

‘Indigenous Peoples’ and land: Comparing communal land titling and its implications in Cambodia and Laos

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Abstract: *In 2001 a new Land Law was adopted in Cambodia. It was significant because – for the first time – it recognised a new legal category of people, ‘Indigenous Peoples’ or chuncheat daoem pheak tech in Khmer, and it also introduced the legal concept of communal land rights to Cambodia. Indigenous Peoples are not mentioned in the 1993 constitution of Cambodia or any legislation pre-dating the 2001 Land Law. However, Cambodia’s 2002 Forestry Law also followed the trend by recognising ‘Indigenous Peoples’. These laws have been both symbolically and practically important, as they have provided government-mandated legitimacy to Indigenous identities and associated land and forest rights, including communal land rights, and have been ontologically significant in dividing Indigenous and non-Indigenous Peoples on legal grounds. Over a decade after the 2001 Land Law was promulgated, this article considers some aspects of its effects. In particular, when compared with the potential for developing communal land rights in Laos, one has to wonder how advantageous it is to adopt Indigenous identities and the types of communal land rights and community forestry rights presently possible in Cambodia.*

Keywords: Cambodia, communal land titling, indigeneity, Indigenous Peoples, land tenure, Laos

Introduction

In recent years there have been significant changes in how the category of ‘Indigenous Peoples’ has become conceptualised in Cambodia. Indeed, in 1993, neither Indigenous Peoples nor even upland ethnic minorities were mentioned in Cambodia’s new constitution. Neither does the concept appear in previous Cambodian constitutions or legislation. The 2001 Land Law of Cambodia has been particularly significant because it was the first law to explicitly recognise the existence of ‘Indigenous Peoples’ (*chuncheat daoem pheak tech* in Khmer) in Cambodia, and it was the first piece of legislation to provide those defined as ‘Indigenous’ with extraordinary land rights apart from what are available to other Cambodians. It gave them the right to establish ‘communal land tenure’, or the shared land rights of a community to a particular piece of land (RGC, 2001; Baird, 2011). Indeed, it is significant that Cambodia is the first country in mainland Southeast

Asia to recognise particular land rights for a certain group of people who are identified as ‘Indigenous’, although it does follow a recent trend in Asia, with similar changes already having occurred in Japan, Philippines and Taiwan (Erni, 2008; Baird, 2011). Still, in both Cambodia and elsewhere in Asia, there remains considerable resistance to providing particular rights to people defined as ‘Indigenous’ (Erni, 2008; Baird, 2011; Ehrentaut, 2013). Part of the reason for this is that the ethnic Khmer of Cambodia often consider themselves to be a ‘minoritized majority’ (Goshal *et al.*, 1995: 28); that is, a dominant group that perceives itself to be threatened with extinction. As Goshal *et al.* (1995: 28) put it, ‘many Cambodians think, as they have thought for centuries, of Cambodia as “srok Khmer”, the land of the Khmer: a people, culture and distinct way of life that once was the jewel of South East Asia, but now, in the minds of many Khmer, is threatened with extinction’.

The population of Indigenous Peoples, as presently defined in Cambodia, seems likely to

range somewhere between 1 and 1.4% of the nation's total population (National Institute of Statistics, 2008; Anderson, 2011), although Ironside (2009) has pointed out that these statistics are far from certain. In any case, it is evident that Indigenous Peoples make up a small portion of the overall population. In Cambodia, they include peoples belonging to various ethnic groups, including the Jarai, Tampuan, Brao, Kavet, Kreung, Lun, Bunong, Stieng, Kuy and others (Baird, 2011; Ironside, 2011; Swift, 2013). Recently, 23 minority 'mother tongues' have been identified as existing in the country (Ironside, 2011; CIA, 2012).

Over the last number of years, the idea of 'communal land rights' has received increased interest and recognition by many governments and international organisations, with various forms of communal land agreements having been adopted in different parts of Asia (Colchester, 2004; Lynch, 2006; Anderson, 2011). In Cambodia, like the Philippines, communal land titling has been integrally linked to the adoption of the concept of Indigenous Peoples (Anderson, 2011; Baird, 2011), but this has not been the case everywhere in Asia, including Laos, where the Lao People's Democratic Republic (PDR) government continues to adopt what has become known as the 'salt water theory' (Erni, 2008). That is, Lao PDR does recognise the importance of the rights of Indigenous Peoples in parts of the world widely colonised by European colonial powers, such as the Americas, Australia and New Zealand, but it considers all the citizens of its country to have equal rights, regardless of ethnicity (Erni, 2008). This is significant for a country such as Laos, which has much more ethnic diversity than in Cambodia, including 49 recognised ethnic groups and well over 100 sub-groups. Moreover, approximately half of the population of Laos are not ethnic Lao (Lao Front for National Construction, 2005), which makes ethnic identities much more important for most people in Laos as compared with Cambodia.

So what have the implications of the creation of Indigenous Peoples been in Cambodia, both for Indigenous and non-Indigenous Peoples, and particularly in relation to land and forest access rights? Also, to what extent has becoming legally defined 'indigenous' been beneficial with regard to gaining improved and more

secure access to resources crucial to their livelihoods? The objective of this article is to address the above questions, although I mainly focus on one aspect of Indigenous identities: communal land titling, the main extraordinary right allowed to Indigenous Peoples in the 2001 Cambodia Land Law.

In relation to the Land and Forest Laws of Cambodia, I mainly want to make the points that: (i) communal land rights are only being provided to a small portion of the population, those defined as Indigenous Peoples; (ii) that accepting communal titles over agricultural lands means recognising state ownership of 'forest land'¹; and (iii) that community forestry only provides local peoples weak and relatively short-term rights over forest resources.

The emergence of 'Indigenous Peoples' in Cambodia

In that Baird (2011) has already provided a detailed account of the genealogy of how the concept of 'Indigenous Peoples' has recently been constructed in Cambodia, and inserted into the 2001 Land Law, I will not repeat all the details here. It is, however, worth providing an abbreviated account, in order to frame this article.

The concept of 'ethnic minorities' is not new to Cambodia, and ethnic minorities have long been referred as *chuncheat pheak tech* (ethnic minorities) in Khmer. In addition, those who speak Mon Khmer languages other than Khmer have often been referred pejoratively as *Phnong* (see Baird, 2008). In the late 1950s during Prince Norodom Sihanouk's *Sangkum Reastr Niyum* (People's Socialist Community) period, however, the terms *Khmer Kandal* (middle Khmer, the majority), *Khmer Islam* (for the ethnic Cham) and *Khmer Loeu* (upland Khmer) were invented by the state to classify Cambodians as part of attempts to integrate minority peoples into the Khmer nation (Baird, 2008, 2010b). Many minorities were, in fact, happy to be referred as Khmer Loeu, and this remains the case today.

It was not, however, until 1997 when the term 'Indigenous Peoples' was more fully conceptualised and articulated by Western non-government organisation (NGO) activists

working in northeastern Cambodia, particularly Ratanakiri Province. It was during an NGO-organised workshop with ethnic minorities held in Ban Lung, the capital of Ratanakiri Province, when '*chuncheat daoem pheak tech*' was proposed as the Khmer language term for Indigenous People. The word '*daoem*', which means 'original', changed ethnic minority to 'original ethnic minority', which has come to mean 'Indigenous Peoples' in the country. The lowland Khmer were referred to as '*chuncheat daoem pheak charoen*', or the 'original ethnic majority' at the same workshop. In that ethnic Khmer people were still classified as an 'original people' of Cambodia, albeit the majority, the concept of 'original ethnic minority' was deemed acceptable to government officials at the time (Baird, 2011), and while 'original ethnic majority' is rarely used in Cambodia today, the term for 'original ethnic minority' has generally been adopted in the country.

It was not, however, until the 2001 Land Law was adopted that the term 'Indigenous Peoples' really gained traction, as the law was the first to provide those classified as Indigenous with particular communal land rights different from other Cambodians (Baird, 2011; RGC, 2001). In fact, the Land Law defines 'indigenous community' (*sahakom chuncheat daoem pheak tech* in Khmer) as:

groups of people who reside in the territory of the Kingdom of Cambodia whose members manifest ethnic, social, cultural and economic unity and who practice a traditional lifestyle, and who cultivate the lands in their possession according to customary rules of collective use (Article 23) (quoted in Ehrentraut, 2013: 99).

Thus, from the very beginning, the concept of Indigenous Peoples has become entangled with ideas about customary and collective land use. It has been defined in a rigid way, something I will refer to later in the article.

The Land Law was followed, in 2002, with the Forestry Law, which was the second piece of Cambodian legislation to provide Indigenous Peoples with special consideration, through providing particular rights to forest resources important for their livelihoods (Baird, 2011; RGC, 2002). Activist NGOs played crucial roles in ensuring that the concept of Indigenous

Peoples was included in both laws (Baird, 2011).

As the Land Law and Forestry Law came into effect, various international NGOs operating in Cambodia promoted the concept of Indigenous Peoples through illustrating the practical value of adopting Indigenous identities. In addition, NGOs started to expose Indigenous leaders to new ideas about the global Indigenous movement by funding and otherwise facilitating their participation in various international conferences, workshops and meetings, including the annually occurring United Nations Permanent Forum on Indigenous Issues in New York, and various events organised by international and regional organisations such as the Asian Indigenous People's Pact and the International Work Group on Indigenous Affairs. Inside Cambodia, various organisations linked to Indigenous ethnic groups also began to emerge in the 2000s, which further increased the importance of Indigenous identities in the country. The Land Law was not the only cause of the development of these groups, but it did help create the discursive space for the development of ideas about 'Indigeneity'. These groups included the nationally active Indigenous Communities Support Organization, the Cambodian Indigenous Youth Association, the Ratanakiri-based Highlanders Association (*Samakom Khmer Loeu* in Khmer) and the Indigenous Youth Development Program, the Preah Vihear and Kompong Thom-based Organization to Promote Kuy Culture, and the Indigenous Rights Active Members Network (Erni, 2008; Baird, 2011; Swift, 2013). It is not that all these organisations were established particularly to promote the idea of being Indigenous, but they have all adopted the concept of Indigenous Peoples, indicating that the term has gained some traction with at least some elements within the Indigenous population of Cambodia.

In short, new legislation in Cambodia, as well as various international and local NGO efforts within and outside of the country involving key Indigenous leaders in Cambodia, have been crucial for establishing and elevating the concept of Indigenous Peoples, and indeed, the Indigenous movement in Cambodia has expanded and has become more widely accepted and normalised in Cambodia over the last decade or so.

The importance of the 2001 Land Law

The importance of the 2001 Land Law in Cambodia for promoting the concept of Indigenous Peoples should not be underestimated, especially in the early years after the law was first adopted. The establishment of communal land rights was the most concrete change that has made the concept of Indigenous Peoples particularly relevant and meaningful for Indigenous Peoples in Cambodia. It is thus worth assessing – over a decade after the Land Law came into effect – how the Land Law and communal land rights in Cambodia have played out. Moreover, how might these concepts have been developed differently, or reimagined?

Although the 2001 Land Law established the right of Indigenous Peoples to receive communal land rights, initially the law did not have a noticeable material impact on the ground. Even now, the Land Law has played out unevenly in the country, with some areas being much less affected by it than others (Peter Swift, pers. comm., 19 August 2012). Moreover, while the law was supposed to provide for interim protection of Indigenous lands, including protections against eviction prior to Indigenous lands being registered (Bugalski, 2012), the reality is that little protection has been given, and Indigenous land losses have continued at a high rate (NGO Forum on Cambodia, 2006; Danida,² 2010; Ironside and Nuy, 2010; Ironside, 2011; Neef *et al.*, 2013; Baird, in press). A major constraint of the 2001 Land Law is that it was not considered sufficient to grant communal land titles. Some in the Cambodian Government decided that communal land titles could not be granted until after the *Sub-Decree on Procedure of Registration of Land of Indigenous Communities* was adopted in 2009 (RGC, 2009; MLM, 2009; Galvin, 2012). This sub-decree was built on the 2001 Land Law, and established the legal foundation for allowing the actual granting of communal land titles to Indigenous communities. Crucially, it sets out guidelines for registering Indigenous communities, which according to the sub-decree is a necessary precondition for securing communal land titles. First, the Ministry of Rural Development approves the designation of a community or village as 'Indigenous'. Then, the Ministry of Interior registers the village as a legal entity,

which involves incorporating the community as a legal person and developing constitutional statutes and bylaws endorsed by the Ministry (Anderson, 2011).

Tania Li's ideas about the 'tribal slot' in Indonesia are relevant to consider in this context, as she argues, drawing on the work of Stuart Hall (1996), that a group's self-identification as Indigenous is not obvious or inevitable. Nor is it simply invented, adopted or imposed by outsiders. Instead, it is a particular type of positioning that variously draws on history, landscapes and repertoires of meaning – particular fields of contingent power – and emerges through different varieties of struggles and engagement.

According to an Indigenous NGO worker in Ratanakiri Province interviewed by reporters from the *Phnom Penh Post*, 'to be recognised by the Ministry of Rural Development, a community needs to prove it is a collective unit sharing common language, customary law and culture, including art, dance and ceremonial events' (Walker and Tep, 2011). Thus, the Cambodian conception of 'Indigenous' is tied to static ideas about 'traditional' culture and especially agricultural practices, including swidden agriculture, something that many Indigenous activists have either challenged or outright rejected in other parts of the world (see Baird, 2011; Ehrentraut, 2013). This raises various questions about the extent to which being defined as Indigenous is actually reifying particular practices and identities, in ways that could potentially box people into certain positions that could actually limit their opportunities to change in ways that might advantage themselves (see Walker, 2001 for a good discussion of this in relation to the Karen in Thailand). In any case, such ideas have been promoted by some NGOs in Cambodia (Baird, 2011; Peter Swift, pers. comm., 19 August 2012), and it is also true that at least some Indigenous Peoples in Cambodia have been happy to go along with this vision of Indigeneity, despite the potential pitfalls it might lead them to. The state through giving certain ethnic groups particular rights and not others, is ultimately changing the ethnic landscape of the country (see Keyes, 2002). After the first two steps of Indigenous and community registration, the third involves registering the already measured land as communal (Anderson, 2011).

As of January 2012, 153 Indigenous communities were reportedly undergoing the process of land titling under an International Labour Organization programme in collaboration with other partners, such as NGOs. Thirty of these were registered as legal entities at the time, which means that they were already in the last stage of the procedure to receive communal land titles (Galvin, 2012). There are now, however, at least 40 communities registered as legal entities, and it was expected that six of those would have communal land titles by May 2013, due to support provided by the Canadian International Development Agency (Jeremy Ironside, pers. comm., 30 August 2012). Although the granting of communal land titles was initially very slow and extremely frustrating for many, including Indigenous community leaders and activists (Baird, 2011; Ironside, 2011; Walker and Tep, 2011), it now appears to be moving ahead quicker (see for e.g. Ironside, 2011; Walker and Tep, 2011; Evans *et al.*, 2012; Galvin, 2012). Still, very few people have questioned whether the adoption of this land management framework, based on reified visions of Indigeneity, is really advantageous for the people who are being asked to adopt them (but see Milne, 2013). For example, it is possible that sacrificing flexibility for secure land title could have a negative impact on sustainability, although it remains too early to know this.

In any case, the first step of the above-mentioned process, the recognition of Indigenous communities by the Ministry of Rural Development, is particularly significant, as it establishes, for the first time in Cambodia, a legal difference between the general population and 'Indigenous' inhabitants (Baird, 2011). It also involves setting up an Indigenous committee to be responsible for managing communal land holdings in the future (Ironside, 2011).

Some of the first communities to receive official communal land titles based on the 2001 Land Law are located in Mondulhiri, northeastern Cambodia, and are populated with mainly ethnic Bunong people, the dominate Indigenous ethnic group in the province. With the support of the Wildlife Conservation Society (WCS), a US-based wildlife conservation organisation, communal land titling has been moving ahead in a number of villages occupied by largely ethnic Bunong people located

within the Forest Administration-designated 292 690-ha Seima National Protected Forest (Evans *et al.*, 2012). It would appear that at least some of these people are happy with the results so far (Ironside, 2011), but it is unclear whether they will feel the same in the long term. Crucially, so far the downsides of this positioning have not been discussed much, so few people are cognisant of the potential downsides of adopting the 'Indigenous slot'. So, how has communal land titling worked in Mondulhiri?

Indigenous land titling in Seima National Protected Forest

WCS has been supporting the management of Seima National Protected Forest since it was first designated in 2002 (Evans *et al.*, 2012).³ In 2004, Andoung Kraloeng Village in O Rang District, Mondulhiri Province (see Fig. 1), which is within Seima, and had been supported by WCS since 2003, was selected as one of the national pilot sites for communal land titling (Evans *et al.*, 2012), along with two other locations in Ratanakiri Province, La In Village and Laeun Kren Village (LMAP/GTZ, 2004; Ironside, 2011). Since then, Andoung Kraloeng has been registered as an Indigenous entity and has had over 1400 ha of communal agricultural lands demarcated. It was expected to become the first village in Cambodia to have its communal agricultural lands formally recognised by the Ministry of Land Management, Urban Planning and Construction (Evans *et al.*, 2012). However, the two pilot villages in Ratanakiri actually ended up receiving their communal land titles first, in December 2011, as an additional sub-decree was required for villages within Seima so as to legally convert protected forest (state public land) into state private land so that it could be legally titled. This was not relevant for the villages in Ratanakiri because they are not located within protected forests (Jeremy Ironside, pers. comm., 30 August 2012).

Essentially, the communal land titling process in Cambodia has allowed for the designation of swidden or other agriculture land as communal. Indeed, Cambodia is also the first country in mainland Southeast Asia to allow for this type of designation. This constitutes a level of collective land tenure security that villagers previously did not have, so not surprisingly, many pro-



Figure 1. Map showing the locations of places mentioned in the article

Indigenous Peoples activists are positive about this. Although the people being defined as Indigenous do not conduct swidden cultivation communally, they only maintain private ownership of plots of land up until the time that they are fallowed, thus resulting in particular fallows being cut down for swidden agriculture by different families than previously conducted agriculture on the same pieces of land. This is why many Indigenous Peoples in Ratanakiri Province have argued that to have communal land at the village level is important for maintaining their swidden agricultural systems (Baird, 2008).

In addition, significant areas of forested lands have been registered as either agricultural or reserve land in both Mondulakiri and Ratanakiri Provinces, so villages have gained more than some feared might end up being the case (Jeremy Ironside, pers. comm., 30 August 2012). Apart from registering existing agricultural lands, Indigenous communities have been allowed to add more land to their titles to allow for some future agricultural expansion and population growth, another crucial argument for communal land titling that some Indigenous Peoples in Ratanakiri have made in the past (Baird, 2008), but the amount of land that has

been added has been limited, although not insignificant. For example, in the case of Andoung Kraloeng, some over 40-year-old fallow areas have been registered as communal agricultural areas. Ironside (2011) has also reported that Indigenous entity registration has, at least initially, provided some communities with additional leverage when bargaining with outside companies who want to access resources in their community areas.

Communal land titling in Seima appears to be moving ahead fairly quickly. As Evans *et al.* (2012: 78) have put it, 'of the other 11 villages [apart from Andoung Kraloeng village] engaged so far, four have made strong progress (having completed their registration with the Ministry of Interior as legal entities eligible to hold land) and seven have begun the process but remain at an earlier stage. Seima area has arguably achieved greater progress in Indigenous land titling than any other part of the country'.

Probably the most important limitation of the communal land titling process for Indigenous Peoples in Cambodia relates to forest lands outside of areas designated for agriculture or reserve. According to the RGC (2009) *Sub-Decree on Procedures for Registering of Land of Indigenous Communities*, only the following types and quantities of land can be registered as communal:

- 1 Residential land or land that is reserved for building residences.
- 2 Traditional agricultural land, actual cultivated land, farm land and reserved land necessary for shifting cultivation recognised by administration authorities and neighbours.
- 3 Spiritual forest land (one or more places for each community) with the total land size not more than 7 ha.
- 4 Forest land of cemetery (one or many places for each community) with the total land size not more than 7 ha.

Crucially, while potentially working well for protecting agricultural lands, including shifting/swidden cultivation areas, only very small areas of 'forest' not used for agriculture can be included in communal land titles (a maximum total of not more than 14 ha per village), even if the reality so far has been that some forests have been defined as agricultural or reserve lands.

In Seima, for example, the Bunong people do not only conduct swidden and lowland paddy

agriculture, but also rely heavily on forest-based livelihood activities, including the tapping of wood resin trees (*Dipterocarpus alatus* or spp.) found in the forest. These trees, as well as other resources crucial to local livelihoods, are found over hundreds or thousands of hectares of forest land (see Evans *et al.*, 2003). These large areas of de facto customary use land are typical for wood resin tree users in other parts of northeastern Cambodia (Baird, 2009b; 2010a) and in southern Laos (Ankarfjard and Kegl, 1998).

It would appear that local tenure over agricultural lands has been strengthened through the process of seeking communal land titles in Mondulkiri, but rights over forest lands have essentially been transferred to the state through legal means as part of the same process. For the Bunong in Seima, the prospects for establishing communal land titles for agricultural areas, and some fallow forest areas defined as agricultural or reserve lands, have oddly and indirectly resulted in their rights over the vast majority of the forests that they have long relied upon being legally taken from them, because the establishment of communal land rights has essentially resulted in local people having to recognise that the other forest lands outside of these communal areas are now considered to be 'state land', although Bunong users of wood resin and other forest resources (i.e. bamboo and fish) are gradually being issued with 'cards' that are designed to provide access to these resources (Evans *et al.*, 2012). Still, the permanency of the rights associated with the 'cards' remains unclear, because the system is new and is so far unproven in the local area and Cambodia more generally. Government support could falter if donor assistance for the area ended, or donor/NGO priorities changed. Moreover, even if some of the forest near their communities was designated as 'community forest', the forest would officially remain under the control of the Forest Administration, and rights would only be for 15 years (with possible renewal).⁴ Although villagers are still able to gain access to many forest resources now – as they are essentially surrounded by protected forest areas – they could be excluded from these forests by the state (represented by the Forest Administration), if the Forest Administration decided that providing access is no longer appropriate for whatever reasons. Legally, com-

munities have little power, although many locals are apparently happy about the prospects of communal land tenure, at least at the moment, as they are aware that the forests and land in their community is subject to potential pressure from people – especially capitalist investors – outside of the community (Ironsides, 2011; Evans *et al.*, 2012).

Comparing communal land rights in Laos and Cambodia

Communal land rights in Cambodia are being established quite differently from those in Laos, as in Cambodia they are only being allowed for a small group of registered Indigenous Peoples, while in Laos they are potentially available for everyone in the country, whether Indigenous or not. Anderson (2011: 1, original emphasis) considers that Cambodia represents a case, like the Philippines, of ‘the *permanent title* model’ in which ‘the state fully and permanently hands the land over to local indigenous communities for private collective ownership’. There is, however, more to land titling than simply providing permanent land titles. It also matters what is included within the titled land.

Communal land titling (*din louam mou* in Lao) is in its infancy in Laos, and as of July 2012 had only been established for five villages in Sangthong District, Vientiane Province (see Fig. 1), which together received communal land titles for 2189 ha of land (mainly forest land). Temporary titles were issued in July 2011.⁵ This was followed, in February 2012, by the granting of communal land titles by the governor of Vientiane Province. According to Article 22 of the Land Law and the Prime Minister’s Office, National Land Management Authority Ministerial Direction 564/NLMA (6 August 2007), these titles can become permanent after three years if there are no disputes related to them. The land, however, cannot be sold (Foppes, 2011; Bounmany *et al.*, 2012), which is also supposed to be the case in Cambodia (Jeremy Ironsides, pers. comm., 30 August 2012), even if it remains to be seen if ways will be found to facilitate the selling of communally owned land, both in Laos and Cambodia. Moreover, following Walker (2001), one has to wonder if gaining control of land that cannot be sold will always be in the best interests of the people, as

it is possible to imagine, for example, situations when villagers might benefit from selling expensive land and using the revenue to buy larger pieces of less expensive land (see e.g. Baird, *in press*).

It is unclear if Laos represents an example of a *permanent title* model, like that in Cambodia, or a ‘*delegated management* model’ (Anderson, 2011: 1, original emphasis), in which the state continues to claim ownership of the land. The Lao system presently has characteristics of both. On the one hand, the Lao state continues to claim ownership over all the land in the country, even if private land trading is ubiquitous and condoned by the government. Thus, technically, communities are not receiving full ‘ownership’ of land, regardless of the kind of title they receive. There are, however, elements of the *permanent title* model in Laos. For example, actual land titles are provided, although sale of the land is not permitted. Moreover, permanent land titles can be provided after a three-year period, if there are no disputes.

The basis for granting communal land tenure in Laos is the 3 June 2006 Prime Minister’s decree #88, which states that, ‘Communal Land Titles can be issued for all types of land that occur in the Lao PDR which are allocated by the Government to village communities’ (Foppes, 2011: 2). Indeed, it would appear that communal land titling in Laos is more inclusive than in Cambodia because all rural residents have the potential to gain communal titles, not just Indigenous Peoples as in Cambodia. Secondly, even for Indigenous Peoples, the situation in Laos allows for forest areas to be included in communal land titles, which is not the case in Cambodia. The process for gaining communal titles in Laos is also potentially quicker than it is in Cambodia. It is worth elaborating on these differences.

First, I am all for Indigenous Peoples receiving strong communal land rights, if they desire them, and at least some clearly do, but the non-Indigenous majority in Cambodia should be given the same rights to obtain communal land rights for their community lands, since they, too, are facing serious land alienation problems. Why not? It would not reduce the significance of Indigenous rights to communal land titles. Moreover, it would probably result in

the majority of Cambodians better recognising Indigenous communal land title, as they would have the same rights and opportunities for land registration. Thus, ironically, even though the Lao Government does not recognise the international definition of Indigenous Peoples, which at one level seems backwards and wrong, Laos actually has the potential to provide communal land titles to more of the population than Cambodia has.

Second, communal land titling in Cambodia is potentially a more cumbersome and time-consuming process than in Laos, as in Cambodia communities have to be registered as Indigenous by the Ministry of Rural Development and as legal entities by the Ministry of Interior before becoming eligible for communal land rights, and that is not easy for many Indigenous communities, especially those without international support (Galvin, 2012). It also forces them to perform reified 'traditions', or feel obliged to maintain particular agricultural systems deemed acceptable for articulating Indigenous identities by the state, but which might not meet the long-term interests or desires of the people themselves (see Li, 2000; Walker, 2001). In Laos, neither the Indigenous nor the legal entity registration processes are required for communities to apply for communal land titles, although the reality remains that NGOs and other donors are necessary in Laos to push the process forward, as most government officials and villagers are so far unaware of possibilities for communal land titling. Still, NGOs and donors have not yet made significant efforts to strongly promote communal land titling in Laos (Joost Foppes, pers. comm., 8 July 2012).

Third, and crucially, communal land titling in Cambodia is only permitted for agricultural lands, reserve agricultural lands and very small areas of forest. Instead, the vast majority of forest land is defined as 'state land' in Cambodia. Thus, the recognition of communal land titles in Cambodia also, ironically, comes with the implicit recognition that all other forest land is owned by the state. As Evans *et al.* (2012: 75) have pointed out, 'most natural forests in Cambodia, including all Community Forests, are state owned'. This includes forest areas outside of land under communal title. One could interpret new efforts to protect Indigenous lands

communally as part of what Polanyi (1944) called 'the double movement'. That is, once the free market has attempted to separate itself from the fabric of society, as has been the case through the separation of forest rights from villager livelihoods via land concessions and other forms of land grabbing (Baird, in press; NGO Forum on Cambodia, 2006; Neef *et al.*, 2013), the attempt to introduce communal land rights is the type of social protectionism that Polanyi saw as society's most likely response.

In Laos, legally all land is also owned by the state, but crucially, communal land rights do not just apply to agricultural land, but are designed to include forest land as well. In Sangthong District, for example, locals have received communal land titles for forest land (Foppes, 2011; Bounmany *et al.*, 2012), something that is not possible in Cambodia, for either Indigenous or non-Indigenous communities.

(Re)evaluating the 2001 Land Law in relation to Indigenous rights in Cambodia

So how should we ultimately evaluate the 2001 Land Law in relation to Indigenous rights in Cambodia? On the one hand, there is no denying that it has been crucial for generating a sense of legitimisation for the concept of 'Indigenous Peoples', as peoples different from the majority and justifying particular rights. Specifically, the 2001 Land Law provided state recognition of Indigenous rights, a concept that is still less developed in Asia than in other parts of the world, especially in the Americas and Oceania (Gray, 1995; Erni, 2008). This may, in fact, be the most important achievement of the 2001 Land Law, if one assumes that adopting the concept of Indigeneity is a positive thing. Regardless of the above, on the practical level, in relation to the actual rights provided to Indigenous Peoples, and the relationship of those rights to other forest users, the Land Law needs to be subjected to more scrutiny, as the separation of agricultural lands from forest lands has resulted in communal land titling mainly covering agricultural lands, while forest lands have become increasingly reified as state owned. Oddly enough, the Land and Forestry Laws have not been heavily critiqued, possibly because many international donors and NGOs do not want to discredit legislation that supports the

concept of Indigenous Peoples. Indeed, one could argue that many in civil society organisations have been quite naïve about the circumstances. Taking a political economy approach, and considering the insights of Polanyi (1944), would seemingly be a useful way forward.

The granting of communal land titles to Cambodia's small Indigenous population has inadvertently institutionally and legally obstructed opportunities for Cambodia's non-Indigenous Peoples, including those highly dependent on forests for their livelihoods, from receiving communal land rights. While it is true that most Cambodians do not presently want communal agricultural land titles (probably at least partially because communal land titling has become discursively associated with being Indigenous in Cambodia, and they do not see themselves as being Indigenous), the reality is that some non-Indigenous Peoples might benefit from communal land titling. For example, some do conduct swidden agriculture, and in addition, various other types of agricultural lands used by lowlanders would potentially benefit from communal titling, such as pasture land for grazing cattle. In Laos, the first group that gained communal land titles was a lowland ethnic Lao group that wanted communal forest land in order to support bamboo cottage industries (Bounmany *et al.*, 2012). This could also be imagined for non-Indigenous groups in parts of Cambodia. Crucially, the 2001 Land Law in Cambodia has promoted the idea that lowland Khmers have rights over individual private plots, while Indigenous Peoples have rights to communal land, and the government has the rights over forest lands (Peter Swift, pers. comm., 19 August 2012). This is potentially problematic for Indigenous Peoples who might also desire private land rights (see Walker, 2001).

So, what are the options for Indigenous and non-Indigenous Peoples in relation to forests in Cambodia? While communal land titling of significant areas of forests is not yet possible, all Cambodians, including Indigenous Peoples, do have possibilities for establishing community forests, which provide communities with limited rights over forest resources. But they are not long-term rights, as at present communities can only receive community forests for 15-year periods, although renewing these agreements is potentially possible, provided

that the Forest Administration approves the past conduct of those communities responsible for the community forests. Community forests are also being established for villages within Seima Protected Forest (Jeremy Ironside, pers. comm., 30 August 2012). Still, even those with community forests have quite limited, temporary and conditional rights, with the Forest Administration retaining most of the power over how community forests are allocated and managed. This is a far cry from decentralised community rights over forests. As one long-time observer of Cambodia forestry issues wrote, 'in its present form, community forestry cannot provide protection to significant areas of forests in Cambodia, for Indigenous Peoples or non-Indigenous Peoples' (Peter Swift, pers. comm., 19 August 2012). It could be argued, however, that the circumstances are legally more advantageous than what people have had in the past, and that it will be more difficult for the Forest Administration to take forest from people once it has been established as community forest (Jeremy Ironside, pers. comm., 30 August 2012).

While the situation in Laos looks potentially much more promising at the moment, we should remain cautious about the future of communal land titling there, as the government of Laos does not have a good record when it comes to providing local communities with long-term rights over valuable forest resources (see e.g. Anonymous, 2000; Hodgdon, 2007, 2008). In addition, it remains unclear whether the new Land Law presently being developed in Laos, and expected to become law in 2013, will continue to uphold the present system for communal land titling in the country (Joost Foppes, pers. comm., 8 July 2012). If it does not, the future of communal land titling in Laos could look much less promising. Whatever the case, the point is that it is possible to imagine communal land titling, or other types of land tenure arrangements, that provide much more secure access to the general population than is presently evident in Cambodia.

Moreover, considering the amount of land alienation presently facing Cambodia, especially in Indigenous areas (COHCHR, 2004, 2007; NGO Forum on Cambodia, 2006; CHRAC, 2009, 2010; Danida, 2010; Ironside

and Nuy, 2010; Ironside, 2011; Neef *et al.*, 2013; Baird, in press), communal titling of agricultural land still provides some level of land security (especially in relation to agricultural production) for Indigenous Peoples.

Conclusions

To be clear, my arguments should not be interpreted as implying that I am unsympathetic to providing rights, including land and forest rights, to Indigenous Peoples. In fact, I have long supported Indigenous land rights in Cambodia. Furthermore, it must be acknowledged that the 2001 Land Law and 2002 Forestry Law have been symbolically and practically significant for establishing Indigenous rights in Cambodia, which have been empowering for many. They have certainly been ontologically crucial. But in the particular case of communal land rights for Indigenous Peoples in Cambodia, the major material achievement of the 2001 Land Law for Indigenous Peoples, when considered in comparison with Laos, has so far constituted a much narrower and limited victory than originally hoped or believed. The future of communal land and forest rights in Laos are far from certain, but the situation in Laos does at least indicate that more is potentially possible in relation to communal land rights than what has so far been achieved in Cambodia, both for Indigenous and non-Indigenous Peoples. It also reminds us of the potential disadvantages of the 'Indigenous Slot' in Cambodia (see Li, 2000; Walker, 2001). Indeed, there are undoubtedly cases where obtaining private land would make more sense for Indigenous Peoples (see Milne, 2013).

My main point is that recent achievements of Indigenous Peoples in Cambodia have been significant, but communal land rights in Cambodia should not be considered adequate, as communal land titles so far do not include the provision of communal rights over forests, an issue of great importance for those whose livelihoods are heavily dependent on forest resources. This is a point that other authors and civil society organisations who have examined communal land rights in Cambodia have so far largely failed to address. Thus, the advocacy efforts for Indigenous land rights in Cambodia have begun, but much more is needed to ensure that

appropriate land and forest rights are provided to rural Cambodians, whether Indigenous or not. And finally, the links between the expansion of capitalism and the separation of resources from society, and associated attempts to protect Indigenous rights, should be more seriously linked, as Polanyi (1944) might suggest.

Notes

- 1 It should be noted, however, that Article 42 of the Forestry Law (2002) accommodates customary user rights in Forest estates, including by Indigenous Peoples and ethnic Khmer. This can include rights to non-timber forest products.
- 2 Danida is the term used for Denmark's development cooperation, which is under the direction of Denmark's Ministry of Foreign Affairs.
- 3 It should be noted that the Forest Administration established its own 'protected forest' system in the late 1990s in response to the establishment of Cambodia's National Protected Areas system, which is under the jurisdiction of the Ministry of Environment, and was established first in 1993 (see Baird, 2009a for a brief review of the protected area system under the Ministry of Environment). Thus, there are now two major protected area systems in the country, one under the Forest Administration and the other under the Ministry of Environment (Baird, 2009a).
- 4 Evans *et al.* (2012) report that as of July 2011, there were 430 official community forests in Cambodia, covering 377 502 ha.
- 5 The differences between 'communal land' and 'collective land' are presently being debated in Laos, and the type of land tenure arrangement in Sangthong may end up being classified as 'collective land' rather than 'communal land'. However, at the time of registration, the land in question was called communal land (*din louam mou* in Lao), and so I retain that term here.

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