

An Alternative Way of Harmonizing Ownership with Customary Rights: Japanese Approach to Cambodian Land Reform

KANEKO Yuka*

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I. Introduction

The Cambodian Land Law adapted in 2001 is only one of numerous similar products of land-titling projects rigorously promoted worldwide by influential donor agencies such as the World Bank and the ADB (Asian Development Bank). However, the Cambodian case can still be worthwhile for review particularly because it involved a serious inter-donor conflict between these international agencies and the Japanese bilateral aid that had been assisting in the drafting of the Cambodian Civil Code. The essence of this inter-donor friction has often been understood as a conflict on the choice between different models for formal lawmaking, or “legal transplant,” and hence linked to the question of superiority among legal models.¹ However, the author is more inclined to view this friction in the context of comparative legal culture,² as a conflict between different approaches toward the integration of donor-oriented formal lawmaking and local informal norms.

Although the integration of customary rights into the formal law regime has been an attractive issue led by Hernando De Soto,³ it is only recently that the donor agencies have

* LL.D., Professor, Graduate School of International Cooperation Studies, Kobe University.

started to incorporate this aspect into their actual practice of law-related assistance.⁴ In contrast, Japan's legal assistance has been paying due respect to local customs since its initiation in the middle 1990s.⁵ Although Japan is often regarded as a typical "developmental state" led by bureaucrats' discretion and its legal assistance activities in Asia are explained as an attempt to export this interventionist interest,⁶ the basic nature of Japanese legal system has been, to the disappointment to many observers, in quite a liberalist vein since the Meiji modernization. Accordingly, Japan's legal assistance activities are basically not much different from typical Western models.⁷ In this sense, a study of Japan's legal assistance might add nothing new to the current academic debate over the choice between common law and civil law origins of the assistance, as far as the discussion is only directed to the choice of formal law models. However, we can still insist that there is one unique dimension to the Japanese legal experience, which is the serious endeavor of modification of the formal law regime towards harmonization with local informal norms, mostly through the accumulation of judicial precedents paving the way for ultimate legislative response.⁸

Actually, a respectful stance on local customs has been a long tradition of Japanese scholarly involvement in Asian lawmaking ever since the pre World War II colonial period, when Japanese government-sponsored prominent scholarships, head by Professor Izutaro Suehiro, devoted great energy to the "Kankou-Chousa" (survey of customary laws) in the Korean Peninsula and the northeastern part of China.⁹ Though such a careful stance of the colonialist government towards local customs might sound odd, it is considered to be a reflection of the pro-customary law stance of then emerging legal sociology in Japan. Since the inception of legal sociology, scholars directed continuous concerns toward the empirical evidence on social norms in the sense of *lebendes recht* (living law) of Eugen Ehrlich, as well as the role of judicial lawmaking, or Ehrlich's judicial norms, in operation between social norms and the formal law. At that time, Japanese scholars were facing enormous difficulties in their attempt to narrow the widening gap between the inflexible formal law regime controlled under imported conceptualism and the changing socioeconomic conditions,¹⁰ which reminds us of the current situation throughout Asia where the formal law regime is not only a far cry from social norms, but is a pastiche of transplanted Western models.

Japan is thus considered as a unique donor in Asia having had its own hard-learned lessons on the difficulty of legal transplants without informal law consideration.¹¹ This fact

leads us to become curious enough about what is happening in the forefront of legal reform projects where this Japanese careful attitude toward local customs meets the other donors' efforts of direct legal transplant. Since land law is a typical area where the likelihood of conflict between the donor-oriented formal law and the existing local customary orders is enormously increased,¹² it seems natural that the Japanese aid has experienced the most serious conflicts with the other donors in this very area. This article attempts to formulate a new approach to the land law problems with this focus on the inter-donor conflict with regard to the customary law treatment.

II. Land Law Reform and Development

A. Disregarded Customary Rights

Land law policies have historically fluctuated according to shifts in the development paradigms. It is definitely true that land policies in the colonial period centered around the overwhelming notion of the absolute freedom of ownership, which was not only transplanted from, but for colonial purpose, even exaggerated, the then prevailing jurisprudence of Western property law.¹³ It was therefore rather natural that the Asian and African countries, which gained their independence after the World War II, tended to promote socialist-style land concentration designed to overcome the absolute nature of the private ownership paradigm that had prevailed in the colonial period. Likewise, the defense of the private ownership regime through campaigning for land titling projects as a means of maximizing agricultural productivity was a natural counter-reaction on the part of capitalist donors.¹⁴ The disturbance and ultimate collapse of the socialist system triggered an even more intense campaign for private ownership among donors as the best way to encourage economic growth.¹⁵ The flourishing new institutional economics of the 1990s provided modified justifications for private ownership even beyond the original question of agricultural productivity, focusing instead on ownership as a necessary condition of economic growth.¹⁶

Despite this complicated drama of conflicting land reform policies, none of them had been provided from any point of view other than from respect formal law. The question of how the existing customary land order should be handled in formal lawmaking had been an almost disregarded context: both the socialist land concentration and agricultural revolutions often viewed local traditions as impediments to productivity.¹⁷ Capitalist donors used to emphasize the quickest transformation of traditional rights into formal ownerships

by means of land-titling project, often coupled with land redistribution policies, although in hindsight most of them have resulted in the dissolution of traditional rights and the ultimate concentration of land in the hands of absentee landowners.¹⁸ It is only recently that the treatment of customary land tenure in the process of formal land law reform has been a featured topic among donors, in response to growing concerns in mainstream development studies to modify the goal of economic development in harmony within the contexts of human development, poverty alleviation and peace-making.¹⁹

B. Different Approaches Toward De Soto's Question

The donors' strategies, however, often conflict each other. Recent projects of the World Bank group have taken the dualist approach of continuing the same ownership promotion through land-titling as before, while newly incorporating special protective programs for individual and collective customary land rights.²⁰ This dualist approach, however, does not purport to explicitly define the legal meaning of customary rights under the formal law regime. Rather, it attempts no more than a temporary suspension of a rigorous land-titling project without positively incorporating the informal norms into the formal ownership regime, and carries within it an implied outcome that the customary rights ultimately will be overtaken by the formal ownerships as a result of gradual penetration of the market mechanism into the customary world, leading to their ultimate extinguishment.²¹

On the other hand, the EU's land reform projects represent an opposing stance against the promotion of land-titling. They are more inclined to preserve the substance of customary land orders as well as their traditional implementation mechanisms.²² Although a possible outcome of such preservation policy could be increased friction with the formal law regime, it seems that the EU's projects are stimulating this dialectic friction that might ultimately produce a new land order beyond the present formal law regime.

Although both of these opposing stances of donors, at a first glance, seem to respond to De Soto's question of integrating the informal norms into the formal law regime, both are, actually, incapable of answering the question. De Soto's original question has to be properly understood as a call for the modification (namely, in his context, deregulation) of the formal law regime so as to incorporate informal laws, thereby activating the potentiality of informal sector. In contrast, the land-titling projects led by the World Bank and its affiliated new-liberalist donors are simply promoting their formal law model, while anticipating the

ultimate extinction of customary orders, with an assertion that such formal law model can best encourage the potentiality of the informal sector, though it is the most ironic that the very person who initiated the original question has turned to accept this twist of logic from the informal law promotion to the informal sector promotion.²³ On the other hand, the EU's preservation policy towards customary laws seems equally harmful in a different sense, since it could result in the same fate of ultimate suppression of informal norms by the market economy as expected in the World Bank, unless a strong initiative is taken in parallel so as to establish decent procedural channels (such as highly independent and creative courts) enabling active recognition of informal norms against the formal law regime.²⁴

Perhaps, a more plausible way of formal law modification to incorporate informal norms should start with an intentional rewriting of formal law at the hands of law-drafters who own the best knowledge of both formal law and informal norms. Japanese assistance to the Cambodian Civil Code can be understood as a trial to incubate such local legal elites.²⁵ However, since the 2001 Land Law came too early for the effect of this Japanese project to be seen, the relevant scholars had no other choice but to be directly involved in an inter-donor conflict with the international donors who promoted formal lawmaking based on their own model.

Table-1: Different Approaches of Donors to Land Law Policies

	World Bank/ ADB	EU	Japanese Assistance
Target of Land Reform	promotion of land transactions; maximized ownership	protection of living basis; peace building	balance between land transactions and protection of living basis
Features of Land Law	land-titling (Torrens System)	Preservation of Customary Rights	balance of ownership and usage rights
Treatment of Customary Rights	initial preservation + ultimate absorption into ownership regime	ADR for the preservation of customary norms	eased burden of proof for ownership; strengthening of usage rights against ownership

III. Cambodian 2001 Land Law

A. Private Ownership as Conditionality

The 2001 Land Law is a product of a tragic legal history of Cambodia. Modern

formal lawmaking in Cambodia was initiated during the French colonial period (~1863) with the introduction of the 1915 Civil and Civil Procedure Code (amended in 1920), which was suspended during the years of Khmer Rouge domination (~1975). Though a minor lawmaking effort occurred in the area of contract and property law under the 1989 Constitution in the late People's Republic of Cambodia (~1979), they were nothing more than tentative responses by administrative laws. After the collapse of socialist regime and the establishment of a constitutional monarchy under the 1993 Constitution, various legal transplant projects of Western donors flowed into Cambodia, but these have only resulted in creating the serious problem of systemic inconsistency.

Land law is one of such areas where a couple of donors concentrated their efforts to legal transplants. Upon the declaration of private ownership in the center of its full capitalist lineup of rights to freedom under the 1993 Constitution (art.44), the limited reach of private ownership on residential use in the former land law enacted in 1992 (art.19) was required to be superseded by a new land law giving full recognition to the right of private ownership. The ADB's conditionality to the ADB Agricultural Policy Reform Loan TA2591-CAM obliged lawmaking to this effect, together with the World Bank and the GTZ (Gesellschaft für Technische Zusammenarbeit), which brought about the 2001 Land Law.

Although the donors promoted a nationwide land titling project while emphasizing the policy slogan of "Land of Their Own," the outcome of the 2001 Land Law has resulted in an effort opposite to the intention of re-distributing state lands for poverty alleviation. One economic result has been a huge growth in national confiscations of farming lands accompanied by the granting of concessions for speculative purposes. As a result, land disputes involving farmers asserting unfair loss of their land rights have frequently arisen since the adoption of the Land Law.²⁶ One NGO survey reports that 80% of land disputes involve farmers' claims.²⁷ Interestingly, the majority of the counterparties to such land disputes were drawn from the public sector – i.e., government officers (39%) and the military (30%), while the private sector accounted for only 16%. It was also reported that the majority of land users were deprived of land possession by administrative compulsion (in 31% of all cases), or by physical means (in another 31%), while deprivations via legal assertion of registered title represented 10% of cases.

Why have there been these outcomes involving farmers and deprivation by authority? What aspects of the legal design in the land-titling project under the Land Law are

responsible for such tragic outcomes?

B. Hurdles for Ownership Registration

If the purpose of the Land Law reform were truly to promote the interests of landed farmers, the first question would be how their rights to land can be secured as private ownership. The 2001 Land Law (art. 29, art. 30, art. 38) lays down alternative requirements of either five years continuous, peaceful, dispute-free, and explicit possession of the land, or purchase with consideration, as the conditions for registration of land ownership. In other words, farmers who want to secure their rights to land have to prove either of the above conditions to the satisfaction of the land administration office.

However, several questions arise in this connection. First, the prescribed period of five years of possession of the land is curiously short. Land holding by Cambodian farmers is mostly long and continuous, especially in the case of those who engage in settled-type agriculture, which is said to amount to 80 % of the total number of farmers in the country.²⁸ Given this apparently settled-type agricultural structure, the meaning of setting a short-term completion of ownership upon merely five years' possession is obscure. Although the Land Law also provides for a special dispute resolution mechanism set within each land administration office for resolving complaints in cases when more than one party claims title to a piece of land (art. 47, art. 237), such dispute resolution seems to have increased the difficulties faced by long-term land users, since the burden of proof is on their side. While a large majority of local farmers lack documentary evidence as to their long-term land holdings,²⁹ it may not be difficult for absentee landlords or commercial land developers to establish that they came into possession of the land through a purchase with consideration.

C. Presumed State Land and Concessions

Despite active campaigns, the land-titling project is progressing very slowly and only 5 % of all national land is registered as of March 2008.³⁰ A serious negative side-effect of this delay is that farmers have been unfairly deprived of land by state offices and the military. This has been made possible by the current design of the 2001 Land Law (art. 12), that allows the automatic presumption that land belongs to the state unless ownership registration is completed as for private land. What has made the situation more complicated is the abuse of separated categories of "state public land" and "state private land," where

the latter have been considered to be transferable to the private sector (art.16) and could be misused. Such misuses seem to be made possible by the current legal design that allows great concentrations of land for concessions with a nominal limitation of up to 10,000 hectares (art. 59) for 99 years (art. 61). Furthermore, loose implementation of provisions for concession conditions, such as the obligation of personal use (art. 62), appears to have allowed improper land concessions to become a serious social problem.³¹

These facts reveal the problematic outcome of the land-titling project initiated by donors, which has resulted only in the provision of justifications for farmers being unfairly deprived of land in the name of presumed state land; a result far removed from the original campaign that aimed to redistribute land to landless farmers. Naturally, complaints have been growing among farmers who have been denied legal rights over their farmland, in many cases without even being paid compensation, to which the government is supposed to respond with an introduction of a decree to elaborate provisions on the compensation to be paid with respect to confiscations in the Land Law (art. 5). However, a partial approach of this type would not adequately settle this problem,³² since the majority of farmers are not legally entitled to receive compensation as land owners, given the continued presumption that unregistered land belongs to the state, together with the ongoing difficulty posed by the burden of proof required to obtain registration.

D. Controls over Collective Ownership

As for the protection of communal rights of indigenous groups, the 2001 Land Law introduced a dualist approach to provide separately for “collective ownership of the traditional community” to which provisions for general private ownership are not applied (Art. 23–28). Though Cambodia is known as a relatively homogeneous society, with the Khmer forming 96% of the population, it is said that 36 ethnic minorities preserve their respective customary orders in the mountainous area near the national borders with Vietnam and Laos.³³ The 2001 Land Law protects these minorities by providing for a special system of “redistribution of state land” for each of minority communities that have obtained formal registration as an indigenous community (art. 26). Once registered as such, minority communities are entitled to continuously apply each traditional communal order while independently being exempted from the application of formal law, except for minimum special policy areas such as environmental law (art. 26, 2nd paragraph). This separate policy

for communal orders, however, contains serious problems.

First, although this dualist approach may be seen as a result of the endeavor to preserve traditional communal orders, its true implication is found to be quite the opposite when several characteristics of the legal design are analyzed. First, what the Land Law considers as “state land” is the very land being used by the ethnic minorities. Accordingly, the true nature of “state land redistribution” is nothing other than the unilateral and comprehensive nationalization of traditional communal land and its partial release to only those communities that have been registered as indigenous communities. In other words, this is a legal construct to prohibit ethnic communities from enjoying the same land usage they enjoyed historically unless special registration as an indigenous community is obtained.

Second, this special registration as an indigenous community is designed in such a way that it is quite difficult to obtain. Those communities that apply for registration have to establish their ethnic, socio-cultural, and economic “unity” as an indigenous community, the existence of a traditional way of living, the existence of a collective-style agricultural method, and the actual continuation of this communal existence and land usage (art. 23). Due to the difficulty of proving all these requirements, it was reported that as of March 2008 only 160 ethnic groups out of 500 candidates have successfully obtained registration.³⁴ In this connection, the Cambodian government is preparing a new decree to elaborate detailed procedures for the registration of indigenous communities, on which criticisms have been heard to the effect that there is a covert intention of further increasing the hurdles that make registration difficult.³⁵

Third, even if registration as an indigenous community is successfully obtained, a fundamental limitation against continuation of the communal land orders has been built into the Land Law; that is, the freedom of an individual member of the community to separate his or her share in the “collective ownership” and to dispose of it (art. 27). This is possible with respect to the privately used parts of the communal land (art. 26), since such parts are considered to be originally “state private land” (art. 27, second paragraph). This separation is justified based on the modernist logic that an “individual to be released from the traditional bindings should be admitted according to the cultural and socio-economic progress of a society” (art. 27, first paragraph).

In summary, “collective ownership” is designed separately from the private ownership regime on the market side, but its recognition is only narrowly possible when stringent

conditions for communal registration are met, or otherwise cannot be claimed over state land. Its ultimate merger into the formal private ownership regime is envisioned as a matter of fact. It seems something far removed from what donors trumpeted as “land redistribution for poverty reduction.”

Also, what about the reaction of donors who designed this problematic mechanism? According to the following-up survey conducted by the GTZ, the stage of institution-building has been evaluated as sufficiently completed, leaving issues for implementation, including the introduction of a new decree detailing the procedures for bestowing legal status on each indigenous community.³⁶ At the same time, the report recognizes that serious delay in implementation often results in providing justification for governmental projects that have the effect of destroying indigenous land usage rather than protecting it.³⁷ Nevertheless, based on its own interpretation of the Land Law without much elaboration that the indigenous people can assert their traditional rights even before the completion of registration as an indigenous community, the same report disregards the need to modify the Land Law.

This represents a typical stance on the part of donors who, even when they recognize the gap between their models and the reality on the ground, never dare attempt to modify their original models in order to harmonize them with local conditions, but stick to the completion of their legal transplant, while insisting that local conditions should be modified in order to adapt to their models.

IV. Outcomes of Land-Titling

The outcomes of the donor-oriented land-titling project are increasing land disputes both for farming lands and communal lands in mountainous areas. In 2005, the Oxfam reported that 15% of land users nationwide had unfairly lost their land and 6% of the national population was involved in land disputes.³⁸

According to the author's interview in March 2008 with Mr. Yeng Virak, a local lawyer and the head of Community Legal Education Center (CLEC), which is a local NGO known for its activities in rescuing victims of abuse of law, the central issue among the drastically increasing number of land disputes in Cambodia is the sudden deprivation of farmland by administrative authorities claiming that such unregistered land is legally presumed to be state land unless otherwise proved. He testifies that such presumed state lands are,

irrespective of farmers' protests, often transferred to high ranked persons in the name of concessions.³⁹ His NGO has been supporting the farmers deprived of land in these cases primarily in bringing claims before both the criminal and the civil courts, since the NGO encourages every possible lawful channel in order to achieve true justice, and he expects the courts could have such possibilities.

Similarly, land disputes involving the communal lands in the area of minority groups are sharply increasing, without satisfactory means of resolution. It is reported that this type of dispute involving communal rights in forest lands amount to 13% of total land disputes.⁴⁰ These disputes are often against land owners who purchased the relevant land from government concessions created on the presumed "state private land" and have obtained land registration as private ownership. Although the claimants often wish to register as an indigenous community in order to assert their "collective ownership" against the risk of deprivation, the land administration often rejects their application, insisting that they have to wait for the delayed new governmental decree for communal registration to come into force. This delay merely provides more room for the abuse of concessions.⁴¹

Interestingly, in the search for justice, according to the surveys of activist NGOs,⁴² Cambodian people show a strong tendency to bring their land disputes to the adjacent local governments (87.9% to village, commune and district authorities; 49.7% to provincial halls), while they seldom rely on the newly established administrative ADR under the Land Law known as "land cadastral commissions" (12.1% to district, province and national levels). This phenomenon could be interpreted to mean that the local people have a strong preference for the forum where they can expect local norms to be applied, rather than for the forum where formal law's norms under the Land Law regime would be unilaterally applied. Also interesting is the fact that the local people show relatively high reliance on the courts (27.2% to provincial courts; 6.4% to appeal courts; 3.5% to the Supreme Court) if compared to their less trust on the land cadastral ADR. This implies that the local people expect that the court may bring them real justice beyond the literal wording given in the formal law.

The formal courts, however, have not been providing solutions for this crucial norm-conflicting situation. In fact, 82.1% of those who answered a NGO survey confess that their disputes are prolonged without proper solution.⁴³ As of March 2008, among the typical cases mentioned in the author's interview with Mr. Yeng Virak at the CLEC, including

the abovementioned case in Koh Kong Province, and another typical case in Rattanak Kiri Province in which the government has declared a concession over more than 20 hectares of land traditionally belonging to indigenous communities, as well as another case involving 15 hectares of indigenous community area, the aggrieved parties had been involved in litigation for more than two years without any progress because of the extremely slow pace of the court procedures. These surveys and cases imply the limitation of existing dispute resolution forums especially in the critical cases involving norm-conflicts between the formal land law and the social justice. The courts cannot respond to the expectation of local people, probably because of the strict formalistic style of application of law among judges who have been trained in the French style of jurisprudence and hence are reluctant about expansive legal interpretations,⁴⁴ although, in fact, the 2001 Land Law includes many points valuable for legal interpretation.⁴⁵

If the judges at formal courts continue to be hesitant to use grounds found in the Land Law to achieve justice in crucial cases, there must be some other quasi formal forums to supplement this task. The NGOs are observed to have now shifted more toward a direct involvement in dispute resolutions as mediators by themselves,⁴⁶ together with the endeavors of educating local people with a view to preventing unfair deprivation of land instead of wasting their effort on *ex post facto* measures. Such direct involvement by NGOs into disputes resolutions must call for further studies, especially because these NGOs are trying to assume a new catalytic role to bridge the formal land law logic and the local customary norms, which is something beyond a simple settlement between the direct parties to dispute.⁴⁷

V. Japanese Alternative

A. Land-Titling v. Draft Civil Code

Despite all the disastrous outcomes detailed above, which have been criticized even by official evaluation agencies,⁴⁸ the leading donors who assisted with the drafting of the 2001 Land Law have shown no intention of modifying their policy stance of promoting the land-titling project, while they continue blaming the Cambodian government for their limited ability to implement the project and causing problematic outcomes due to this delay.⁴⁹ Their advice amounts to nothing more than a desire to accelerate the process of land-titling. Accordingly, there is an emerging need for legal assistance to help fill the gap between

this unchanged formal lawmaking policy and the socio-economic reality based on the unregistered farmers' rights for land use and transactions.

The Japanese assistance team has been involved in this critical situation, at least partially, by drafting and implementing the Cambodian Civil Code (headed by Professor Akio Morishima). The facts are as follows: Japan's ODA project to assist the Cambodian draft Civil Code was officially started in 1999, and by the time when the final draft was completed and handed over to the Cambodian government in 2003, the Japanese team tried several coordination meetings with the Land Law drafting team from the World Bank and the ADB. However, these donor agencies often rejected this coordination sought by the Japanese team, and went on to the final adaptation of the Land Law in 2001, while insisting that the Japanese team should amend the contents of the draft Civil Code so as to conform to the Land Law. The Japanese team did not easily surrender, while emphasizing the superior role of the Civil Code as the basic law setting fundamental principles for such a subsidiary area as that covered by the Land Law.

The core issue was the legal effect of the ownership registration.⁵⁰ The Japanese team has repeatedly advised the Cambodian government that the Land Law should be amended to ensure consistency with the general policy set out in the draft Civil Code that the legal effect of ownership registration should be weakened so that it would have only a notice and priority effect against third parties, as opposed to the current design that gives a Torrens-style absolute titling effect which is undeniable once the registration is completed. The Japanese team has held the view that mitigating legal effect in this way will help guarantee the continued lawfulness of customary land transactions among ordinary farmers based on the style of transfers of documentary evidence but without formal registration. This was especially meant for the customary transactions during the transition period until the completion of the nationwide land-titling. Japan's historical experience in its Meiji modernization period indicates that nationwide land registration takes at least a decade, and hence there is a strong need to admit the continued lawfulness of transactions during the transition period in order to avoid neglecting genuine land dealings while also preventing the abuse of registration and various forms of corruption.⁵¹

However, the donor agencies have never accepted this advice, and the Japanese team was instead compelled to modify the draft Civil Code in order to partially allow for the Torrens-style absolute effect of registration for a transaction of land to which a title is already

established, while sustaining the original limited effect of registration for the initial creation of a land title. This compromise was contained in the Civil Code adopted finally in 2008 (art.183). However, there is nothing to guarantee that this compromise among the donors was the best choice for Cambodian farmers. It is possible that fewer land disputes may have arisen if the Land Law was reviewed in response to Japanese advice.

B. Strengthening Land Usage Rights in the Formal Law

Other than the legal effect of ownership registration, there have been many other issues for modifications under the 2001 Land Law. Among all of them, the recognition and protection of long-term land use rights should have been elaborated under the formal law regime so as to extend reasonable security to the living basis of land users even though their rights cannot be recognized as an ownership.

Under the Land Law, it seems that a land use right which does not amount to ownership can still be claimed as a long-term lease as a right *in rem* (art. 106; 108), provided that the agreement for creating it is made in writing (art.109). In the absence of a writing, however, it is provided that the right can easily be terminated by a unilateral notice by the owner upon the lapse of a period of one payment term (*ibid*). There is no mention to the right of a lessee to make a request for a registration. These provisions contradict the stance of draft Civil Code which attempted to establish “perpetual leasehold” (art. 243) as one category of rights *in rem* for the purpose of protection of long-term customary land use rights as long as 50 years (capable of extension up to 100 years) upon written agreement. Even in the absence of this written agreement, under the draft Civil Code, the same right was supposed to be treated valid as a “lease for infinite period of time” (art. 244 & art. 612) which could only be unilaterally terminated after one year’s grace period. It was also the clear stance of the draft Civil Code to explicitly mention to the legal effect of registration for securing the priority of perpetual leasehold against the third parties (C.C. art. 245). The 2001 Land Law does not only contradict these protective treatments under the draft Civil Code, but also its actual implementation for the registration system has been merely for the land ownership, without admitting any chance for the registration of those rights *in rem* other than ownership.⁵²

Although another chance of admission for long-term customary land use rights under the formal law regime was “usufruct” to be continued for the life of the land user, the Land Law and the draft Civil Code again contradicted each other on the details of legal design.

The former made it a necessary condition that a usufruct must be made on a written agreement (art.120, sec.3), while the latter permitted unwritten agreement (C. C. art. 257), provided that a unilateral termination could be made by the owner upon the lapse of one year's grace period (C.C. art. 258, sec. 2). The draft Civil Code also explicitly provided that a usufruct can be registered for the purpose of securing its priority against the third parties (C.C. art. 258, sec.1), while the Land Law does not allow for the registration of usufruct and so its actual implementation.

In sum, these differences in legal designs between donors represented each different stance on the questions of whether or not to admit an assertion of traditional land use rights without written evidence, and whether or not to guarantee the priority of such rights against third parties including the new purchaser of the land from the original owner. The negative stance of the World Bank and the ADB toward these questions represented a new liberal policy to promote land transactions, while the Japanese team was more concerned with the incorporation of local informal order. This inter-donor conflict once seemed to be mitigated in the agreement between the World Bank, the ADB and the Japanese team as of August 2004,⁵³ in favor of the basic stance of the draft Civil Code in protective of the traditional land use rights. However, no actual response for the Land Law modification has been seen on the side of World Bank and the ADB.

C. Treatment of Communal Rights

The last important issue to mention is the stance of the draft Civil Code (art. 303) of admitting the priority of special laws as well as "customs" over the Code provisions with regard to the ownership as well as the other rights *in rem* of minority races and/or communal groups. This was apparently in conflict with the abovementioned stance of the Land Law (art. 23-28) of disregarding the communal rights and customs unless the special registration as a community is admitted by the authority.

Applying local customs prior to the voluntary provisions in the Civil Code has, however, long been an established practice in the Japanese courts, and thus naturally was followed by the Japanese assistance team in Cambodia. Although the Law on Legal Sources (Hourei) in Japan, adopted in conjunction with the Japanese Civil Code in 1898, narrowed the applicability of customs by providing that they were merely effective with regard to issues not covered in any laws and regulations (art. 2), implying the intention of the Code

drafters to limit the freedom of judicial law-making incorporating civil customs during the pre-Code period, nevertheless, the Japanese judiciary, since its early years of the Code implementation, has continued this practice, in the name of the interpretation of the Code. In particular, the prohibition of “abuses of rights” was one of the general principles developed by judicial precedents, which often upheld the priority of communal usage rights (*iriai-ken*, etc.) over registered ownership⁵⁴ or even national lands.⁵⁵ Thus affirmed communal rights have survived through the drastic socio-economic changes in modern Japan until their revival in the post-modern context of anti-development movement in the present days.⁵⁶ What these Japanese judicial precedents from the early days of capitalist modernization implied was the need to achieve a balance between the formal law for capitalist ownership and the informal orders for land users’ living.

VI. Implications: Beyond Legal Transplant

This article has reviewed the land law reform in Cambodia with a special focus on the inter-donor conflict with regard to the customary law treatment. Although the 2001 Land Law adopted under the auspices of the World Bank and other leading donors emphasized the land distribution to the poor as well as the preservation of communal collective rights, the detailed review into its legal designs has identified the reality of donors’ new liberalist policy, which sets highly strict hurdles for the informal land holders to establish their ownership, narrows the alternative chance for them to assert long-term leaseholds and/or usufruct against the owners, and tightens the requirements for minority groups to assert their communal rights while incorporating future opportunities for their dissolution into private ownerships. This Cambodian Land Law is a clear example of a De Soto’s question of informal law integration toward the, even if incremental but, ultimate absorption into the private ownership regime.

As a result, Cambodian society is experiencing an expeditious penetration of the most vicious type of capitalist freedom of land transactions where long-term land uses of local people are easily being denied by newly registered ownerships mostly created under the name of state concessions. This vicious outcome could have been mitigated if the land law reform paid more attention to the detailed legal designs for the protection of traditional land users. A clear lesson obtained from this Cambodian case is that the donors’ hidden, continued agenda of land-titling project for maximizing the capitalist land transaction

has to be modified so as to incorporate more substantial considerations for informal law treatment, beyond unrealistic campaigns appealing for poverty alleviation through the market mechanism. If the result of the pursuit of formal lawmaking for capitalist freedom is an outbreak of social disturbance, those seeking a sustainable and peaceful social system should prefer alternative means of balancing the formal and informal norms.

Perhaps, Japanese experience will continue to be worth revisiting, as its society has long been struggling with the vicious outcomes of capitalist land reform since the very beginning of its Westernization when the “chiso-kaisei (land taxation reform)” (1873–1884) rigorously compelled the land registration system while allowing no room for land to be left un-owned. It is said, as a result of this reform, that traditional land users under the control of absentee landowners, which affected about 30 % of all of the nation’s agricultural land, went into difficult and prolonged ownership disputes, and that communal land usage, which existed in a majority of the forestry area corresponding to 70 % of the entire national land, were forced to struggle against the state confiscation and/or the encroachment by private ownerships.⁵⁷ These struggles on an entirely national scale have been brought to the judicial process, where the judicial struggle for case-law making in favor of traditional rights against the pro-ownership formal lawmaking by the government has been another prominent drama throughout Japan’s Westernization process.⁵⁸ It is a notable implication from this Japanese drama that the donor-oriented formal law could be incrementally modified through the accumulation of case-law made out of the social dispute resolution process.⁵⁹

After the failure in the inter-donor conflict for the modification of the 2001 Land Law in Cambodia for the sake of customary right treatment, the Japanese assistance team has still remained in Cambodia in its third phase of assistance (2007-2010), while concentrating its efforts on judicial training such as the methods of fact-finding, law-application techniques, and the creation of judgment manual, with an expectation to promote adjudicative independence through an enhanced quality of judgments.⁶⁰ Given the politically complicated process of formal law modification at the legislature, this indirect, incremental approach to assist the institutional infrastructure for the formal law modification could ultimately prove to be a better way.

Notes

- 1 For a series of discussions on the “legal origin” for the superiority of American law model, see Rafael La Porta, Florencio Lopez-De-Silanes, Andrei Shleifer & Robert W. Vishny, “Law and Finance” (NBER Working Papers 5661, 1996); Rafael La Porta, Florencio Lopez-De-Silanes & Andrei Shleifer, “The Economic Consequences of Legal Origins” (NBER Working Papers 13608, 2007).
- 2 While the mainstream of the American comparative law school has been favor for the idea of “legal transplant” (see Alan Watson, ; Wald ;), the new stream of discussion on comparative legal culture has asserted that the law cannot live apart from a given culture and therefore any attempts of legal transplants must fail (see Pierre Legrand, “Impossibility of Legal Transplants,” 4 *Maastricht Journal of European and Comparative Law* 111 (1997); Pierre Legrand, “What Legal Transplants?,” in *Adapting Legal Cultures* (David Nelken & Johannes Feest, eds., 2001).
- 3 Hernando De Soto, *The Other Path* (1989).
- 4 See e.g., World Bank (2006). On this new agenda for changes, there are both optimistic (see David Trubek, “The Rule of Law in Development Assistance: Past, Present, and Future,” in Trubek & Santos eds, *The New Law and Development: A Critical Appraisal*, Cambridge University Press, 2006), and pessimistic observations (see Alvaro Santos, “The World Bank’s Uses of the “Rule of Law” Premise in Economic Development,” in Trubek & Santos eds, supra 2006). See, for a detailed lineup for each side’s observation, Kevin E. Davis & Michael J. Trebelcock, “The Relationship between Law and Development: Optimists versus Skeptics,” 56 *Am. J. Comp. L.* 895 (2008).
- 5 See Akio Morishima, “Houseibi-shien womeguru Kokusaiteki Doukou to Houseibi-shien Katsudou no Kadai to Tenbou (International Trends of Legal Assistance and Issues and Prospects for Legal Assistance),” *ICD News* No.1, 28-40 (2002) at p.35.
- 6 Veronica L. Taylor, “New Markets, New Commodity: Japanese Legal Technical Assistance,” 23 (2) *Wisconsin Intl. L. J.* 251-281 (2005).
- 7 See, for a concise introduction to the modern Japanese law, Zentaro Kitagawa, “Comparative Law in East Asia,” in *The Oxford Handbook of Comparative Law* (Mathias Reimann & Reinhard Zimmermann 2006) 239-260.
- 8 For the case-law development in the hundred year’s Japanese Civil Code application, see, e.g., Toshio Hironaka & Eiichi Hoshino, *Minpouten no Hyakunen (A Hundred Years of the Civil Code)* (1998).
- 9 For the details of Kankō-Chousa, see, e.g., Fukushima Masao, *Fukushima Masao Chosaku-Shu (Collection of Works by Fukushima Masao) VI: Comparative Law* (1996).
- 10 See Zentaro Kitagawa, “Development of Comparative Law in East Asia,” in *The Oxford Handbook of Comparative Law* 237, 255 (Mathias Reinmann & Reinhard Zimmermann eds. 2006).
- 11 Akira Mikzaki, *Houritsu-gaku heno Shoutai (Introduction to the Legal Study)* (1982) at p.89-98.
- 12 See Franz von Benda-Beckmann, “The Multiple Edges of Law: Dealing with Legal Pluralism in Development Practice,” in 2 *World Bank Legal Review* (2006) at p.58.
- 13 Franz von Benda-Beckmann, Keebet von Benda-Beckmann & Melanie G. Wiber *Changing Properties in Property* (2006).
- 14 World Bank, *World Bank Land Reform*, (World Bank Sector Policy Paper 1975).
- 15 USAID, *USAID Policy Determination in Land Tenure* (1986).
- 16 See, e.g., Klaus Deininger & Lyn Squire, “New Ways of Looking at Old Issues: Inequality and Growth,” 57 *Journal of Development Economics* 259-287 (1998).
- 17 For a general review of works for the promotion of agricultural revolutions in Africa, see Henryk Podedwornny, “The customary land tenure: selected problems of agrarian reforms and agricultural development in countries of Africa south of Sahara,” 15 *Africana Bulletin* (1971). For a review of the outcomes of agricultural revolutions in Asia, see e.g., Hiromitsu Umehara, *Tounan-ajia Nougou no Syougyouka (Commercialization of Agriculture in South East Asia)* (IDE-JETRO 1989).
- 18 Toshimitsu Umehara, *Tounan-ajia no Tochi-housei to Nougou-henka (Commercialization of Agriculture in South East Asia)* (IDE-JETRO 1991).
- 19 World Bank, *Land Policy for Pro-Poor Development* (2003); Klaus Deininger, eds, *Land Policies for Growth and Poverty Reduction* (World Bank Policy Research Paper 2003); UNDP, *Making the Law Work for Everyone*, Vol. II (2008).
- 20 John W. Bruce, “Reform of Land Law in the Context of World Bank Lending,” in *Land Law Reform: Achieving Development Policy Objectives* (World Bank Law, Justice, and Development Series, John W.

Bruce et al. eds., 2006) at p.41.

- 21 Klaus Deininger, Gershon Feder, Gustavo Gordillo de Anda & Paul Munro-Faure, "Land policy to facilitate growth and poverty reductions," in *Land Reform: Land Settlement and Cooperatives* (World Bank/FAO 2003); Leonard Rolfes, Jr., "A Framework for Land Market Law with the Poor in Mind," in *Land Law Reform: Achieving Development Policy Objectives*, supra note 20.
- 22 EU Task Force in Land Tenure, *EU Land Law Policy Guidelines* (2004) at 18-19.
- 23 Hernando De Soto & Francis Cheneval, eds., *Realizing Property Rights* (2006).
- 24 For some experimental challenges of donors in this attempt to strengthen procedural channels bridging the formal and informal norms, see, e.g., UNDP, *Broadening and Backing Local Justice in Aceh: Options Paper AJP-Adat* (2008).
- 25 Morishima, supra note 5 at p.35.
- 26 See Oxfam, *Land Dispute in Cambodia* (2005); NGO Forum on Cambodia, *Statistic Survey on Land Disputes Occurring in Cambodia*, (2008); NGO Forum on Cambodia *Land Dispute Database – Pilot Study Report* (2008).
- 27 NGO Forum on Cambodia, *ibid.*, at p.7.
- 28 Such empirical data as the survey of 797 land disputes in 23 provinces nationwide by Oxfam (*Land Dispute in Cambodia*, supra note 26) reported that the average land holding period among farmers was 16 years, and that 47% of farmers questioned had held the land since before 1989, and 15% had held it even before the 1970s.
- 29 It is reported that 71% of 797 land disputes assessed by Oxfam (*Land Dispute in Cambodia*, supra note 26) lacked any documentary evidence.
- 30 Data obtained from the interview conducted in March 2008 with Mr. Nheam So Hurim, a senior project officer at the EWMI (East West Management Institute) Phnom Penh Office, a consultation office working for the ADB/ World Bank land reform project in Cambodia.
- 31 A survey of 145 land disputes in two selected pilot provinces, conducted by the NGO Forum (*Land Dispute Database – Pilot Study Report*, supra note 26) to follow the results of the above-mentioned Oxfam survey (*Land Dispute in Cambodia*, supra note 26), revealed an interesting change in the behavior of land abusers: although the structure of land disputes is not very different from the results found by Oxfam (*ibid.*), in the sense that the majority of counterparties with respect to unfair deprivation claims are drawn from the state sector (30–50% from government departments and 30% from the military), these deprivations tend to be less physical than before and more the result of legal procedures. Only 40% of victims have been physically forced off their land, and others have continued to use the land for farming purposes respective of the progress of formal legal procedures for concessions, which implies the real intentions of the land takers are broadly speaking speculative instead of genuine usage for concession purposes.
- 32 There is also a need to elaborate the interpretation of constitutional conditions for confiscations including the public purpose, due process, and proper compensation (1993 Constitution Article 44 (3)).
- 33 Simbolon, I., "Access to Land of Highland Indigenous Minorities: The Case of Plural Property Rights in Cambodia," (Max Planck Institute for Social Anthropology Working Paper No.42., 2002) at p.3–6.
- 34 According to the author's interview with Mr. Nheam So Hurim at the EWMI as of March 2008 (supra note 30).
- 35 Information obtained in the author's interview with Mr. Yeng Virak, the head of the Community Legal Education Center (CLEC) in Phnom Penh as of March 2008.
- 36 GTZ, *Legal Issues Related to Registration of Lands of Indigenous Communities in Cambodia* (2005) at p.2.
- 37 *ibid.*, p.2.
- 38 *Land Dispute in Cambodia*, supra note 26 at p. 2-3.
- 39 He raised disputes in Koh Kong Province (adjacent to industrial areas in Sihanoukville) as being a typical example. In this case, an area of 20,000 hectares of unregistered land, which had been in continual use as farmland by local farmers since 1979, were suddenly transformed into part of a large sugar cane concession, and soon afterwards transferred to third parties probably in a speculative purchase.
- 40 *Land Dispute Database – Pilot Study Report*, supra note 26, p.3-4.
- 41 Information also obtained in the author's interview with Mr. Yeng Virak at the CLEC in March 2008.
- 42 *Statistic Survey on Land Disputes Occurring in Cambodia*, supra note 26, at p.5, Figure-2.
- 43 *Statistic Survey on Land Disputes Occurring in Cambodia*, supra note 26, at p.4, Table-4.
- 44 Though the Royal Academy for Judicial Profession has been providing judicial training under the auspice

of various donors from common law countries, the basic legal education is under a strong French influence, according to the author's interview in March 2008 with the Rector of Royal University of Law and Economics of Cambodia.

- 45 For example, on the debated meaning of Article 27 (second paragraph) that automatically classifies a private share of indigenous communal land as transferable "state private land," there must be room to interpret this to mean that only the parts of the indigenous communal land originally designated as state private land can be separated by individual members and transferred. Another example is the mitigation of the burden of proof for farmers on their assertion of land title (Articles 29-30) by methods such as the admission of supporting evidence and/or shifting the burden of proof onto the parties in an economically stronger position. There is the room of imposing more stringent evidential requirements on purchasers; for instance, the requirement to provide proof of being the bona fide purchasers.
- 46 The author's interview with Mr. Yeng Virak in March 2008.
- 47 According to a vivid description of one mediation case also given by Mr. Yeng Virak (*ibid*), a group of his NGO staff called all related parties to gather on the very disputed land, and using a loud speaker before all villagers who were curious enough to observe the case, presided an open mediation by asking both parties to assert the facts and to provide evidences for several days until both parties were satisfied. During the whole process of the mediation, the NGO staff facilitated the understanding of both parties on the whole legal issues involving both the formal law and local customs.
- 48 See, e.g., United States General Accounting Office, *Cambodia: Governance Reform Progressing, But Key Efforts Are Lagging* (GAO-02-569, 2002) at p.7.
- 49 See for the stance of the GTZ, *Legal Issues Related to Registration of Lands of Indigenous Communities in Cambodia*, *supra* note 36, p.2-3. The same stance was repeated during the author's interview in March 2008 with the officer at the EWMI, note 30.
- 50 For the detail, see Issei Sakano, "Drafting fundamental laws in Cambodia: Japan's experience in supporting legislation of the Civil Code and the Code of Civil Procedure," (presentation paper, Law & Society Association Denver Conference, 2009).
- 51 See Akio Morishima, "Donor-kan niokeru Shien no Soukoku to Nihon no Shien no Seibi (Inter-Donor Conflicts and Rethinking of Japanese Assistance)," *ICD News*, No.14, 19-23 (2004); Sakata, *ibid.*; Issei Sakata, "Cambodia Minpoutenn to Tochi-hou (Cambodian Civil Code and the Land Law)," in *Houseibi Shien Ron (Studies on Legal Assistance)* (Kozo Kagawa & Yuka Kaneko, eds., 2007).
- 52 The Japanese assistance team has, in its second phase legal assistance project (2004~), been assisting the Cambodian government for the drafting of the law on registration of immovable property rights, so as to enable a comprehensive system of registration inclusive of not only the ownership but also all relevant rights in rem. See, Sakano, *supra* note 50.
- 53 See Sakano, *supra*, note 50.
- 54 See *Daishinin* judgment dated February 1, Meiji 32 (1899) etc.
- 55 See *Daishinin* judgment dated June 1, Meiji 36 (1903) etc. This activist stance of judicial precedents was continued at least until the notorious change of precedents by *Daishinin* judgement dated March 14, Taisho 4 (1915).
- 56 Korehiko Nawada & Yoshiki Kurumizawa, "Thiiki-chuukan-shuudan no Hou-syakaigaku (*legal sociology of communal intermediary groups*)," in *Hou niokeru Kindai to Gendai (Modern and Post-modern in the Law)* (Nobuyoshi Toshitani et al. ed., 1993).
- 57 Masanori Fukushima, *Chiso-Kaisei no Kenkyuu (Study of Land Taxation Reform)*, (1962); Kunio Niwa, *Meiji-ishin no Tochi-henkaku (Land System Change in Meiji Restoration)* (1964).
- 58 The judgments of the Supreme Court (*Daishinin*) during the 1880s-1890s repeatedly upheld the rights of traditional long-term leaseholders against newly registered landowners and even against their bona fide successors, while declaring that it had been part of Japanese legal tradition that a sale of land does not revoke a lease over the same land. For more detail, see Sumio Ohkawa, "Kosakuken no Touzen-shoukei-ron wo-meguru Meiji20nendai no Daishinin-hanei ni-tsuite (the Supreme Court judgments on the automatic succession of tenant rights in Meiji 20s)," in *Tochi-hou no Rironteki-tenkai (Theoretical Trends of Land Law)* (Shouzou Inui, eds. 1990).
- 59 Even after the introduction of Japanese Civil Code in 1898, and regardless of the government pressure toward the independence of judicial administration, the Japanese judiciary continued its law-making effort via the techniques of legal interpretation, which involved the elaboration of Code provisions and/or intervention

in private contracts while seeking justification from such general principles as the prohibition of abuse of rights, public order and good morals, and trust and fairness, as well as civil and commercial customs, which often paved the way for legislative modifications. See Toshio Hironaka, *Minpou-kaisyaku-houhou ni kansuru 12 Kou (Twelve Lectures on the Methods of Interpretation of Civil Code)*, (1997); Nobuhisa Segawa, “Minpou no Kaisyaku (Interpretation of Civil Code),” in *Minpou Kouza Bekkann-1 (Lectures on Civil Code, Extra Volume No.1)* (Eiichi Hoshino, eds. 1990).

60 See, for the detail, *ICD News* No. 35 (Ministry of Justice of Japan, International Cooperation Department 2008).

