Towards equitable and secure access to land and natural resources for family farmers in the Mekong region

Thematic Study

November 2016

The Recognition and Security of Customary Tenure of Indigenous Peoples in Cambodia: a Legal Perspective



Cambodia Indigenous Youth Association
Mekong Region Land Governance

Thematic Study

Written by NGO Sothath and LAY Chantha

This Thematic Study is a joint reflection by the **Cambodia Indigenous Peoples Alliance (CIPA)** represented by Cambodia Indigenous Youth Association (CIYA). Other members of CIPA include: Cambodia Indigenous Peoples Organization (CIPO), Highlanders Association (HA), Organization for the Promotion of Kui Culture (OPKC), Conserve Indigenous Peoples Language (CIPL), Yeak Laom Community (YLC), and Indigenous Rights Active Members (IRAM).

The joint reflection was undertaken with the cooperation other partners including Community Legal Education Center (CLEC), NGO Forum on Cambodia, Analyzing Development Issues Centre (ADIC), Center for People and Forests (RECOFTC) and the former GIZ Land Rights Programme.

Reviewed by:

Natalia Scurrah, Christian Castellanet and Jean-Christophe Diepart, MRLG

Georges Cooper, Independent consultant

Poch Sophorn, Independent Mediation Group

Yun Mane, Cambodia Indigenous Peoples Organization

Chhoem Samut, Cambodia Indigenous Youth Association

Yun Lorang, CIPA Secretariat

For more information, contact

Ngo Sothath at MRLG: <sothath.ngo@gmail.com>

Lay Chantha at CIYA: <laychanthaciya@gmail.com>

Suggested citation:

Ngo, S. and Lay, C. (2016). *The Recognition and Security of Customary Tenure of Indigenous Peoples in Cambodia: a Legal Perspective*. MRLG Thematic Study Series #2. Vientiane: MRLG and CIYA.

Table of contents

List of acronyms

CPA	Community Protected Area
CSO	Civil Society Organization
ELC	Economic Land Concession
ICLT	Indigenous Communal Land Title
IP	Indigenous People
MLMUPC	Ministry of Land Management, Urban Planning and Construction
MRLG	Mekong Region Land Governance
NTFP	Non Timber Forest Products
PA	Protected Area
SD	Sub-Decree

Executive summary

The various provisions in Cambodian law recognizing and protecting indigenous peoples' (IP) customary lands have led to a common observation that Cambodia's legal framework for governing land and natural resources is adequate but problems arise when it comes to implementation. Nonetheless, there are instances where the legal texts themselves are subject to different interpretation by stakeholders. This begs the question of whether these legal instruments are in fact sufficiently precise, cohesive and comprehensive to realize their intended purpose. Against this backdrop, a core group of IP NGOs who are members of the Cambodia Indigenous Peoples Alliance (CIPA), with support from MRLG and in cooperation with other partners, held a series of seminars to discuss the legal framework supporting the recognition of customary tenure of IPs in Cambodia with a view to identifying gaps and making recommendations for their strengthening and improvement.

Introduction

A common view of Cambodia's 2001 Land Law as well as other legal instruments for governing land and natural resources is that they are generally good, but the challenge lies in their implementation. Yet, there are various instances where legal provisions are subject to different interpretations by the government, civil society organizations (CSOs) and indigenous peoples' (IPs) organizations. This begs the question of whether these legal instruments are in fact cohesive, comprehensive and lacking in ambiguity.

With support from the Mekong Region Land Governance (MRLG) project, members of the Cambodia Indigenous Peoples Alliance (CIPA) and other interested organizations held a series of seminars to discuss the legal framework governing customary lands of indigenous peoples in Cambodia. The overall aim of the seminars was to identify gaps and inconsistencies in the legal framework and come up with recommendations for strengthening the legal recognition and protection of customary tenure. The seminars brought together representatives of eight members of CIPA, IP communities, some government institutions, and interested organizations such as the NGO Forum on Cambodia, Community Legal Education Center (CLEC), Analyzing Development Issues Centre (ADIC), the Center for People and Forests (RECOFTC), and the GIZ Land Rights Programme. MRLG facilitated discussions, documented outcomes, and assisted with the development of this paper.

- The first seminar, held on 18 December 2015 and attended by 21 participants (7 women, 11 IPs), focused on customary rules of IP, the 2001 Land Law, and sub-decree (SD) #83 on the Procedure for the Registration of IP Communal Lands.

- The second seminar, held on 4 February 2016 and attended by 17 participants (3 women, 8 IPs), focused on the 2002 Law on Forestry and the 2008 Law on Protected Areas.

- The third seminar, held on 13 July 2016 and attended by 20 participants (6 women, 11 IPs), discussed a draft version of this paper which was based on the outcomes of the previous two seminars.

This paper consolidates the outcomes of the exchanges from the learning seminar series and presents the common view of CIPA member organizations on the status of legal recognition and security of the indigenous peoples' rights to land and natural resources.

Key reflections

Through the seminar series, participants discussed and clarified their understanding with regard to three important legal instruments governing land and natural resources in Cambodia, including: the 2001 Land Law, 2002 Law on Forestry, and 2008 Law on Protected Areas. There was no discussion on the Civil Code, but some provisions are presented in this paper as they concern customary law. The discussions have reinforced participants' common understanding of legal protections for customary rights of IPs, as outlined below:

2001 Land Law

Articles 23-28 of the 2001 Land Law provide that certain customary communal land rights of IPs may be converted to formal land ownership rights, but ownership is limited to residential land, land in actual agricultural use, and reserved land necessary for shifting cultivation (SD #83 Article 4 clarifies that reserved land "refers to land used previously by indigenous community as rice field or farm for traditional shifting cultivation"). SD #83 Article 6 provides for two more types of IP customary communal land rights that may be converted to formal ownership: up to seven hectares (ha) of spiritual forest land and up to seven ha of burial ground forest land. Various other IP customary communal land rights exist for which there is as yet no legal possibility for conversion to ownership. This includes, for example, land for grazing, for gathering non-timber forest products or NTFPs (traditional medicinal plants area), and for water sources (ponds and small streams). Moreover, the maximum seven hectares of spirit and burial forests allowed is frequently less than individual communities customarily use.

There are other serious shortcomings in the laws regarding protection of IP customary lands. While articles 23 and 26 of the Land Law indicate that IP lands are reserved for IP except when needed for "the undertaking of works done by the State that are required by the national interests or a national emergency need", these articles are far from clear on this point. There are no direct statements in the Land Law or in any other law explicitly preventing land that is eligible to receive community land title (or IP customary lands) from being claimed by the state or in any other way being claimed by private persons for private uses (for economic land concessions, for example). In addition, there are no legal provisions for establishing some kind of mechanism that provides interim protections for IP lands, namely the rapid demarcation of lands to be titled to IP, with strict requirements for respecting these demarcations. Various legal texts including SD #83 do recognize IP use rights to forests and other lands customarily used by IP, but none of these recognitions include outright specific bans on the use or ownership of these lands by non-IP.

There are mismatches between the 2001 Land Law and the SD #83 on the Procedure for the Registration of the IP Communal Lands. The Land Law recognizes reserved land necessary for shifting cultivation as the property of IP communities, but SD #83 (Art. 6) regards it as state public land. Furthermore, Article 6 of SD #83 also regards spiritual forest land and burial ground forest land (cemeteries) as state public land, while there is no mentioning of this in the Land Law. Spiritual forest land and burial ground forest land (cemeteries) are places where indigenous groups have a specific and deep spiritual connection with. These places are steeped in particular cultures and sovereignties and they are intertwined with customary law that give them responsibility to care for these lands. As such, these lands cannot be shared, categorized as state public land or be given any other denomination that implies a public interest. On this point, amendments to both the Land Law and SD #83 are necessary to reflect the actual situation at the ground and to ensure consistency between the two pieces of legislation.

Because of the inconsistencies mentioned above, the domain of ownership for communal land and state land are not clearly distinguished or do not appear to be mutually exclusive. SD #83 (Art. 6) is clear that registration for Indigenous Community Land Titles (ICLT) includes spiritual forest land, burial ground forest land, and reserved land for shifting cultivation. The confusion is that they are regarded as state public land (though not the case in the Land Law). This suggests communal land titles comprise two parts: i) lands that belong to IP communities (i.e. residential land and agricultural land); and ii) lands belonging to the state (i.e. spiritual forest land, burial ground forest land, and reserved land for shifting cultivation).

However, another legal interpretation is that the establishment of indigenous collective titles confers ownership rights to a community, which means a transfer of ownership from state to collective, with no state ownership remaining after titles are issued. As such, there should no longer be any lingering state rights after ICLTs are issued and the government should recognize them as the property of indigenous communities. This is clearly echoed by the Land Law (Art. 26), which states that "collective ownership includes all of the rights and protections of ownership as are enjoyed by private owners". However, the same article (Art. 26) goes on to say "the community does not have the right to dispose of any collective ownership that is state public property to any person or group." This again suggests some level of state public property remains within the collective ownership, and thus leaves the two ownership domains unclear. Adding to the confusion is the practice of the government to issue sub-decrees that reclassify all the land to be titled to indigenous communities as state private land before being fully transferred into the collective ownership domain, which strongly reinforces that no state public ownership remains.

Civil society and indigenous peoples appreciate the Royal Government of Cambodia's recognition, through SD #83, of both spiritual forest land and burial ground forest land as eligible for registration and ICLT. However, recognition of these forest lands should not be limited to a total size of seven hectares for each of these two types of lands. In reality, there are various instances where the size of spiritual or burial ground forest land exceeds seven hectares. The spiritual forest land in Prome community in Preah Vihear Province is a case in point.

Under Article 25 of the 2001 Land Law, formal recognition of customary communal land rights of the indigenous peoples is also subject to recognition by administrative authorities. This is ambiguous because the term "administrative authorities" is not properly defined in the law. The use of more specific terms, for example, "commune chief" or "district governor", instead of 'administrative authorities' would help clarify what level of authority and responsibility is being denoted. Other technical terms that are also ambiguous in the Land Law include "competent authority" and "local authorities". Clarifying these terms is important as various interpretations can be applied. These terms should be clearly defined in the glossary of the 2001 Land Law.

The meaning of "indigenous peoples" should also be clearly defined for nationally recognized use across various laws and decrees so that it eliminates unnecessary confusion due to different interpretations. This argument does not deny the diversity of indigenous peoples in Cambodia. Each ethnicity has their own unique characteristics and customary rules, but a nationally recognized definition or concept of "indigenous peoples" in Cambodia is important for communication.

2002 Law on Forestry

The 2002 Law on Forestry has a dedicated chapter (Chapter 9, Article 40-47) with provisions for customary user rights of timber and non-timber forest products, and for the management of community and private forests. The law allows for the establishment of community forests by local communities living inside or near a forest area.

However, not all customary user rights in specific locations will be turned into a community forest, and the law does not have specific provisions to ensure customary user rights in permanent forest reserves that are not formulated as community forests. On top of recognizing such user rights outside the community forests, the law should actually require the inscription of those user rights in the certificate of state land (when registered) and/or introduce user rights agreements between the designated community and the responsible government institutions.

Through Article 37, the 2002 Law on Forestry has extended its recognition of the traditional practice of shifting cultivation of local communities, but it bears a technical loophole. Article 37 only recognizes traditional shifting cultivation on land that is already registered with the state[1]. This means the Law on Forestry does not have particular provisions for recognizing existing traditional shifting cultivation practices that are not yet registered with the state. Such negligence can be addressed if the 2002 Law on Forestry accepts the authority of the 2001 Land Law . However, no reference is made to the Land Law.

Further to the inadequate recognition of traditional shifting cultivation, the 2002 Law on Forestry does not acknowledge settlements inside permanent forest reserves that pre-date both the law and the establishment of permanent forest reserves. As such, the law does not have provisions to recognize the existing settlements and existing land uses inside the forest. The law simply assumes forest reserves are only forests with no human settlements. Such negligence points to the absence of proper recognition of the customary tenure in the 2002 Law on Forestry. It is therefore highly recommended that the Law on Forestry be revised to include legal provisions recognizing indigenous peoples' lands inside permanent forest reserves and for this provision to be included in other related laws for consistency.

Through its glossary, the law tries to distinguish "local community" from "community". Both terms are separately defined, but they are not clear. Despite attempts to distinguish their meaning, both terms are rather mixed up, especially for Articles 40-47. The term "indigenous community" is also used in Article 37 and thus adds further confusion. Therefore, it is suggested that the meaning of these terms be revised and reinserted with a clear explanation in the law.

2008 Law on Protected Areas

The Law on Protected Areas acknowledges an important fact that there were already existing settlements or inhabitants inside the Protected Areas (PAs), which have been established in Cambodia since 1993. As such, Article 11 of the law stipulates that PAs be divided into four management zoning systems[2], one of which is a "community zone" where customary land tenure of local communities and indigenous ethnic minorities are respected. Once zonation is completed, land inside a community zone is recognized as the property of local people and thus they can apply for registration and certificate with MLMUPC. Such recognition is a positive development and a complete zonation of all PAs would tremendously reinforce the recognition and security of customary land tenure of local people. However, the government's progress with regard to zonation of PAs has been too slow.

---

1. Article 37 states, "local communities that traditionally practice shifting cultivation may conduct such practices on land property of indigenous community which registered with the state."
2. 1) core zone, 2) conservation zone, 3) sustainable use zone, and 4) community zone.

Since the release of the Royal Decree on Protected Areas in 1993, only one Protected Area (out of 23) in Koh Kong Province has been zoned. Meanwhile, a significant proportion of new areas have recently been reclassified as PAs. Therefore, it's an urgent task for the Ministry of Environment to prioritize and accelerate the zonation of all PAs in the country.

Importantly, the Law on Protected Areas acknowledges the existence of both types of local communities: indigenous ethnic minorities and local communities that are not indigenous. However, the indicated land tenure does not appear exhaustive especially for the communities of indigenous ethnic minorities as it includes only existing residential land, paddy fields, orchards and land for swidden agriculture, but not other types of land such as spiritual forest land and burial ground forest land. It is important to keep such recognition consistent with other laws, especially the supreme ones.

In addition to recognizing customary land tenure in the community zone, the Law on Protected Areas also recognizes indigenous and non-indigenous customary user rights to other natural resources. Chapter VI (Articles 21-28) is dedicated to illustrate the "involvement and access rights of local communities and indigenous ethnic minority communities." Local people residing within and adjacent to PAs are given access rights to traditional uses of natural resources and customary practices within sustainable use zones and conservation zones (Article 22). These access rights to traditional uses of natural resources and customary practices shall provide a clearer and stronger tenure security when community protected areas (CPA) can be formulated in the sustainable use zone. However, not all areas of traditional uses can be designated as CPAs, and the law does not have clear provisions to ensure the security of access rights in such areas. On top of recognizing such rights, the law shall require the inscription of those access rights into the certificate of state land (when registered) and/or introduce access/user rights agreements between the designated community and the responsible government institutions.

According to Article 24, swidden agriculture is not permitted in the core zone and conservation zone. While the justification for such prohibition holds stronger for the core zone given its high conservation value to be protected, swidden agriculture should be allowed in the conservation zone as long as people follow their traditional use and ensure no further expansion. In cases where swidden agriculture cannot be allowed in either or both zones, customary land rights should still be respected by offering alternatives such as appropriate land swaps for local people. Such alternatives are currently absent in the 2008 Law on Protected Areas.

There are instances of disagreement or at least different understandings of swidden agriculture. There are views that swidden agriculture or slash and burn agriculture involves anarchic movement all over the place rather than organized on rotational basis. This view has implications for limiting recognition of swidden agriculture in the core and conservation zone. As such, clarification of terms for these agricultural methods (swidden, slash and burn, shifting, and rotational) would help address future misunderstandings.

2001 Civil Code

Based on the Civil Code and on the Law on Application of the Civil Code, customary law exists in Cambodia concerning immovable property, but only to the extent that it does not conflict with – or is not concerned with – a subject covered by formal law:

Civil Code 131. "No real right may be created except as permitted by this Code or under special law. A real right permitted under customary law shall be valid under this Code to the extent that it does not conflict with the provisions of this Code and special law."

Civil Code 306. “Ownership and other real rights of the state, Buddhist temples, minority ethnic groups and other communities shall be subject to the provisions of the Civil Code, except where otherwise provided by special law or custom.”

Law on Application of the Civil Code Article 5.2. “The effect of legal provisions or customs in Cambodia before the date of the implementation of the Civil Code shall not be disrupted after the Date of Application, except where otherwise provided in Chapter 5 (Transitional Provisions) of this Law”. The Civil Code Article 5.3. clarifies that the above provision “shall not prevent fair implementation of the Civil Code to matters occurring before the Date of Application in the event that there are no applicable legal provisions or customs or existence of such provisions/customs is obscured.”

Conclusion and recommendations

Overall, the legal framework in Cambodia, particularly the 2001 Land Law, 2002 Law on Forestry, and 2008 Law on Protected Areas, are formulated with good sensitization and attention to indigenous peoples, especially the recognition of their customary tenure. Nevertheless, all of these laws still have important discrepancies, shortfalls and loopholes. Moreover, there needs to be stronger coherence among these laws and relevant sub-decrees. These gaps leave the legal provisions subject to various angles of interpretation with implications for law implementation and enforcement. Nonetheless, all these weaknesses somehow reflect a rather nascent stage of legal and regulatory development in Cambodia. Therefore, iterative and continuous improvement is really important in order to address these weaknesses as well as to respond to changing contexts driven by the country's socioeconomic development. To acknowledge the weaknesses as well as to keep improving the legal and regulatory framework for the governance of land and natural resources, this paper calls for the Royal Government of Cambodia to consider the preliminary evaluation presented above and the following proposals:

⇒ Hold a series of multi-stakeholder dialogues in order to encourage discussion and mobilize different views with regard to the recognition of customary tenure for indigenous peoples and in a broader context. This mobilization will help enhance our common understanding of the issues and gaps that can eventually serve as basis for the improvement of the legal and regulatory framework for the governance of land and natural resources.

⇒ Urge concerned ministries of the Royal Government of Cambodia to consider amending existing laws such as the 2001 Land Law, 2002 Law on Forestry, and 2008 Law on Protected Areas. While amendments of the 2002 Law on Forestry and 2008 Law on Protected Areas are taking shape, it is hoped that the concerned ministries will undertake a participatory process and provide an opportunity for stakeholders and wider public to have a meaningful contribution to the process.

References and suggested readings

Royal Government of Cambodia (1993). *Royal Decree on the Protection of Natural Areas (PRK/1Nov93)*.

Royal Government of Cambodia (2001). *Land Law (NS/RKM/0801/14)*. Phnom Penh.

Royal Government of Cambodia (2002). *Law on Forestry (NS/RKM/0802/016)*.

Royal Government of Cambodia (2003). *Sub-Decree on Community Forestry Management (79 ANK/BK)*.

Royal Government of Cambodia (2005). *Sub-decree on Economic Land Concessions (146 ANK/BK)*. Phnom Penh.

Royal Government of Cambodia (2005). *Sub-decree on State Land Management (118 ANK/BK)*.

Royal Government of Cambodia (2006). Sub-decree on Rules and Procedures on Reclassification of State Public Properties and Public Entities (129 ANK/BK)

Royal Government of Cambodia (2008). *Law on Protected Areas (NS/RKM/0208/007)*.

Royal Government of Cambodia (2009). *Sub-Decree on the Procedures of Registration of Land of Indigenous Communities (83 ANK.BK)*.

*The **Mekong Region Land Governance** Project aims to contribute to the design of appropriate land policies and practices in the Mekong Region, responding to national priorities in terms of reducing poverty, improving nutrition, increasing economic development, and supporting family farmers, so that they can be secure and make good decisions on land use and land management. MRLG is operating in Cambodia, Laos, Myanmar and Viet Nam since April 2014, with the support of SDC and the German cooperation. For more information on MRLG, please visit www.mrlg.org.*

*The **MRLG Thematic Study series** examines major themes related to land tenure in the Mekong Region. It is aligned with strategic priorities of MRLG and is intended as background document for all relevant MRLG partners. As such, the series consists of a synthesis of existing references in a particular theme, which can be complemented with additional enquiries and studies. The production of Thematic Study is usually undertaken at the initiative of MRLG but we also accommodate proposals originating from outside the programme.*

***Cambodia Indigenous Youth Association (CIYA)** is an association aiming to mobilize indigenous youths for mutual support for the protection and promotion of natural resources, traditional cultures, and customary rights of the indigenous peoples in Cambodia. For more information about CIYA, please visit www.ciyamedia.wordpress.com.*

Funded by

Schweizerische Eidgenossenschaft
Confédération suisse
Confederazione Svizzera
Confederaziun svizra
Swiss Agency for Development and Cooperation SDC

german cooperation
DEUTSCHE ZUSAMMENARBEIT

Implemented by

LAND equality

GRET
Professionals for Fair Development

Supported by

giz Deutsche Gesellschaft für Internationale Zusammenarbeit (GIZ) GmbH