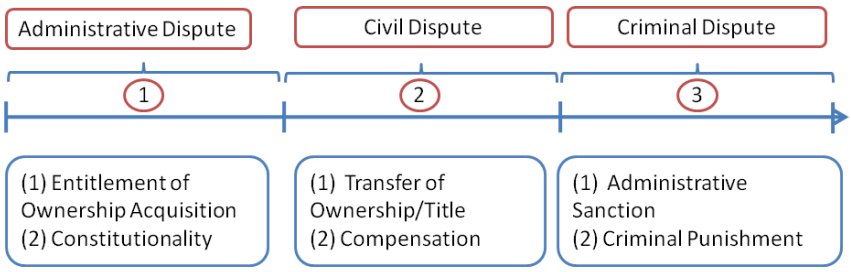
Current redress mechanisms deal with land takings only with civil and criminal disputes, excluding administrative disputes. Criminal charges are filed after the landowners protest against authority or developers, who proceed with the development project. Thus, the Cambodian court becomes embroiled in violation of human rights and miscarriage of justice. In order to avoid this, this Dissertation proposes new three administrative steps for dealing with competing claim disputes in Cambodia.

In competing claim disputes, ownership over land is unclear or caused by overlapping/double title in doubt. Therefore, the specialized court will consider the entitlement right of land ownership acquisition, constitutionality of taking action and decision, and legitimacy of title issuance first. The specialized court must determine who legitimate owners over competing claims are. The specialized court will interpret the eligibility of land ownership acquisition under existing laws among stakeholders.

When the legitimate owner is clearly determined, the specialized court will dealing with ownership transfer and compensation in case taking occurs. The specialized court will decide and determine the amount of compensation for affected (legitimate) owners and transfer of title between parties.

Competing claim disputes involve many parties and documents of whom, a number of claimers can be unreal owner and hold forged documents or titles. Therefore, the specialized court will check and decide criminal charges and administrative sanction against whom violates or infringes legitimate owners over land. The following figure shows the new administrative steps for dealing with competing claim disputes in Cambodia.

Figure 37: The new administrative steps for dealing with competing claims over land takings



Source: Author

In short, the new three administrative steps can provide opportunity to clarity entitlement right of ownership acquisition over competing claim disputes prior to dealing with criminal dispute. In a word, these steps will reduce and prevent criminal charges over land protesters.

b). Special Hearing Process of Specialized Court for Restoring Public Trust

Restoration of public trust in current justice system is a primary action for the prospective specialized court. If the prospective specialized court follows the same procedure as the current judicial procedure, the public trust may not be attracted. A major cause of trust loss in the current judicial system is attributed to the procedural delay and reduced accountability to deal with land disputes, which results in backlogs of cases.

In order to address these issues, the Dissertation proposes an innovative means for legal and judicial reform, which is commissioned under the proposed specialized court. The new methods are: (1) public participatory judicial process and (2) compulsory procedural hearing.

i). Public Participatory Judicial Process

Likewise, learning from the Cambodian perspective of institutional trust in the Labor Arbitration Council (LAC) shows an exemplar of institutional trust in post-war Cambodia. Trust in the LAC is, as noted above, is attributed to the professional diversity, method of selection, and mandatory responsibility in the Cambodian context. In these, the method of arbitrators under selection of parties is an exception that shows the public participation in the resolution process. This method makes affected parties trust in resolvers they choose. As a result, the LAC can retain trust from parties.

The public participatory judicial process can be made either by two alternative rules; namely, judge under selection or judge under exclusionary rule. In order to apply these rules, this Dissertation suggests a hearing of competing claim disputes be resolved by a panel of three judges. Therefore, these rules can be applicable under the members.

The first alternative rule is that judges are under the equal selection of parties. Under this membership, one judge is designated, while two others are equally selected by parties. The second alternative rule is that judges are under the exclusionary rule of parties. Parties can agree to exclude any judges in a hearing panel.

In order to have multiple choices and transparency of judge selection process, the number of judges at a court must have more than the selected would-be panel. Furthermore, all background, knowledge, and work performance of judges must be shown in selection paper or public display board for parties to have confidence in selection.

In short, the public participatory judicial process, through alternative method by judge under selection or exclusionary rule, will provide more opportunity for affected citizens to choose any resolvers who they trust. The public participatory judicial process in hearing process of competing claim disputes is appropriate in the neo-patrimonial administration in order to attract public trust in the judicial system.

ii). Compulsory Procedural Hearing

The second feature of the prospective specialized court is the compulsory procedural hearing. The current court system tends to delay and screen out type of cases upon judicial discretion. This results in procedural delay and backlogs of case, which are a cause of trust loss. Rehabilitation of public trust in court and bring people to use court is primary task of the prospective specialized court. To achieve this end, the Dissertation proposes a compulsory procedural hearing for the mission of the specialized court.

Learning from the Cambodian context in the Labor Arbitration Council (LAC) clearly shows the necessity of mandatory procedural hearing to make resolvers bear responsibility. The LAC has a mandatory obligation to resolve collective labor disputes within 15-day limitation, which is a short time that almost no system can determine as such. However, the LAC is responsible for resolving and concluding most disputes within this fixed period. This implies that fixed period of time makes resolvers bear their responsibility. Therefore, the method of resolvers under selection is effective in the Cambodian society.

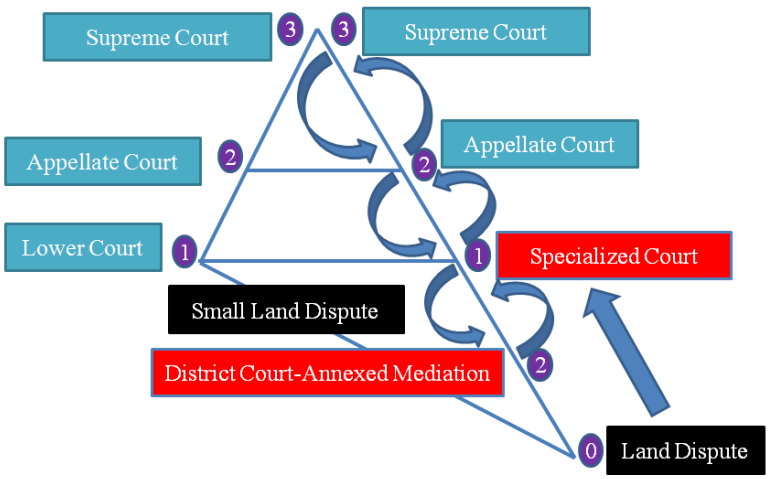
Time limitation for resolution is appropriate for a system of public trust loss, reduced responsibility, and competing claim disputes. Competing claim dispute caused by land grabbing and land taking for development is a dispute, in most cases property is under siege of economic development. Property owners cannot develop their property and obtain interest. Property owners lose economic interest of their property during taking dispute. If there is no a speedy resolution over taking dispute, affected property owners will strive to protest against the taking in order to release the economic embargo and take their property back for development, as can be seen the case in Cambodia.

Having seen such significance, this Dissertation proposes a compulsory procedural hearing of competing claim disputes within a mandatory one-year limitation. In this regard, upward and downward referral of complaints between each forum is bound by 6 months. If the case is ignored or kept prolonged without process within 6 months, parties can challenge the ignorance or prolongation to the upper court for reviewing the performance of the lower court.

The appellate court will review the affected citizens' request of administrative review over ignorance or negligence of the lower court. The appellate court, if the request is appropriate, will put the obligatory

mandate for the lower court to resolve the case within another compulsory 6 months. Such a procedure will protect and make affected citizens attain procedural justice and reduce social tensions through on-street protest. The following figure shows the compulsory procedural hearing under the newly proposed system.

Figure 38: The compulsory procedural hearing under prospective specialized court



Source: Author

In short, the compulsory procedural hearing will make resolvers bear responsibility to fulfill their obligation within the allocated time. This method will achieve the procedural justice and reduce on-street protests. Affected citizens could access to justice on equal arms of protection by law. Briefly, the method of public participatory judicial process and compulsory procedural hearing are regulated under this prospective specialized court based on theories of public trust, economic interest protection, and procedural justice, which is necessary and appropriate for the neo-patrimonial system and protecting affected citizens' rights.

F. Expected Achievement of Newly Proposed Mechanism

The newly proposed mechanism will be expected to achieve a number of reforms to the Cambodian legal and judicial system. This section will illustrate the expected achievements under this new proposal.

1. Clear Administrative System

The first achievement is expected that Cambodia will have a clear complete administrative system for this category of cases. Under the current system, Cambodia does not have a clear function and responsibility among local authority, expropriating authority, and dispute resolution authority. The responsible authority plays the three roles (prevention, protection, and resolution) in the same body. The mixture of these roles impedes the efficient and effective resolution of land disputes.

Under the newly proposed system, Cambodia will have the three distinguished roles among local authority, expropriating authority, and specialized court. Local and expropriating authorities are executing authorities under the executive branch to prevent land disputes, while the prospective specialized court will bear responsibility to resolve land disputes under the judicial branch. Such a division, institutional structures and roles are clearly distinguished, and conflict of interest and hierarchical constraints will no longer exist in the proposed mechanism.

Local authority is the territorial authority staying at their localities to prevent and protect land disputes. Cadastral official and administration commission responsible for registration will lie within the territorial administration. Governors of territorial administration have a right to declare and determine an area for registration or state land. The cadastral officials or administration commission can register land under the instruction from the governors. However, if there is a dispute, the cadastral officials or the administration commission can make an initial conciliation. However, if the dispute is not settled, the dispute will be forwarded directly to the proposed specialized court for decision.

Currently, there is not a permanent expropriating authority responsible for land takings for development throughout the country. The government appoints an ad-hoc commission as expropriating authority that is composed of the national to local authorities for development project. Ad-hoc commission is responsible for all issues relevant to development project, including compensation and resolution of complaints.

Under the new proposal, the expropriating authority, whether permanent or not, can exercise taking of private land for development project, but does not have exclusive right to decide any grievance from affected citizens. The main role of the expropriating is to assess social and environmental impact, evaluate affected

property, and negotiate with affected citizens on willing buyer and sellers on market price without duress. However, if there is a disagreement on compensation or dispute over ownership of a land, the ad-hoc commission can attempt to conciliate with affected citizens. If affected citizens still disagree or challenge the taking, the complaint will be forwarded to the specialized court for resolution.

Taking disputes consist of administrative and civil disputes. If a complaint is made against the administrative body such as decision of confiscatory order, constitutionality of takings, or violation of due process, the administrative chamber will be responsible for addressing them. However, if a complaint is made over ownership or compensation issue, the civil chamber will be liable for resolving it. Thus, the prospective specialized court is equipped with two ready specialized chambers for resolving taking disputes.

In short, the proposed mechanism has a clear division of institutional functions and roles among local authority, expropriating authority, and redress mechanism, which is far from hierarchical constraints conflict of interest as the previous institutions. Under this new proposal, Cambodian justice system will have a complete review function of constitutional requirements; namely, constitutional review and judicial review.

2. Independence of Judges

The second expected achievement is the independence of judges or resolvers under the newly proposed mechanism. Under the current system, resolvers or judges are constrained by the neo-patrimonial administration, even though their independence is provided by law, but they cannot perform independently. Hierarchical constraints make judges indecisive; especially, in a number of sensitive cases.

Under the new mechanism, the method of judges under selection or exclusionary rule will help strengthen the independence of judges even though they are appointed by the government. Judges will be under the indirect pressure from the public to fulfill their obligation. The method of judge under selection or exclusion by parties will make parties; especially, affected citizens will select only capable and reputable judges and exclude judges who are thought to be incapable and biased to be a hearing panel for deciding their case.

A panel of three judges will make a decision-making diverse. Judges will make decision by a majority of votes. A dissenting judge will be allowed to write down his or her opinion the judgment. This method will help strengthen judges' knowledge and performance. The public will have more chance to see the performance and knowledge of judge through judgment. People will have more chance to make decision in choosing a good judge for later cases. Unused judges will endeavor to enhance their performance and update their knowledge in order to make people choose them for a hearing forum.

In short, the public participatory judicial process, through the method of judges under selection or exclusionary rule, will enhance the knowledge and performance of judges in fulfilling the legal obligation. It is expected to make judges more confidence in fulfilling their legal obligation and achieve judicial independence in the future. This method is considered as a "tender reform" of the current legal and judicial system, which is established from scratch and the neo-patrimonial administration.

3. Interpretation of Law and Reasoning

The third expected achievement is the institutional interpretation of law and reasoning. The current Cambodian judiciary is called the "applied law system." Judges make an applying-law-to-fact judgment. Therefore, the judgment is short, lacking of appropriate interpretation of law and reasoning. As a result, this makes the Cambodian judiciary weak and unable to adhere to the jurisprudence or case law in its legal system.

Under the newly proposed system, the prospective specialized court is an institution that interprets law and reasoning before applying law to fact of the case. Judges will conduct legal interpretation and reasoning prior to making a judgment. Therefore, under the new mechanism, judges will have more chance to conduct judicial review over administrative decision and action, interpretation of legal clauses of competing claim disputes, submitted evidence, as well as fieldwork to check the actual physical land occupation before making decision. Such methods will have more opportunity to achieve the due process of law, the clarification of ownership claim, and just compensation.

In short, the new proposed specialized court will establish a framework of legal interpretation and reasoning prior to decision-making. The future Cambodian judiciary will adhere to the jurisprudence or case law, which can help promote the transparency of judge's performance and decision-making.

4. Overarching Deterrent and Ripple-Effect Function

The fourth expected achievement is the overarching deterrent and ripple-effect function of the prospective specialized court. Current land dispute resolution institutions lack overarching deterrent and ripple effect punishment on property infringers or wrong doers. This is a crucial principle for ending and preventing new land disputes in Cambodia. The proposed specialized court will be to fulfill this gap. The specialized court will treat parties equally and punish offenders. The prospective specialized court will be expected to serve as a model responsible institution for a ripple-effect decision and sanction for other courts and state institutions.

5. Public Trust

The fifth expected achievement under the new mechanism is the restoration of public trust in state institutions, social redress mechanisms, and averting on-street protests. This is the core mission of the prospective specialized as proposed by this Dissertation. The institutional trust will be achieved by institutional performance.

This Dissertation proposes various methods to improve the institutional performance such as the public participatory judicial process, through which judges are under selection or exclusionary rule, compulsory procedural hearing, and judicial review. These methods will lead the prospective specialized court to achieving a good performance, which results in independence of resolvers and overarching deterrent application of punishment. These will attract and restore the public trust in the whole justice system.

In sum, the new mechanism brings the Cambodian court system close to citizens and under the public view. This will enhance and restore public trust in court in the future.

6. Strengthening Rule of Law and Democracy

The sixth expected achievement of the proposed specialized court is the permanent cornerstone of the constitutional authorization of power separation. The 1993 Constitution is equipped with the principle of power separation, and checks and balances, which are core of the rule of law and democracy in post-war Cambodia.

However, these principles are deficient in Cambodia. Under the new mechanism, the principle of checks and balances will be applied by judicial review over administration. Therefore, it will be expected to help strengthen the constitutional principle of power separation, and checks and balances. If this mission is achieved, the real rule of law and democracy will exist in Cambodia.

In a word, the mission of the prospective specialized court will help strengthen the rule of law, checks and balances, and democracy in Cambodia.

G. Chapter Summary

In summary, the newly proposed mechanism has a clear division of institutional functions and roles among local authority, expropriating authority, and redress mechanism, which is far from conflict of interest and hierarchical constraints as the previous institutions.

The prospective specialized court is the new mechanism consisting of two expert chambers – civil and administrative, through jurisdiction transferred from the administrative ADR institutions, responsible for receiving and resolving complaints from land dispute-affected citizens. The prospective specialized court will have its assisting attached body called "district court-annexed mediation," which is combined from the existing ADR institutions, but it has a delegated power to conciliate and decide the dispute under the review of the specialized court.

Trust is a core of institutional reform. In order to have and restore public trust, such a mission this Dissertation proposes extraordinary methods to the 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. These methods are based on theories of public trust, economic interest protection, and procedural justice for affected citizens in land taking disputes. The prospective specialized court, through its mission, will be expected to enhance and restore public trust in the whole justice system.

The newly proposed mechanism will make Cambodia have a clear complete set of administrative system. Cambodia will achieve a clear distinction of duties and roles among local authorities, expropriating authorities, and the specialized court. Cambodian justice system will have a complete review function of constitutional requirements; namely, the constitutional review and judicial review in its legal and judicial system. Thus, under the newly proposed mechanism, the specialized court is commissioned as an institutional protégé of due process of law between the state and its citizens. In brief, the new mechanism will activate judicial review and proposes a tender reform to legal and judicial reform of the neo-patrimonial administration in post-war Cambodia.

Conclusion

A. Application and Implications of This Study

This research studies the theoretical relations of property law, eminent domain law, due process of law, and institutional design and responsibility, and public trust over the taking powers. This study mainly focuses on the exercise and experience of the taking of unregistered land ownership and institutional responsibility in Cambodia, with a brief comparative study with American and Japanese institutional arrangements and responsibilities for similar experience. Such a comparison is to discover the concept and policy that can be learned to improve and redesign Cambodian redress institutions for efficiency and effectiveness.

The comparative study shows a close relation of property law, eminent domain law, due process of law, and institutional design and responsibility, and public trust. Takings are the boundary of public law and private law. Public law consists of constitutional law, which is the baseline norm for authorizing the taking power, and administrative law, which governs the due process of taking – taking decision and action. Private law consists of property law and its economic interest, such as land, house, construction, ownership, property interest, right to property development, loss and damage of property, and compensation. In overall, public law governs the authorization of a taking over private property, while private law demands the balance of public interest and compensation of loss and damage incurred by such a taking. These laws become a fundamental subject for consideration and decision-making over a taking dispute.

In theory, eminent domain power is a constitutional level. The constitution constrains the exercise of taking powers over private rights by setting out three requirements – public use, due process, and just compensation – for the government to follow prior to exercising a taking of private rights. The three requirements are called the "constitutional three pillars" in this Dissertation. The constitutional three pillars are to protect private rights from arbitrary takings and rent-seeking. Therefore, the constitutional eminent domain law is seen to protect private rights from arbitrary takings rather than authorizing government to exercise such a power.

Property rights are subject to the target of taking for either private or public use. In property theory, property can have a dual, positive and negative, side-effects in the society. In productive result, property can

provide development and interest to both the private and public. In counter-productive result, property can advantage one side and disadvantage the other in case of less protection from the state or responsible institutions. The share of development crops from property rights is unequal among stakeholders; especially, the poor will benefit less from the development. Then, the haphazard of property rights will exist in the society under the form of land disputes and arbitrary land takings resulting a forced eviction and relocation of local residents.

The exercise of taking power, under the authorization of the constitutional eminent domain law, must depend on responsible institution to maintain the due process of law between the state or authorized developer and the citizens. Otherwise, on-street protest will exist, and people will lose trust in the redress mechanism owing to the conflict of interest, as in the case of Cambodia.

In eminent domain theory, the constitutional authorized institution is the court that has jurisdiction to decide taking disputes between the state and citizens. The court will act as the intermediary to protect constitutional requirements, equal protection clause, assess due process of law, and evaluate just compensation. In a word, the court is a protégé of the constitutional three pillars.

The comparative study of America, Japan, and Cambodia shows a remarkable aspect of eminent domain practice; institutional responsibility and redress mechanism, and social consequences. America is the judicial redress, while Japan and Cambodia is the administrative redress. America exercises taking powers based on the constitutional context, while Japan and Cambodia exercise this in reliance on legislations, granting this power to administrative agency through initial disposition prior to proceeding with last resort to court for review.

Institutional arrangement under judicial and administrative redress provides noteworthy difference of institutional and procedural protection. Judicial redress is rigid to interpret the constitutional three pillars for authorizing a governmental taking. In this sense, court uses judicial review to make government or authorized body comply with the constitutional three pillars. Therefore, under the judicial redress, court becomes a protégé of constitutional rights (right to life, liberty, and property) against arbitrary takings.

Arrangement of administrative redress under the executive characterizes two noticeable different results in Japan and Cambodia. If administrative redress is arranged in a single forum; and administrative agency follows procedural law; and no conflict of interest exists, negotiation can stand equal between expropriating authority or authorized developer and affected citizens. Therefore, market/just compensation can be achieved. As a result, a few disputes occur, as the case in Japan.

If administrative redress is arranged in multiple institutions; administrative agency fails to follow procedural law; and conflict of interest exists, equal negotiation will not exist. Thus, market/just compensation cannot be achieved and equal treatment by redress mechanism is guaranteed, the self-protection by *ultra-vires* or direct collective action to protect property rights will exist, as the case in Cambodia. As a consequence, people lose trust in state institution, and seek solution through political intervention. Thus, institutionalization does not fit the constitutional theory of eminent domain, administrative law, and property law in Cambodia.

In overall comparative aspect, administrative redress faces a higher risk of conflict of interest and lack judicial review. For procedural protection under the eminent domain law, judicial redress provides institutional and procedural safeguards to affected citizens than the administrative redress. Thus, Cambodia is necessary to rearrange its redress mechanism in order to restore public trust, as this Dissertation proposal is preferred.

B. Suggestion for Further Research

This study provides an overall blueprint of legal and judicial reform in Cambodia. The purpose of this Dissertation is to pave a way for a broad discussion over the legal and judicial reform in compliance with the Khmer administrative regime and culture. Post-war Cambodian legal and judicial system is weak and slow. Judicial system has set at place for more than three decades, but it cannot enhance public trust. In overall, the post-war court system lacks judicial review.

The 1993 Constitution provides for the constitutional and judicial review. The constitutional review proceeds with a limited course by the Constitutional Council, while the judicial review stays silent. This Dissertation proposes the judicial review in the specialized court; especially, the administrative chamber, which will become a prospective administrative court, under the current Cambodian government policy in the

near future. Thus, Cambodia will achieve the judicial review as required by the 1993 Constitution under this Dissertation proposal.

However, the constitutional review is made by the current Constitutional Council, which is a standalone ombudsman, deems separated and cannot strengthen judicial system. Thus, in order to strengthen post-war democracy, checks and balances, and rule of law in Cambodia, the transformation and integration of the standalone Constitutional Council to be the constitutional court under the judicial system is necessary for future Cambodian legal system. Then, Cambodia will achieve a balanced principle of the constitutional power separation.

This suggestion leaves the Cambodian next and next generations to think and make Cambodian legal and judicial system stronger and stronger. Institutional reform takes time. Suggestion for reform with innovative or creative idea is a pre-requisite for a broad discussion and next practical work.

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