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# Land Reforms and the Tragedy of the Anticommons—A Case Study from Cambodia

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**Abstract:** Most of the land reforms of recent decades have followed an approach of “formalization and capitalization” of individual land titles (de Soto 2000). However, within the privatization agenda, benefits of unimproved land (such as land rents and value capture) are reaped privately by well-organized actors, whereas the costs of valorization (e.g., infrastructure) or opportunity costs of land use changes are shifted onto poorly organized groups. Consequences of capitalization and formalization include rent seeking and land grabbing. In developing countries, formal law often transpires to work in favor of the winners of the titling process and is opposed by the customary rights of the losers. This causes a lack of general acknowledgement of formalized law (which is made responsible for deprivation of livelihoods of vulnerable groups) and often leads to a clash of formal and customary norms. Countries may fall into a state of *de facto* anarchy and “*de facto* open access”. Encroachment and destruction of natural resources may spread. A reframing of development policy is necessary in order to fight these aberrations. Examples and evidence are provided from Cambodia, which has many features in common with other countries in Asia and Sub-Saharan Africa in this respect.

**Keywords:** tragedy of the anticommons; customary rights; property rights; land reform

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## 1. Introduction

During recent decades the efforts to formalize property rights in developing, threshold and transitional countries have increased significantly (e.g., Thailand, Indonesia, Philippines, Ghana, Bolivia). The theoretical basis and justification for land titling, land registration and land administration

projects that formalize property rights refer to a privatization approach. Subsequently we understand “privatization approach” to mean the formalization of individual and capitalized use rights on land (discussed in detail in Section 2.2.). Privatization also comprises water resources, among other things, which are often connected to the property rights on land. Due to land scarcity and an increase of land values, the proponents of privatization expect that the marginal benefits of private ownership might outweigh its marginal costs [1]. According to property rights theory, the efficiency of land markets can be increased by means of an unambiguous allocation and specification of property rights. In particular, external costs might be internalized by private ownership schemes. In addition, access to loans might be granted, tenure security provided and land conflicts might be eased. The original idea stems from the property rights theory emanating from research work carried out by Coase [2], Demsetz [1], Posner [3] and others.

Popularization within the stressing of formalization has been done particularly by de Soto [4]. However, there is a different understanding of the role of the state. While the property rights theorists see private land titles as the natural and logical culmination of an ongoing process of rights individualization, de Soto sees state rights provision of titles as a necessary and desirable step in pushing the process of evolution along [5]. In brief, de Soto’s agenda could be described with the words “capitalization by formalization” [6].

The “capitalization by formalization” agenda has been adapted by the International Monetary Fund, the World Bank, the World Trade Organization and also governmental development organizations.

However, non-government organizations (NGO) working on environment and human rights issues are particularly critical, saying that private property on land means the loss of livelihood and forced evictions, especially among socially and economically vulnerable groups. Governmental development organizations are taking greater notice of this criticism [7], but some promising conceptual alternatives are still out of reach at present.

## 2. Methods

### 2.1. Hypothesis

Subsequently, we want to show that the privatization agenda—in contrast to the assumptions of the property rights theorists—causes a decoupling of benefits and costs of land. The consequence is rent seeking and state capture behavior at the expense of poorly organized groups. Among other things, formalization is abused for land grabbing. Hence the aims of privatization are scarcely possible to attain.

Under these circumstances, formalized law may turn out to work for powerful groups, whereas customary law is the law of the losers. The consequence may be a clash of norms and a lack of recognition of formalized law. In the end, a state of anarchy may develop. If neither formal law nor customary law works satisfactorily, the consequence may be a state of *de facto* open access. The biggest loser is the environment, which is degraded. Also, attempts to formalize customary rights may fail in an institutional vacuum and a state of *de facto* anarchy.

Examples and evidence are provided from Cambodia, which has many features in common with other countries in Asia and Sub-Saharan Africa in this respect. However, due to a lack of reliable data, most of the evidence can only be provided in anecdotal form. More research is necessary.

## 2.2. Theory

From a legal point of view, private property rights grant the possibility to exclude other persons from an asset. Moreover, owners may do with their property as they like. From an economic standpoint, a completely privatized ownership title may be interpreted as encompassing all four sets of rights mentioned below [8] (the following economic classification is abstract and derived from Roman law). However, besides this, the privatization agenda leads to a specification of the elements of the bundling of property rights into private hands.

**Table 1.** Property rights on land, from an economic point of view (adapted from [6]).

| Exclusive rights, based on ... | ... control and use                                                                                             | ... value and rent                                                                                |
|--------------------------------|-----------------------------------------------------------------------------------------------------------------|---------------------------------------------------------------------------------------------------|
| <b>Asset (stock)</b>           | Right to control, to change the asset according to one's needs and to misuse the asset.<br>Latin: <i>abusus</i> | Right to sell the asset and to participate in its value (disposal).<br>Latin: <i>ius abutendi</i> |
| <b>Utility (flow)</b>          | Right to use the asset.<br>Latin: <i>usus</i>                                                                   | Right to appropriate any returns on the asset, here: the land rent.<br>Latin: <i>usus fructus</i> |

The property rights theorists stress in particular the necessity of coupling a secure right of use with the *usus fructus* right and the right to sell the asset. This is what we want to call a “capitalized” use right. A capitalized use right might of course be achieved by full private property titles. Since 1989, the Royal Government of Cambodia (RGC) has pursued a privatization policy. So far, some 1.7 million plots have now been registered, and around 1.25 million land titles had been allotted by November 2009. However, the registration of an additional ten million parcels is still pending in order to formally establish the land tenure security that is envisaged [9].

To date, some 80% of Cambodian territory is still state owned. This data includes concessions for agriculture, forestry and mining [9]. However, long-term leasehold arrangements may also provide capitalized use rights. For example, as in other developing countries, the RGC leases out “Economic Land Concessions” (ELCs) (besides other types of concessions) for economic exploitation. The formal fees are often ridiculously low (currently, fees for Cambodian ELCs are between 0 US \$ and 10 US \$ per year and hectare [10,11]). Hence investors can reap the land rent privately (“*usus fructus* right”). The rights can also be sold (“*ius abutendi*”) if the government agrees to do so. Hence, for investors, such concessions are even more advantageous than full property titles, because the holder does not have to pay a purchase price (apart from bribes that are often paid).

According to the view of property rights theorists, the coupling of a secure right of use with the *usus fructus* right and the right to sell the asset makes a unique assignment of benefits and costs of improvements to the acting persons possible. Yields are allocated to those persons who bear the investment costs [12]. Because beneficiaries and originators of this income are the same, investments in improvements (e.g., setting up a building or tilling a field) would be stimulated. Benefits and costs are coupled. Thus, no negative externalities appear from this, and the efficiency of land markets will rise. Furthermore, overuse of resources could be avoided. Many proponents of the privatization agenda assert historical progress towards more formalization and capitalized property rights in response to

higher land values, caused by rising scarcity of land [12]. Apart from misleading wording—Hardin [13] was in fact describing a tragedy of open access, while commons are always characterized by controlled access—the problem of the “tragedy of the commons” seems to be solved at first glance within the privatization agenda.

However, an important aspect is often neglected in the relevant literature: Land and improvements are connected, but they are indeed different types of assets. Hence the right to take the yields (*usus fructus*) and the right to sell the asset (*ius abutendi*) is not limited to the “improvements” (such as plantings or buildings) but also includes land itself. The most important sources of the value of unimproved land are differential rents due to the location, the intensity of use or the quality of the land compared with marginal land (where the yields just cover the costs [14,15]). A share of the differential rent may turn into an absolute rent if land gets so scarce that even marginal land can earn a rent. The theory about differential rents was originally created for agricultural land, but can be applied to any kind of land if certain modifications are made [6]. Neither differential rents nor absolute rents can be tackled by market entry of new actors or by an extension of supply of land (exception: more land conversion) and has therefore a semi-monopolistic character [16]. Most of the differential rents derive or rise mainly by accident or by public activities. In specific terms, an important cause of increased land rents relates to changes in the land use planning. The costs of planning (direct costs as well as indirect costs such as streets, water and electricity supply) are mostly carried to a significant degree by the community. Moreover, the community bears the opportunity costs caused by waiving land use alternatives (e.g., public spaces). In contrast, before making an improvement the investor also takes opportunity costs into account (e.g., the discount rate). Hence, whereas the benefits of land use changes (higher land rents) are reaped mostly privately, with the costs being borne to a large degree by the public [6].

However, the benefits of the land owners are not limited to the land rent. Due to underdeveloped capital markets in developing or threshold countries, land is often used as a store of value. Often the land is bought in the hope that it can be changed from agricultural land to settlement areas. In such cases, land serves as a real option for the owner. Due to the fact that oftentimes the investors are non-agriculturalists, a valorization by improvements is not intended by the “investors”—either due to a lack of know-how or access to capital. In many cases, the rationale for the land taking (or: land grabbing) is obviously speculation. Such hoarding of idle land causes an effective shortage of land supply. Because land cannot be reproduced and substituted arbitrarily, the opportunity costs of holding idle land are not borne by the landowner but externalized to society. In countries like Cambodia, the unused land is also often not leased out to needy farmers, because the owners are afraid that one day their property rights will be contested [6]. In such cases, legal protection would be difficult to obtain because of a weak legal system.

Against this background, the starting point of our analysis might be formulated as follows: In contrast to the viewpoint of the property rights theorists, private property in land may also result in a decoupling of benefits and costs of land use. Due to the decoupling of benefits and costs, capitalization of use rights on land fuels rent seeking. According to Tullock [17], we understand rent seeking as being closely connected with external costs, which are shifted from powerful and well-organized beneficiaries onto poorly organized groups.

**Table 2.** Cost benefit structure of land and improvements (adapted from [6]).

| Private property       |                             | Unimproved land                                |                                                                                       | Comparison:<br>Improvements       |
|------------------------|-----------------------------|------------------------------------------------|---------------------------------------------------------------------------------------|-----------------------------------|
|                        |                             | Investment                                     | Postponed investment                                                                  |                                   |
| Benefits               | Individual/private benefits | Land rent (stress on: “ <i>usus fructus</i> ”) | Unused land as store of value (stress on: “ <i>ius abutendi</i> ”, “ <i>abusus</i> ”) | Yields                            |
|                        | Public/external benefits    | Insignificant                                  | Insignificant                                                                         | Insignificant                     |
| Costs                  | Individual/private costs    | Insignificant                                  | Insignificant                                                                         | Operating costs, investment costs |
|                        | Public/external costs       | Planning, infrastructure                       | Opportunity costs of “land blockades”                                                 | Insignificant                     |
| Cost benefit structure |                             | Decoupling                                     |                                                                                       | Coupling                          |
| Consequences           |                             | Rent seeking, state capture, market failure    |                                                                                       | No aberrations                    |

The decoupling of benefits and costs causes a multitude of aberrations [18]: Formalized rights turn out to be the tool for rent seeking. Land use planning is not neutral and access to land might be denied. Land use is not efficient, overuse and underuse of resources may happen at the same time. Such mechanisms are particularly dangerous if no strong institutional framework (public law, e.g., natural protection laws, building codes) exists to restrict private property in order to reduce the aberrations. The protection of economically weak forms (such as indigenous people, living under customary rights) is problematic under such conditions. Due to a lack of acceptance, an unsound rivalry between formalized and informal law may emerge.

### 3. Results and Discussion

#### 3.1. Lack of Neutrality of Planning

In most developed countries with at least a working rule of law, private property rights on land are “weak” private rights by nature. Unlike other assets, private property on land is restricted by public law. This refers in particular to the “*abusus*” right (Table 1): If land is designated as agricultural land, the owner is not allowed to erect a commercial building for instance. The owners of land should not be able to do whatever they like, because this may impact on other actors (external costs). Thus, planning contributes to avoiding rationality traps [19]. Hence, when the rule of law is working and public law is enforced by a strong state, private property on land is more diluted than property on other assets. Regarding land, the planning framework is one of the most important restrictions to private property on land.

Planning is also necessary to protect such forms of land use which are moving beyond efficiency and profitability. Such forms are not only important for the cohesion of the social system, but in many cases also for the resilience of the ecological system [20]. Thus they often have important positive external effects. However, it is almost impossible to measure the external benefits and costs.

If planning provides space for land use alternatives with high external effects but with a low ability to pay (purposely I do not use the term “willingness to pay”), other profitable projects might not be realized. In this regard, from the perspective of an individual, spatial planning causes opportunity costs

because the unsuccessful stakeholders cannot realize intended projects. The opportunity costs of powerful stakeholders may be particularly high if they cannot realize profitable projects.

Nonetheless, planning has to balance the competing demands of various stakeholders, including vulnerable groups with low budgets (e.g., indigenous groups) and the protection of nature. Planning has to create space for a diversity of forms, not only for forms with a high ability to pay. Thus, good planning should be able to resist well-organized and economically powerful special interests.

Planning in its restricting function to private property affords a strong and independent state as well as the rule of law. However, if property titles allow the land owners to reap the benefits of unimproved land but the (opportunity) costs of land use planning are externalized [21], the result might be rent seeking and capture of the planning authorities. Thus, the “neutrality of planning” [22] is challenged by economically powerful private actors. Social and economical forms which may provide significant external effects but which are also moving beyond the logic of profit have to give way to the economically and politically powerful actors. Since there is also no *raison d’être* for such forms in the “one size fits all” paradigm of major property rights theorists (such as Posner [3]), it may serve at the same time as an ideological justification for the marginalization of forms with a weak ability to pay. Hence, externalizing the costs to such weak groups is interpreted as strengthening the efficiency.

Examples for rent-seeking activities and the marginalization of forms with a weak ability to pay are manifold. In Cambodia, the planning system is in its infancy and the rule of law is weak. The Cambodian state is “an empty institution” rather than a “credible institution” [23]. Among other concessions, the state grants long-term ELCs, which provide capitalized use rights, in particular to powerful actors and political favorites. Public consultations, environmental and social impact assessments, as required by Article 4 of the Sub-Decree on ELCs (2005) [24], are often poorly executed or not done at all [11]. A concrete example is representative of many grievances in Cambodia: In Phnom Penh, the Boeung Kak lake (80 ha of a total 90 ha lake area) was filled up with sand in order to develop the lakeside by a joint venture between the Chinese company “Inner Mongolia Erdos Hungjun Investment Co” and the Khmer company “Shukaku Inc” (owned by the powerful senator Lao Meng Khim). The area was provided by lease at 0.60 US \$ / sqm / year. The destruction of the lake was not in accordance with the Master Plan of Phnom Penh, which indicated protection of such areas. Phnom Penh lost its last big lake, which is not only an important attraction but also a livelihood for many families [25]. According to human rights groups, more than 4,000 families are displaced. The households affected were denied land titles shortly before the lake area was leased out [26]. A multitude of similar cases has been collected and documented by NGOs (for example, see [27–29]) or scientists (for example, see [30,31]).

A “captured” (local) government is no longer a neutral trustee of the common good. Capitalized land titles in the context of a weak public law (including land use planning) must result in severe aberrations.

### 3.2. Lack of Compliance with Natural Protection Laws

Similar features can be considered with natural protection laws. Cambodia has good and sophisticated natural protection laws, particularly for forest protection [32]. However, compliance is obviously poor. Cambodia has one of the highest deforestation rates in the world [33]. The poor enforcement of the protection laws is obviously caused by a lack of capacity, but also by an obvious

lack of political will or simply because of corruption. Some of the most wealthy and powerful Cambodians made a fortune with illegal logging of primary forest on their estates. In the mid-1990s, senior government ministers awarded between 30 and 40 logging concessions to Cambodian and foreign-owned companies. More than seven million hectares of forest—or 39% of Cambodia’s land area—were signed away in these contracts on terms that greatly favored the interests of the concessionaires. Apparently, many concessionaires proceeded to break the law or the terms of their contracts, or both, in order to reap fast profits. By the end of the decade, they were responsible for most of the illegal logging in Cambodia [34]. Again, the benefits are reaped privately by powerful actors; the costs are externalized to weak actors or society as a whole. The state has turned a blind eye to the violation of the protection laws. The beneficiaries of the illegal activities are often closely connected with the political elite. If the rule of law works, the “*abusus*” right on land (see Table 1) is in the hands of the state, not in the hands of the holders of the use right. In Cambodia, due to a lack of enforcement of laws for the protection of natural resources (particularly forests), the “*abusus*” right is in fact shifted into private hands. Seen in this way, the property rights on land in Cambodia are even stronger than property titles in developed countries (as for example Germany), where the “*abusus*” right is in the hands of the state.

### 3.3. Land Titling and Land Grabbing

In many developing countries, formalization of capitalized land titles is obviously “abused” as a tool for a special form of rent seeking: Land grabbing [35]. Powerful actors use land titles to reap the benefits (land rents and incremental value), while vulnerable groups and households have apparently sometimes been arbitrarily excluded from the titling system [36,37]. The elite know how to play the formalization game. It has access to legal advice and personal connections to key governmental decision makers. In contrast, poorly educated rural people are defenseless when new land titles are suddenly claimed out of the blue. They do not understand what is going on until it is too late. With little understanding of formal legal procedures and no financial and political backing, they have barely any chance of successfully defending their traditional claims, which are often based on customary law. Hence, formalized law turns out to be a tool for appropriation of land by powerful groups at the expense of poor groups. Under these circumstances, formalized law is the law of the winners, whereas customary law is the law of the losers.

Human rights organizations (for example, see [28]) have noticed that land grabbing and forced evictions have escalated significantly over the last ten years in Cambodia. According to the empirical investigation of the World Bank, lower recognition of customary land rights even increases a country’s attractiveness for land acquisition [38]. Actually, Feder and Nishio [39] admit that land registration “may provide opportunities for ‘land grabbing’ by those who are better informed, are more familiar with formal processes, and have better access to officials and financial means to undertake procedures for registration.” NGOs’ criticisms in this regard, that the attempt of solving the land disputes within the privatization agenda, seems to be like putting the fox in charge of the chicken. There is little constitutional state and rule of law in countries such as Cambodia to prevent such aberrations.

On the contrary, formalization of capitalized land titles may even contribute to a higher inequality of land ownership [6]. Since 1989, when the privatization policy started, the inequality of land has

risen continuously in Cambodia. Meanwhile, also in comparison with other South East Asian countries, the inequality is high. The Gini coefficient of land distribution is 0.65 (for comparison: Thailand: 0.41, Indonesia: 0.49, Malaysia: 0.51, India: 0.55 [40]). As of 2004, it was estimated that 20–30% of landowners already held 70% of the country's land, while the poorest 40% occupied only 10% [41]. As in other countries, for Cambodia it also turned out that formalizing of individual land titles “supplies a mechanism for transfer of wealth for the educational, economic and political elite” [35]. An Oxfam GB survey [42] also gave an insight into the consistency of land ownership: The main land owners are businessmen (31%), high-ranking officials (with the title “His Excellency”, 23%), so-called “okhna” (a title given as a reward for financial contributions of more than 100,000 US \$, 23 %), high-ranking military officers (generals, 15%) and members of the National Assembly (8%).

The unequal distribution of land makes access difficult for needy people, even though Cambodia's land reserves seem to be abundant at first glance. Cambodia ranks among the leading countries world-wide concerning its proportion of arable land *vis-à-vis* its total area, which is 20.44 percent (or 3.7 million ha) of 18.1 million hectares. In *per capita* terms, this is 0.25 hectares of arable land per person in Cambodia compared to 0.07 hectares in Vietnam or 0.11 hectares in the People's Republic of China [43]. However, most of the land is, in fact, already distributed.

Considering concessions for an economic exploitation, the allocation of land is not driven by market forces (as with private property on land) but by the state—oftentimes in the form of undisclosed payoffs to political cronies (by so-called “unsolicited proposals to the government”). In Cambodia, ELCs now account for about 1.4 million hectares or about 25% of the country's agricultural land [9]. In addition, there are extensive concessions regarding forestry, mining and other commercial activities, which account for at least the same area [9].

The central government grants the concessions, usually without consulting regional or local administrations. Oftentimes social impact assessments are also conducted inadequately or not at all. The resulting overlapping land claims often lead to disputes, which concessionaires often do not even try to solve by negotiating agreements with the people affected (see Section 3.5). Instead, according to NGO-reports [28], they simply contact the central government, which has allotted the concession to them, because they expect that the government will “resolve” such conflicts in their favor, using police or armed forces if necessary.

More than 80% of Cambodians currently live in rural areas. About 21% of rural households are involuntarily landless, while a further 45% are land poor (owning no more than 1 hectare per household [44]). The people who lose their livelihoods by land snatches then join the queue of landless migrants, moving either into the big cities or encroaching on protected areas (see Section 3.4.).

### 3.4. The “Tragedy of the Anticommons”

However, in our view the central problem is not the formalization *per se*, but the titling of mainly individualized and capitalized rights, which allows exclusive reaping of semi-monopolistic rents (“capitalization”), while the costs of the valorization of land are externalized to a high degree. The aforementioned exclusion of weak groups from titling, land grabbing *etc.* leads to a manifestation of rent seeking of powerful groups at the expense of economically and politically weak groups. However,

although the RGC as well as official development assistance intend to combat (land) poverty, the privatization approach is still guiding their land use policy (since 1989).

This is despite the fact that, in a historical view, the genesis of individualized and capitalized use rights is anything but a success story. Exclusion of the needy and squeezing of the land rent by landlords runs through economic history as a main theme. This endemic source of conflicts provoked the genesis of social counter movements again and again all over the world (stretching back to feudal times, e.g., in the German peasants revolt in the early 16th century [45]). Resistance against exclusion of access to land by law (feudal society) or by price (bourgeois society) was put up in legal and illegal forms. The same holds true for the present situation: Besides open violence, the resistance mainly involves ignoring formal law and the reference to manifold forms of customary law:

- The first form is an open violation of formal law by the losers of the privatization agenda. In particular, the peripheral area of Cambodia is being filled with ELCs. Since 2006 more than 300,000 ha of ELCs have been granted [46]. At the same time there is huge migration pressure from the central area. In regions with land price hikes in particular, many farmers could not resist the temptation to sell the land. Furthermore, distressed sales of land also play an important role, e.g., in the case of disease of family members. Such landless people try to find new land in peripheral regions [47]. Owners of large estates consider their property and their investments to be threatened, particularly by encroachment. Encroachment also affects state (public) land, which formally regulates the traditional commons in Cambodia (see Section 3.5). The consequence of encroachment is often a degradation of natural resources.
- The second form is the adherence to customary law. New claims, set by formal law and superimposed on customary law, are often not recognized. Within customary law, the access to land is regulated and the livelihood is secured. In Cambodia, like in many other developing countries, this is often done by using some forms of common property (in a wide sense, which also includes forms of open access [48,49]). Because customary law is as numerous as the communities to which it refers (often small communities which are based on kinship relationship), space is provided within the claims of customary law for a plurality of social forms. The overriding effect of formal law is a latent threat to the access to resources by poor people as well as to social diversity.

However, in both forms, the rationale for ignoring formal law is mainly the need for access to land for an actual livelihood instead of reaping differential rents or capturing value. Concerning the second form, most of the people affected are not even integrated in the market and have a low income. The first form is more complex: Besides those who need access for their livelihood, there are also reports in Cambodia about encroachers who try to contest formally acknowledged claims or at least to extort compensation (for giving up the encroachment) from the legal owners, sometimes supported by powerful backers.

Of course, the lack of acceptance of formal law is also an education problem, at least in Cambodia (where the intellectual class was widely eliminated by the Khmer Rouge). However, the lack of compliance with formal law and the split between the law of the winners and the losers shake the very foundations of the privatization approach: “The point is that, if property has no social legitimacy, it is no property because it lacks the basic ingredient of property, recognition by others ...” [36].

However, the beneficiaries of the privatization agenda refer to the enforcement of formal law and insist on overriding the customary law, if necessary with police or military power. Nonetheless, due to a weak government in Cambodia (as in many countries of the Third World), the enforcement of the privatization agenda is also often weak.

The consequence is a failure of the agenda and sometimes even a regression of formalized law due to the resilience of customary law, although in theory the conditions for privatization are favorable (rising scarcity and increasing value of land) [49]. In fact, this may lead to a legal vacuum and at least a partial *de facto* open access situation (this is precisely what the widespread encroachment in Cambodia amounts to). Such *de facto* open access contributes to accelerating *inter alia* the overuse of resources (e.g., deforestation). This *de facto* open access situation fuels the influx of displaced people into peripheral regions, who are encroaching onto state public land in particular. Combined with a lack of effective access controls, this causes further degradation of natural resources that had been stable commons in the past. A telling example is the province of Monduliri in Cambodia. In this province, the reported rate of population growth in Seima Protection Forest at around 5.8% per year between 2003 and 2008 is high compared to the national rate of 1.7%. It is reported that migrants show less interest in sustainability and maintaining forest resources for livelihood benefits [50].

On the other hand, this anarchic situation might also be interpreted as a case of the “Tragedy of the Anticommons” (for example, see [51–53]): Exclusion rights are claimed by the state (formalized rights) and private land owners, and at the same time by the owners of the customary rights as well as by the contesters of the formalized rights (encroachers) respectively. The result is an underuse of resources, due to competing, overlapping claims and land conflicts. A significant share of ELCs are affected by encroachment problems [9]. According to the findings of the World Bank, only about 10% of the areas granted by ELCs are in use. Besides speculation, encroachment also seems to be an important reason for that [54].

Hence, overuse and underuse of resources turns out to be not only a theoretical dichotomy [55], but also happens simultaneously on the ground.

### 3.5. A Flipside of the Tragedy: The Failure of “Formalized Commons” in an Institutional Vacuum

As a solution to the conflict of customary law and formalized law, coexistence of both regimes is often proposed. However, there are hints that in an environment of rent seeking, a weak state and *de facto* anarchy, such approaches are also difficult to put in place.

The idea of such coexistence has also been taken up by Cambodian law makers. In order to achieve better protection of resources and to make traditional rights legally enforceable, attempts were made to formalize commons regimes. For instance, according to the Law on Forestry 2002 (Article 40) [32] and the Sub-Decree on Community Forestry Management [56], communities may apply to be recognized as a community forest organization.

Within such a community forest organization, limited user rights are provided to a community for subsistence (the forest area itself remains state public land; see Article 3 of the Sub-Decree on Community Forest Management). A commodification of the forest and the fruits should not take place, the exploitation rights are limited (see Article 12 of the Sub-Decree on Community Forest Management).

Presently, there are more than 420 community forestry sites covering around 400,000 hectares, although only 94 sites covering 113,544 hectares are legally recognized and have signed an agreement (on February 2010). Evidence on the performance of community forestry initiatives to reduce deforestation and forest degradation remains inconclusive, however [50]. Although many community forest organizations seem to be successful in reducing illegal logging, an unknown number of the community forest organizations apparently failed, and the illegal logging continued. Due to a lack of research, statistics are not available so far. Thus, we have to be cautious. Nonetheless, some statements are possible concerning the reasons for the failure of such institutionalized commons.

First, rent seeking, rent and value capture, as well as a “wild commodification” and commercial pressure, apparently play an important role in the violation of law:

- Violation of laws from central administration levels: As mentioned in section 3.3, land was taken and sold or leased out as state land by central institutions without any consultation of the local level administration about current uses, correct location and spatial expansion [50,57]. This rent-seeking driven, centralistic attitude ignores, in many cases, the legal framework (for instance Article 4 of the Sub-Decree on ELCs as of 2005) and is in sharp contrast to the decentralization approach, on which the community forest organization approach is based.
- Violation of laws “on the ground”: The above-mentioned migration of landless people from central areas (see section 3.4.), where the land is scarce and more concentrated, into peripheral regions, causes new problems [47]. On the one hand, the forestry law and the land law were openly violated by encroachment of state public land and illegal clearing due to a lack of effective control by the authorities in charge. On the other hand, the failure happened although the communities applied for the acknowledgement as a community forest organization. During the time-consuming registration process, the responsibilities have often been unclear; hence logging and tree cutting went on. The cleared land was sold to immigrants, thus a “wild commodification” took place, even though it was apparently state public land [50]. As a result, forests have been converted to agricultural land on a larger scale. These and other illegal activities have also been backed by powerful people, who apparently took a good deal of the captured value [57].

Second, important design principles for long-enduring common pool institutions, which have been promulgated by Ostrom [58], could not be implemented on the ground [57]:

- Functioning commons need engaged commoners. However, like many countries in the Third World, Cambodia is a post-conflict country. The trust among villagers and the willingness to cooperate and the progress in community building is low. With the influx of foreign migrants in villages, the cohesion of the community probably does not increase in most cases.
- Due to the weak state and the legal vacuum, the violation of the formal rules apparently also often went unpunished. In contrast, obviously such people who tried to resist illegal logging activities have been threatened in the cases reported by Weingart and Kirk [57].
- Due to a lack of responsibility and capacity, effective monitoring was missing. Instead of providing support, the state agencies apparently removed their responsible officers very quickly after having shifted the responsibility for monitoring and enforcement to the community organization.

- Furthermore, in the absence of cadastral records the boundaries of the collective good have not been clearly defined—in contrast to the legal requirements (e.g., Article 11 and 24 of the Sub-Decree on Community Forestry Management [56]). Due to a lack of community building, mapping within participatory land use planning is also difficult to introduce [59]. Hence claims were overlapping while cooperation among neighboring communities was lacking at the same time.

Thus, there is some reason to assume that formalizing commons in an institutional vacuum may even contribute to the *de facto* anarchy and thus are endangered to fail [57]. A coexistence of customary law and formalized law needs a strong state, as described in section 4. However, more research is necessary in this regard.

#### 4. Conclusions: Toward a Paradigm Shift in Development Policy

The picture painted above seems to be quite black. However, there are conceptual alternatives. The alternative derived out of the analysis above is based on the subsequent pillars: Fighting rent seeking by a “decapitalization” of the use rights, redistributing power and strengthening the state as trustee of the common good, encouraging a variety of forms and supporting the principle of subsidiarity and decentralization. Of course it is not realistic that such an alternative blueprint is implemented in a pure form. The purpose of the draft is to show a direction toward which development assistance might move forward step by step.

##### 4.1. Decapitalization of Use Rights

In opposition to the de Soto agenda (“formalization and capitalization”) we have tried to demonstrate that a central problem of the privatization agenda is the capitalization of land rights.

As shown above, privatization strategies on land intend to bundle essential property rights in the hands of private-sector actors, including the right to take the differential rent and the value of the land. By doing this, rent seeking is also encouraged, because the land rent is reaped by strong and influential groups, whereas the costs are shifted onto poorly organized groups. Moreover, land is used as a store of value and as a means of speculation, which lowers the effective supply of land and thus may end up in failure of the land market.

Therefore, in our view, only strong private use rights are sufficient for an efficient use of unimproved land. In particular, the private reaping of differential rents and private value capture is not necessary. Therefore we are calling for an unbundling of property rights: The use right (“*usus*”) shall be private, but the “*usus fructus*” right and the “*ius abutendi*” right should be given into the hands of the state, as well as the “*abusus* right” (see Table 1). The idea of unbundling use rights from the ownership bundle has been made subject by different authors of the land reform movement, although they did not use the terminology of the property rights theorists (for example, see [16,60]). Land has different characteristics, compared with other goods (see Table 2 and Section 4.2.), hence the idea of the unity of property [61] should be released. However, also within such an unbundling scheme, it is urgently necessary to keep conformity between use rights and exclusionary rights (it also makes sense to make such rights transferrable) [55]. This means in particular to cut the red tape of bureaucracy

which limits the private use rights. The unbundling of property rights might be done by a “decapitalization” of the land use rights.

Two methods are available to achieve this goal [62]:

- Lease arrangements may refer to an agricultural lease or ground lease. The commune or the state is the legal owner of the plot, and a private-sector actor has the (long-term) right to use the plot, e.g., for agriculture or by setting up and using a building. The crucial point is to set up an arrangement to skim off the land rent by the leasehold fee in a reliable way. In this case, the use right on land might be almost completely “decapitalized”. In current leasing schemes (state land) the leasing fees are significantly smaller than the land rent. This means that the land rent and its increases are not skimmed off. The user rights are capitalized; the schemes allow private rent capture and value capture.
- Another mechanism is taxation. The idea is to skim off huge parts of the differential rent by means of a land tax (but not the income from improvements!). This idea was heavily promoted by Henry George [60]; before him, David Ricardo [15] also thought about skimming off the differential rent with a tax. Within taxation schemes, private-sector actors may keep the legal ownership to the sites. Nonetheless, the “*usus fructus*” as well as the “*ius abutendi*” right (see Table 1) might be at least partially transferred to the public. However, for many technical and legal reasons, a tax which skims off the differential rent completely is difficult to put in place. For example, for legal and practical reasons a site value tax is only able to skim off a share of the land rent and to transfer only a share of the economic value into the hands of the community or of the state. (The formula for the after-tax value on land “V” in private hands is:  $V = \frac{R}{i+t}$ , as “t” is the tax rate on “V”. Solving the equation for the proper tax rate in order to “decapitalize” the land ( $V = 0$ ),  $t = \frac{R}{V} - i$ . The term is not defined if the after-tax value  $V = 0$  [63]). However, precisely the weakness of the site value tax option could turn out to make a site value tax a viable political option. If a public valuation system is put in place comprehensively, a site value tax could be introduced with marginal effort [64]. A site value tax is levied on the value of unimproved land without regard to buildings and fixtures (this would be a compound tax base). Hence an efficient use of plots is not discouraged and does not distort the way land is used, as a compound tax base does. The rate of a site value tax should be fixed without being changed according to the actual use of the site. A fixed tax rate always results in the same tax burden for the owner. The owner of the land cannot avoid the tax if it has the character of a fixed cost. The only way to lower the effective burden of the tax is to use the site efficiently. Furthermore, fixed costs can hardly be shifted onto tenants’ shoulders; the owner of the site (or the ELC holder) has to bear the tax burden. In order to achieve the intended effects, the tax rate should not be too low.

In order to avoid a misunderstanding, it should be noted that the differential rent cannot and should not be abolished. The differential rent is an important allocation force that regulates the use of the land [65]. However, skimming off the land rent by means of leasehold or taxation means putting in place the missing link between benefits and costs of a user right (see Table 2) [66]. On the one hand,

this means a source of finance for infrastructure, planning *etc.*, which generates the land rent to a high extent. On the other hand, this also means a compensation for waiving land use alternatives by the public.

Indeed, regarding land markets, the RGC saw the necessity to put a fiscal scheme in place. In order to intensify the use of land, a tax on unused land was introduced in Cambodia. However, this tax is not levied in a comprehensive way. Among other things, discussions arose as to whether the land was in use or not in use. Land should be taxed without considering the actual use to which it is put; it should be a tax on imputed proceeds. Furthermore, a tax rate of 2% on the land value as it is assessed by the “Land Committees” is not enough to avoid any aberrations if price hikes of 10 to 60% occur (as has happened in the past). With the launch of the new property tax, which came into force in January 2011, the RGC missed another opportunity to encourage higher efficiency in the use of land. The tax rate was set at only 0.1%. The tax base comprises the value of the land including any improvements that may have been made to it (compound tax base). Tax exemptions are made for agricultural land, among other things, which also includes ELCs [9]. Tax exemptions, low tax rates or low leasing fees (particularly for agricultural sites) are often justified with positive external effects of agriculture. If there were indeed any positive external effects, open subsidies would be preferable in order to achieve a transparent fiscal system and a good land use policy. To summarize: The actual framework on land taxation in Cambodia is as far away as it can get from an ideal situation.

#### *4.2. Tackling the Economic Base of Existing Power Distribution*

Unlike industrialized countries, land is of central importance in developing countries. Developing countries’ economies are based at the very beginning of the value chain, which is mostly agriculture and resource exploitation. However, land as a capital asset has different features from other assets. Land cannot be reproduced and substituted arbitrarily [67], and market entries and any increase of land supply is limited. The scarcity of land, and the land rent, can hardly be brought down by competition, due to an increase of supply. Hence a “decapitalization” by market competition does not work in the land sector as in other sectors of the economy.

As Eucken stated [68], competition in a market economy also has the function of limiting and balancing power. However, if the market cannot work as a “decapitalization” mechanism in the land sector as in other sectors, economic power might cumulate and radiate into the political sphere. Because the power limitation cannot be achieved by market mechanisms, different sorts of “decapitalization” schemes have to be put in place. We suggested leasehold and land taxation schemes in order to make sure that the land rent and land value is transferred into the hands of the public.

Thus, the political target of the “decapitalization” of land is to support a redistribution of power. In developing countries at least, land is not only a capital asset but also the foundation of a power relationship in society, which may sometimes have feudalistic features. The distribution of power among the stakeholders is not at all in balance. Most of the power is in the hands of the owners of large estates and also in the hands of the military (which is also often closely related to powerful landlords). The state is not a steward of the common good, but a vehicle to privatize the land rents [66].

So far, the official development assistance (ODA) only tried to improve the rule of law, to fight corruption *etc.* This is certainly a step in the right direction but by no means enough. The economic

basis of all the aberrations, in particular rent seeking and state capture, has not been tackled systematically. The same holds true for the roots of corruption. As Harrison emphasizes, weak governance goes hand in hand with a private “taxation” of land rents, e.g., by bribes or mafia-style activities [66].

A better balance of power cannot be achieved without tackling the economic foundations of the aberrations. In particular, it is necessary in order to take economic and political power away from the holders of the large estates. Hence the “decapitalization” framework on land might be considered as a condition for developing such a state into a “credible institution” and *vice versa* [23]. The transfer of land rents to the public by means of leasehold or taxation may contribute to strengthening the state, *i.e.*, by financing infrastructure and decreasing the susceptibility of civil servants to corruption by giving them a better salary [66]. Thus a “decapitalization” framework may support a better balance of power among the stakeholders, which is a precondition for a working rule of law.

On the other hand, a “decapitalization” framework is a necessary condition but is not nearly sufficient on its own for good governance. Without a certain strength of a constitutional state, a “decapitalization” framework is almost impossible to put in place. It is clear that “decapitalization” of land is difficult to enforce in countries where political decision makers are closely connected to owners of large estates and developers. In order to cut the Gordian Knot, among other things, land “decapitalization” might be supported by the development of attractive investment alternatives. Hence the institutional development of the capital markets is an important supporting measure. As in other developing countries, the financial sector is still comparatively weak in Cambodia. A lack of attractive financial investment alternatives was an important reason for the boom in the real estate market from 2004 until 2008 [9]. Hence money was diverted away from the productive sectors of the economy and instead inflated the value of land, hampering the development of the real economy. (However, from an overall real economic perspective, savings are only possible in reproducible and depreciable assets, but not by inflating the value of land). In this regard, ODA in Cambodia is already taking a good direction. A developed capital market with lower interest rates will also fuel investments in improvements. Such capitalization of improvements and not of unimproved land is the right path to take. Hence a successful policy has to tackle several challenges at the same time and in coordination within a consistent package of measures. Within this package, the “decapitalization” aspect on land is essential. Leaving it aside, as the ODA has done so far, is to take same wrong track as neglecting the redesigning of political institutions and political culture.

#### 4.3. Planning and Legal Framework

Formalization (titling) is not exclusively linked to capitalized and individualized land titles. Instead, formalization should go hand in hand with planning and provide space for a variety of forms, also beyond the logic of efficiency and profitability. Generally, economic efficiency of land use cannot be the only criterion of social significance for land use policy. It is the task of the state as the trustee of the common good to protect this variety and the resilience of the social and ecological system.

This includes not only public spaces (as for example the former Boeung Kak lake in Phnom Penh), but also indigenous groups, smallholders and others (concerning the impacts of property rights on the culture, particularly of indigenous people, see [69]). Despite their lack of economic performance, such groups are important for a working social system [20] and ecological functionality. This holds

particularly true for the conservation of biodiversity, because agribusiness companies are frequently interested only in a single crop. In contrast, indigenous groups or small farmers usually have permanent multi-cropping systems. Biodiversity also depends on social diversity.

However, neutral planning and space for forms with a lower ability to pay needs an emancipation of the authorities from powerful economic interest groups. Moreover, the planning has to be enforced by the administration. The necessary emancipation is not compatible with a weak and captured state, and any vouchers for rent seeking of powerful pressure groups, such as capitalized land titles. The practical value of a good legal framework is low if the law is violated due to rent capture and value capture of elites. Hence, “decapitalization” of land titles contributes to strengthening the state in order to be a reliable trustee of the common good.

However, besides the implementation of a “decapitalization” scheme, additional action is necessary regarding the design of institutions. Regardless whether central state, province or municipality: The actions of authorities should be decoupled from the influence of powerful pressure groups [68]. The authorities should know about the interests of the stakeholders (e.g., within hearing procedures), but law-making and decision-making should not be influenced by such groups. Thus, the collusion of private special interests with governmental institutions should be criminalized—something that is not always the case even with the western development “blueprints”. (For instance, ratification of the UN convention against corruption by the German parliament is still outstanding. Although, Germany is providing Official Development Assistance to Cambodia, including changing institutions in order to improve governance). It is clear that this requirement is even more difficult to enforce in countries where political decision makers are closely connected to owners of large estates and developers. Besides, cultural barriers might be an obstacle. However, poor governance cannot be considered as a cultural heritage which is worthy of protection.

#### 4.4. Beyond Efficiency

Protecting forms with a low ability to pay but high external benefits also means setting up a differentiated legal framework with equal treatment for equal things and unequal treatment for unequal things (principle of equality). Doing this, increasing commercial and administrative efficiency is not the primary need:

- This means, for instance, a better coexistence of formalized law and customary rights in order to support a variety of cultures, lifestyles and models for living together. Instead of private property as a wholesale solution, the broad variety of customary rights of indigenous communities might also provide a quite effective protection of natural resources and at the same time guarantee the necessary access. In order to avoid failures such as those described in Section 3.5., suitable instruments for different situations as well as appropriate procedures have to be figured out. A stronger emphasis on collective land titles for communities where customary rights are in place appears to be particularly promising. Within such a scheme of common or communal land titles, a “home” for traditional commons might also be provided. Inside the communities, the traditional rights might be applied as long as this does not violate the constitution (or human rights). However, any legal relationships to outsiders should be based on formalized law [70].

- If good planning provides space for the manifold functions of land (spiritual, ecological, *etc.*) and particularly also for “inefficient” use of land, the value of such land differs from land which should be used according to the efficiency criterion. Thus taxation or public lease requirements should also take these differences into account (maybe a zero charge is the adequate solution for some forms). Under these conditions a “decapitalization” framework may provide an important contribution to protect the diversity of economic, ecological and cultural forms, which are moving beyond the logic of profit and efficiency.

In addition, state policymaking should reflect the principles of subsidiarity, decentralization and transparency. Lower administrative levels (e.g., within the land allocation process) should be granted greater powers. In concrete terms, this means that local communities and communes get higher shares of land rents (in the case of leases) or land taxes (in the case of property). However, capacity building is urgently required in order to put in place a working administration.

Moreover, participation is necessary, particularly if new titles are provided for economic exploitation (regardless of whether they are private property or concessions). Any participation process might be time consuming and causes transaction costs (maybe delays of investments). However, without such a participation, no trust may develop between the claimants of different stakes. By decentralization of responsibilities, the state may put authorities on a lower administrative level in charge. Unfortunately, the RGC took a different way. Since September 2008, the power to grant ELCs was moved away from the provincial authorities to the central government [71].

Another crucial task is to encourage the stakeholder (in particular local people) to make use of such participation possibilities, if they exist. There is a lot of mistrust on the ground, and often there is little willingness among the competing stakeholders to negotiate with each other.

Of course, a redistribution of power by “decapitalization” of land and decentralization of power is the opposite of what influential political decision makers generally want. Hence, a new development agenda will need to sail against the wind. It is time to adjust the compass.

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## Conflict of Interest

The authors declare no conflict of interest.

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