



# Fiction, fraud, and formality: the legal infrastructure of property speculation in Cambodia

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## ABSTRACT

Through the standardization of property as a commodity, real estate speculation in Phnom Penh has flourished and has included foreigners, for whom Cambodian real estate property is constitutionally off-limits. This essay outlines some features of Cambodian law to highlight the contours of the country's deep legal pluralism, as well as to describe how law is part of the way property has been remade as a market commodity. "Legal fictions" – technical devices and shell companies – give access to Phnom Penh's real estate market. The use of legal fictions in Cambodia's economy is widespread and, crucially, structures property ownership and its distribution. In the process these devices work to veil ownership in plain sight and skew access to property to those who can utilize this effectively.

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## Introduction

As in other post-colonies where the law has been a potent force of transformation, law in Cambodia has been formative in shaping Phnom Penh's built environment. Cambodian law reflects diverse global connections complicated by the ideological and social upheavals that have occurred since the country's independence from France in 1953. These upheavals include not just the widely known dismantling of private property by the Khmer Rouge in the 1970s, but also the reconstitution of capitalism that began prior to the signing of the Paris Peace Accords in 1991, which has proceeded apace since the 2000s. I outline some features of Cambodian law to highlight the contours of the country's deep legal pluralism, as well as to describe how the law is part of the way property has been remade as a market commodity. As Sally Engle Merry notes in her important work on the law:

Law is not simply a set of rules exercising coercive power, but a system of thought by which certain forms of relations come to seem natural and taken for granted, modes of thought that are inscribed in institutions that exercise some coercion in support of their categories and theories of explanation.<sup>1</sup>

One such category made to seem natural through the law is property as commodity. Through the standardization of property as commodity, real estate speculation in

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<sup>1</sup>Merry 1988, 889.

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Phnom Penh has flourished and, among its owners and holders, has included foreigners for whom Cambodian property is constitutionally off-limits, at least at first blush. In addition to the law, I focus on “legal fictions,” the technical devices and shell companies that give access for those near and far to Phnom Penh’s real estate markets.<sup>2</sup> The law and its technicalities matter to markets because, by their very mundane practicality, these provide economic and political legitimacy to a wide array of practices.<sup>3</sup> The use of legal fictions in Cambodia’s economy is widespread and, crucially, structures property ownership and its distribution. In this process, these devices work to veil ownership in plain sight and skew access to property to those who can utilize them effectively.<sup>4</sup>

## Law in the post-colony

Cambodia’s post-colonial legal system is based largely on French civil law.<sup>5</sup> As such, it relies on continuously updated legal codes. Reflecting the country’s legal pluralism, some of these codes bear the influence of Cambodian customary norms as well as socialist principles. There are also common law tenets at play, given the outsized role of foreign assistance in the country’s legal and judicial reforms after the 1991 Paris Peace agreement.<sup>6</sup> Generally, however, in contrast to common law countries, in which legal precedent and case law guide decisions and outcomes, civil law systems are organized around written rules and their application. Legislation, and its never-ending churn, is the key factor in a civil system. In Cambodia, the executive issues decrees and other regulations that constitute law and, importantly, it is the executive that wields power over a subordinated, rather than independent, judiciary.<sup>7</sup> In concrete terms, in addition to formal law (*chbab*) and the country’s constitution (the supreme law of the land), the primary source of law is executive regulations. These include royal decrees (*preah reach kret*), sub-decrees (*anukret*), and proclamations (*prakas*). Differences between these executive regulations vary in terms of authorship, procedure, and authority. A royal decree is signed by the King (currently Norodom Sihamoni) after it is proposed by the Council of Ministers. A sub-decree is normally prepared by relevant ministries, adopted by the Council of Ministers, and signed by the prime minister. A proclamation is issued at the ministerial level and signed by the relevant minister. Executive regulations are important

<sup>2</sup>A legal fiction is “a fictitious fact that is treated as true under the law for purposes of legal, administrative or other expediency. That is, in certain situations where it is more convenient for the law to consider the facts to be a certain way, a policy may be adopted creating the necessary legal fiction.” Washington University, School of Law: <https://onlinelaw.wustl.edu/blog/legal-english-legal-fiction/>, accessed June 17, 2020.

<sup>3</sup>Riles 2011.

<sup>4</sup>By property, I refer primarily to land. However, Cambodian law makes no distinction between a parcel of land and the structure or structures that sit atop it. A building is treated as part of land and is transferred with it when sold. The one exception is condominiums, which are freehold property. What makes a condominium different from a house or a flat in Cambodia is that its value is not based on land. What you own is a parcel of space (rather than a parcel of land) that is secured through a strata title.

<sup>5</sup>Cambodia was a protectorate of France until 1953. The financial constraints faced by the French government meant that “colonization must not cost France a thing, which implied resorting largely to an ‘inexpensive’ mode of domination – the protectorate.” See Brocheux and Hémerly 2009, 70–71. This early distinction between a protectorate (*pays de protectorat*) and colony (*pays de souveraineté français*) may be a difference without distinction since French authorities did not establish a legal system for the whole of the Indochinese Union until 1919, with French oversight over Cambodian administrative and judicial matters. See Hooker 1978.

<sup>6</sup>Kong 2012; Upham 2018. The 1993 Cambodian Constitution follows a British or Japanese model of parliamentary democracy, in contrast to a French or American model of presidential democracy that relies on an explicit separation of powers. See Hor 2012.

<sup>7</sup>The Cambodian judiciary is not only subordinated to the executive but is poorly resourced. See Un 2009.

tools in alienating land, including through administrative reclassification. For example, once state-owned public land is re-categorized as state private land, it can be fully privatized. In their research on Cambodian land policy, Kheang Un and Sokbunthoeun So have shown how sub-decrees, for example, are a powerful executive instrument for privatizing public assets.<sup>8</sup> Because of the importance placed on codes and written decrees, civil systems require an overactive bureaucracy. These features make a “government of paper” which in Cambodia is constituted through a continuous circulation of documents, from proclamations and sub-decrees to certificates and identity cards, all of which mediate relations between people and property, and by extension the built environment.<sup>9</sup>

As scholars of Cambodian political economy and land have pointed out, land expropriation also takes place through force and violence. For example, Simon Springer describes how legal sanction is the basis of legality and force in Cambodia:

The determination of legality being vested in particular institutions and individuals simply speaks to the arbitrary nature of sovereign power, which is both law-positing and law-preserving, meaning that sovereignty is simultaneously the creator and the protector of the prevailing political and legal order. It matters not if land is obtained through force, theft, violence or “unlawful” means: so long as the courts recognize the outcome, the act of legally sanctioning unscrupulous activity is what explicitly *makes* it legal. This is what primitive accumulation is all about.<sup>10</sup>

However, property appropriation and accumulation more commonly occur through ordinary administrative and bureaucratic techniques. The structural and banal features of the country’s legal system sometimes get overlooked in analyses of Phnom Penh’s property market as well as in accounts of Cambodia’s bureaucracy and how power functions, but they are part of what ground regulatory norms of property. In addition to highlighting the broad contours of property law in Cambodia, my aim here is to bring attention to the lesser known legal forms that provide wide access for foreigners to Cambodian property and facilitate real estate speculation. To do so, I draw upon existing excellent policy work on Cambodian law and property as well as on my ethnographic fieldwork in Phnom Penh and the accounts of speculators, planners, brokers, and developers who have described at length the legal fictions that are used to come to own Cambodian land.<sup>11</sup>

Typically, accounts of Cambodian history bracket time periods in discrete and disconnected epochs: from French colonialism (1863) to independence (1950s and 1960s), the civil conflict and the country’s rule under the Khmer Rouge (1970s), the era of socialism (1980s), and the post-conflict transition to the contemporary neoliberal moment (1990s to present). This periodization reflects the discontinuities in the ideologies of each of these epochs. The most obvious is the period of the Khmer Rouge, which was a regime that deliberately dismantled the institutions of capitalism, including private property, through its radical ultranationalist experiment.<sup>12</sup> Such bracketing of time, however,

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<sup>8</sup>Un and So 2011, 296–299.

<sup>9</sup>Hull 2012.

<sup>10</sup>Springer 2013, 22–23, emphasis in the original.

<sup>11</sup>I draw on over eighteen months of ethnographic fieldwork (fifteen months in 2008 and 2009, and shorter trips between 2012 and 2016).

<sup>12</sup>The Khmer Rouge government was labeled a Marxist-Leninist state despite the inaccuracy of the term. See Frieson 1988. It was not until 2009 that the United States government formally removed Cambodia from its list of Marxist-Leninist states, a decision that allowed the US Export-Import Bank to grant loans to American businesses seeking investment opportunities in Cambodia.

risks obscuring continuities of logics, norms, and practices across time as well as space. For instance, the state currently claims de facto ownership of all land, just as it did in the socialist period. Similarly, the idea of property as commodity is not the result of recent legal reform alone. In her ethnography of village life in Kandal province before the Khmer Rouge era, May Ebihara showed that villagers had a keen sense of property, and considered ownership rights to be absolute and highly individuated even in a context seemingly governed by usufruct principles:

A sense of property is highly developed in village life; virtually everything in and around the community – every tree, every length of rope, and even every fish that spawns in a bit of water – can be traced ultimately to some owner(s) ... once ownership is established, property rights, according to law ... are *absolute* (with the exception of possible confiscation by the government in cases of public interest or emergency ...) and *perpetual*.<sup>13</sup>

Ebihara explains that usufruct practices could quickly morph into extractive economic ones, as “... such free usufruct of someone else’s property may be subject to sudden cancellation at critical moments when the owner wants to assert his exclusive rights” whether grass on dikes during dry season, or when open lands “ordinarily appear to be a no man’s land” when in fact “owners of these lands exacted fees from other villagers to dig dirt from, or even merely to drive across, their property.”<sup>14</sup> Ebihara’s work fundamentally complicates the assumption that Cambodians were historically governed by pure customary principles and forces scholars to rethink the widely circulated notion that land belongs to the holder. What Ebihara described is a system that is both regimented and flexible, allowing a diverse set of landholding practices on the same land, but one in which land ultimately belongs to a single owner.

Property in many ways explains the history of Phnom Penh as much as it indexes its future. In the past, property was a key to generating rents for the monarchy and, during French rule, for the colonial state, which was organized around the accumulation of rents and revenue.<sup>15</sup> For the colonial state, land was Cambodia’s most important asset for revenue generation, along with customs, duties, and monopolies over goods like alcohol and opium.<sup>16</sup> Turning land into a commodity that could be bought, sold, and leased was necessary to create new modes of accumulation and expand the colonial state’s bureaucratic and legal power.<sup>17</sup> It involved the formal introduction of private property, not only to end the royal monopoly over land but to claim its profits. One of the first moves of the early protectorate was to seize control over property and development rights in Phnom Penh.<sup>18</sup> This legal maneuver, which routed customs, taxes, and concessions into French hands, financed the transformation of Phnom Penh and its built environment.<sup>19</sup> Because of the structure of metropolitan investment that focused on the export of raw materials and limited financing, little effort was placed on modernizing industry.<sup>20</sup>

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<sup>13</sup>Ebihara 1968, 343–344, emphasis added.

<sup>14</sup>Ebihara 1968, 349–350.

<sup>15</sup>Cooke 2007.

<sup>16</sup>Müller 2006.

<sup>17</sup>Müller 2006; Slocomb 2007; Bhandar 2018.

<sup>18</sup>The 1884 Convention between the Cambodian monarchy and France, which reduced Cambodia’s king to a figurehead, also involved the wholesale appropriation of all land and the economy. In return for development rights to Phnom Penh, King Norodom received an annual rent of 30,000 piastres a year. See Edwards 2007.

<sup>19</sup>Willmott 1967; Müller 2006.

<sup>20</sup>Robequain 1939; Forest 1980.

Capital investment was instead organized around land speculation, real estate construction, and infrastructure contracts.<sup>21</sup> Colonial land policies gave incentives to private enterprises to attract investments and permitted the repatriation of profits overseas.<sup>22</sup> The cadastral system was crucial to expanding tax revenue, especially in cities.<sup>23</sup> Specifically, registration of land ownership was a prerequisite for land appropriation, as well as for regular and uniform taxation.

During the colonial era, private property was governed by French contract law while all other land was declared state domain.<sup>24</sup> This included large tracts of land sold at nominal prices that would be immediately resold to increase land values, a monetization strategy that became a structural carryover in subsequent eras. In the countryside, the concession was used as a legal device to grant ownership of vast stretches of land to foreigners and loyalists. The colonial state had “the legal right to dispose of all lands which were not effectively occupied by the indigenous population,” thus exercising “through the principle of ‘eminent domain,’ the discretionary power to grant permission over all uncultivated lands” even without carrying out proper land surveys or verifying the financial resources of investors.<sup>25</sup> By the 1930s, plantations developed on concessions were “the most modern in Asia and the most competitive in the world.”<sup>26</sup> By the 1940s, two-thirds of cultivated land in French Indochina belonged to large joint stock companies or industrial groups that operated through French holding companies known as *sociétés*.<sup>27</sup> The colonial land concession developed by the French is the template, including its methods of appropriation and its governance, for the contemporary economy.<sup>28</sup> For instance, then as now, under a concession contract, the concessionaire can set the price of land as long as regular fees are paid to the state and its intermediaries and brokers.

Following independence in 1953, a complicated series of events, including a protracted civil war, military coup, and US bombing campaign, led to the rise of the Khmer Rouge, its conquest of the country in 1975, and a subsequent intense period of mass starvation and widespread death.<sup>29</sup> The Khmer Rouge deliberately dismantled private property, destroyed the cadastre system, and imposed collectivization over the most important means of production. Following a Vietnamese invasion in 1978 and 1991 Paris Peace agreement, institutions destroyed in the 1970s had to be rebuilt (rather than transformed as in other post-socialist contexts). Humanitarian intervention focused not just on rehabilitation but the return of private property. The definition of property shifted amidst regulatory restructuring. Reforms institutionalized private property rights in land, while legislation remade property in its colonial image.

The Cambodian civil war generated a great deal of international attention that focused on what would become the first paradigmatic case of post-Cold War humanitarianism. These devastating events led to a level of international intervention that enabled the

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<sup>21</sup>Murray 1980; Slocomb 2007, 2010.

<sup>22</sup>Murray 1980.

<sup>23</sup>French authorities tried to create a central cadastre for all of Cambodia in 1884, 1908, 1911, 1926, 1930, and 1931, but failed, due to a mismatch between Cambodian land practices and the structure and capacity of the colonial administration. See Brocheux and Hémerly 2009; Guérin 2012.

<sup>24</sup>Murray 1980.

<sup>25</sup>Murray 1980, 190.

<sup>26</sup>Brocheux and Hémerly 2009, 128.

<sup>27</sup>Brocheux and Hémerly 2009.

<sup>28</sup>Slocomb 2007.

<sup>29</sup>Estimates vary, but of a population of seven million, approximately two million Cambodians died.

formal consolidation of the country's property regime centered on a definition of property as private, absolute, and exclusive. Pushed by international advisors from the United Nations and elsewhere, the post-conflict Cambodian government institutionalized legal conceptions of property in the service of markets. Coupled with the use of legal devices, land formally became a speculative asset. International technical assistance, which has been important to Cambodia's economy, funded the necessary infrastructure and bureaucratic measures to facilitate land registration. The economy was treated as a problem of law, and the legal infrastructure of the economy was remade to ensure and formalize capitalist property norms and the circulation of capital. Property, in other words, became an important target of law, and law an important target of reform.

### Contemporary legal reform

The law is the cutting edge of capitalism in Cambodia.<sup>30</sup> The government passed a range of laws when Cambodia joined the World Trade Organization (WTO) as its first "least developed country" member in 2004. Its membership was based on special provisions and allowed it to join earlier than Vietnam, both of which have much larger economies and populations.<sup>31</sup> Cambodia began its WTO membership process in 1994, a year after adopting a new constitution that includes a commitment to free market and multi-party democratic principles.<sup>32</sup> Global and regional integration (Cambodia joined the Association of Southeast Asian Nations in 1999) remain central to the country's economic growth strategy.<sup>33</sup> Legal reform has gone hand-in-hand with integration.

Legal reform was meant to make the economy legible and attractive to foreign investment. One real world effect of reforms over the last two decades has been recentralized state authority and consolidated executive and administrative privileges to a degree not seen since the period of socialism in the 1980s. While privatization officially began in 1991, laws passed following 1993 constitutional changes standardized the legal definition of property and its role in the economy. For example, a 1994 Law on Investment provides generous guarantees to prospective investors with no price controls on services or products and no capital controls on repatriated profits. More broadly, this law opened up the entire economy, including state-owned enterprises, to private sector investment. The lack of capital controls is all the more attractive because of the widespread use of the US dollar in the country.<sup>34</sup> These conditions are part of what makes Cambodia's economy open and extremely amenable to external influences.<sup>35</sup>

<sup>30</sup>This reworks Chanock's observation that "the law was the cutting edge of colonialism ... " Chanock 1985, 4.

<sup>31</sup>Cambodia's population as of 2018 was 16.2 million, compared to a population of 95.5 million in Vietnam and approximately 1.4 billion in China. In the same year China's approximate GNP, in purchasing power parity (PPP) terms, was US \$25.3 trillion, Vietnam's was US\$661.8 billion, and Cambodia's was US\$66.1 billion.

<sup>32</sup>Economic liberalism in Cambodia has flourished whereas political liberalism and multi-party democracy have not. Hun Sen has remained prime minister since 1985, during which time the ruling Cambodian People's Party has retained its majority through coercion, patronage politics, and legal recourse.

<sup>33</sup>Hang 2012.

<sup>34</sup>Chronic political instability and price volatility rather than government policy produced the conditions that invigorated the prevalence of the dollar. Throughout the 1980s transactions were settled in Thai baht, Vietnamese dong, gold, silver, and gems, along with forms of barter. See Gottesman 2003. The government's long-term goal is to eventually de-dollarize, evident in the requirement that the country's stock exchange provide listings in riel. See RGC 2012.

<sup>35</sup>Nam 2017a.



In matters of land, the law has been a powerful tool in the commodification and the abstraction of property, making it exchangeable through practices that are separate from its use. The 2001 Land Law (which replaced a 1992 law) and 2007 Civil Code reforms provide the primary legal framework for property.<sup>36</sup> Both reflect the mandates of the 1993 Constitution. Because of the pressures from international donors to pass land reform, the sequencing of legislation was reversed. Civil Code reforms – which include provisions on issues that involve private persons and their property as well as the relationships between them – should have been passed before the Land Law.<sup>37</sup> The 2001 Land Law underpins a regime of private property in which formal registration of ownership is guaranteed by the state. The new Civil Code, drafted with the help of Japanese legal scholars, also requires formal registration to fully claim private ownership over property.<sup>38</sup> According to one Japanese lawyer who worked as an expert in the Cambodian Ministry of Justice at the time, “an agreement to transfer ownership over immovable properties will not take effect unless the transfer is registered accordingly (Article 135) [of the Civil Code]. Registration therefore becomes the condition for legal effects to take place.”<sup>39</sup> The point is that the 2001 Land Law and the 2007 Civil Code reforms require property to be mediated through the formalities of paper and bureaucracy. Without proof of private ownership, the state is the legal landowner by default.<sup>40</sup>

The 2001 Land Law represents a full return of property to private ownership, specifically the principle of absolute rights in ways first imagined but not fully implemented when Cambodia was a French protectorate. This law defines immovable property and the rights of the owner as follows: “The owner of immovable property has the exclusive and extensive right to use, enjoy, and dispose of his property, except in a manner that is prohibited by the law.”<sup>41</sup> This mirrors the absolutist definition of private property in the French Civil Code (also known as the Napoleonic Code): “Property is the right to enjoy and dispose of things in the most absolute way, provided that the use made of it is not prohibited by law or regulation.”<sup>42</sup> This principle of absolute and exclusive ownership was first outlined in the 1920 Civil Code which, as in other colonial contexts, transformed local conceptions of space, time, property, and the state. That code defined property as something that could be individually owned as part of a single landholding system aimed at increasing land values and capitalized rents.<sup>43</sup>

The 2001 Land Law was supposed to correct ambiguities found in its 1992 predecessor and related property laws.<sup>44</sup> Crucially, the 2001 Land Law eliminated the possibility of

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<sup>36</sup>The 2007 Civil Code is modeled on the Japanese Civil Code and includes rules borrowed from both the French and German Civil Codes. See Mong and Tanaka 2002. Because the legal system is organized around the application of code, it required another law (the Law on the Application of the Civil Code, passed in 2011) to lay out the procedures for implementation of the 2007 reforms. These efforts reflect a decade of legal technical assistance provided by the Japanese government on Civil Code procedures, while the World Bank and the Asian Development Bank, among others, provided assistance on the drafting and implementation of the 2001 Land Law.

<sup>37</sup>A draft law becomes law when passed by the National Assembly and Senate. See Hor 2012.

<sup>38</sup>The 2001 Land Law relies on the Torrens system, in which property ownership is considered absolute once registered. The 2007 Civil Code had to be amended to reflect this principle. See Kaneko 2010 on the conflicts in legal doctrine and between donors in the drafting and rollout of the 2001 Land Law and the 2007 Civil Code reforms.

<sup>39</sup>Kamiki 2010, 38.

<sup>40</sup>Kaneko 2010; Upham 2018.

<sup>41</sup>Article 85, 2001 Land Law. See Rendall et al. 2003.

<sup>42</sup>*La propriété est le droit de jouir et disposer des choses de la manière la plus absolue, pourvu qu'on n'en fasse pas un usage prohibé par les lois ou par les règlements.*

<sup>43</sup>Thion 1993.

<sup>44</sup>Guillou 2006.

gaining ownership of land through the act of possession. This customary principle was very much at the heart of the 1992 Land Law and other laws that were passed by the Cambodian government during the transitional period. This principle was first outlined in a sub-decree (*Anukret 25*) issued by the Council of Ministers in 1989, which granted ownership rights to any Cambodian citizen in possession of a home or a flat.<sup>45</sup> This sub-decree had the greatest implications in Phnom Penh, where some residents suddenly found themselves owners of assets with potentially enormous value.<sup>46</sup> But this sub-decree left unspecified who could profit from real estate sales. Similarly, again, the 1992 law was meant to bolster the extension of property ownership to those with legal possession.<sup>47</sup> However, the 1992 law left unclear the practical differences between ownership (*kamaset*) and possession (*phokeak*) that the 2001 Land Law would remedy.

### Legal fictions, the landholding company, and fraud

The Bureau des Affaires Urbaines (since renamed the Urbanization Division and part of the Municipality of Phnom Penh) explicitly criticized the 2001 Land Law for facilitating speculation. In a white paper it prepared in anticipation of a master plan for Phnom Penh, the authors argued:

Land speculation, directly driven by the cadastral policy [of the 2001 Land Law], makes every day urban planning difficult. The state's domain – its right of way over large boulevards, canals, and lakes [which control water flow] – is becoming increasingly difficult to maintain given pressure from investors. Urban functionality is thus compromised.<sup>48</sup>

The codification of ownership requirements in the 2001 Land Law and, later, the 2007 Civil Code, serves the legal infrastructure of property along with other technicalities and legal fictions that are important to land speculating. As set out in the 1993 Constitution, land ownership is off-limits to foreigners.<sup>49</sup> This principle restricting ownership of land to Cambodian citizens and entities is repeated in Article 8 of the 2001 Land Law. The restriction is meant to prevent foreigners from taking advantage of land prices which are comparatively low for the region.<sup>50</sup> It also gives the state a valid cover against nationalist accusations that it is selling the country to outsiders. This same legal restriction applies to built space. Under the law, foreigners may not directly own structures in Cambodia because these are immovable “things” attached to land.<sup>51</sup> One exception is

<sup>45</sup>A “flat” refers to a *pteah lveng*, also known as a shophouse, which is a common dwelling type in Cambodia, much like in the rest of Southeast Asia, given the large presence of Chinese merchants and traders in its cities. Usually narrow and long with a shared or private courtyard, a *pteah lveng* combines residential and commercial functions (the ground floor operates as a storefront, for example) while the building itself can be between two to six stories in height and house single or multiple families in individual units.

<sup>46</sup>Shatkin 1998.

<sup>47</sup>Russell 1997.

<sup>48</sup>“La spéculation foncière qui découle directement de cette politique cadastrale rend chaque jour plus difficile l'aménagement urbain. Le domaine de l'Etat comme les emprises des grands boulevards, des canaux et les lacs sont de plus en plus difficiles à maintenir sous la pression des investisseurs. Le fonctionnement urbain est compromis.” See BAU 2007, 185.

<sup>49</sup>According to Article 44 of the 1993 Constitution, “All persons, individually or collectively, shall have the right to ownership. Only Cambodian legal entities and citizens of Cambodian nationality shall have the right to own land. Legal private ownership shall be protected by law.” In the official Khmer version of the constitution, the term “Khmer” is used instead of “Cambodian.” Khmer denotes both nationality and ethnicity in the Khmer language.

<sup>50</sup>Kork 2012.

<sup>51</sup>The general principle is that a structure atop land is part of that land. According to the 2007 Civil Code, “Things attached to land or comprising a part thereof, particularly buildings or structures immovably constructed on land, or seeds planted in the ground, crops in the fields or timber growing on the land, are components of the land unless they are severed from



foreign ownership of a condominium which excludes rights to the land to which it is attached. But there are a number of legal fictions that allow foreigners and overseas firms to own and speculate with Cambodian land. These legal fictions include technical devices and shell companies that provide access to Cambodia's real estate markets.

Phnom Penh is a massive construction site. With the exception of a short lull following the 2008 global financial crisis, the real estate and construction sectors have been booming.<sup>52</sup> When I first encountered the issue of land speculation in Phnom Penh during the real estate boom that began in the mid-2000s, the people driving land price fluctuations were generally depicted in local news reports as foreigners from other parts of Asia operating in an opaque and unregulated economy. This seemed odd to me, given the legal prohibition on foreign ownership of Cambodian land. But, what shields land sales most effectively is not so much a murky economy but a transparent legal infrastructure that permits land ownership and development behind corporations. The landholding company, for one, is a widely used corporate form and legal vehicle to secure land, according to people who are directly involved with and knowledgeable about property transactions in the city. Although the exact configurations and uses of devices that they described varied, the following accounts are typical of how a legally registered landholding company helps to formalize land speculation and provides an expedient way for foreigners to buy land. Such devices are part of the legal infrastructure that has been built through donor aid and technical assistance centered on concepts of absolute and exclusive private property ownership.

Foreigners have been able to lease Cambodian land on multi-year contracts since at least the 1990s. But in order to fully capture the benefits and secure revenue streams from landed investments, many use a landholding company as a front to buy land. The landholding company is a legal device and part of a broader repertoire of regulatory forms that not only structure access to land and space but also are important to Phnom Penh's "real estate turn."<sup>53</sup> By design, it produces murkiness. After a groundbreaking ceremony of yet another construction project in 2016, in this case an office tower, I met with Chenda and Seiha, both of whom are local realtors who work with both Cambodian and foreign clients. Chenda explained:

When it comes to real estate investment, as you probably know, foreigners cannot own land. In order to own land, you establish a holding company as a shortcut. Or you get Cambodian citizenship.

I had heard of foreigners fraudulently obtaining Cambodian citizenship in order to buy land in 2008, at a time when land prices in Phnom Penh were doubling every few months. With Cambodian citizenship, a foreign buyer has all of the rights and privileges of a Cambodian national, including the right to own property. The price of and protocol for buying citizenship appears to vary, according to those with whom I spoke. Some people told me that an extended period of residence in the country makes foreigners eligible for Cambodian citizenship at a discounted cost of a few thousand dollars. Others stressed that

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the land, and may not, except as otherwise provided by law, be the subject of rights separate from those applicable to the land" (2007 Civil Code, Article 122). Chapter 3, "On Real Rights," in the 2007 Civil Code in effect since 2011 outlines principles of immovable things.

<sup>52</sup>Nam 2017b. Property investment and development in Phnom Penh have been explosive despite a short lull following the global financial crisis. The effects of the coronavirus pandemic remain to be seen.

<sup>53</sup>Shatkin 2017.

residency matters less than finding a reputable broker, ideally someone who is a high-ranking government official. This latter route allows a foreigner to bypass Khmer language and other legal requirements for naturalization. By 2016, according to my interlocutors, the cost of buying citizenship ranged from US\$50,000 to US\$70,000. Paradoxically, paying less than this range carries a risk that the legal papers are fake. These costs and processes are discernibly different from what is stipulated in the nationality law, which includes provisions for foreign investors to acquire citizenship with investment amounts above 1.25 billion riel (approximately US\$312,500) or a direct donation to the state of 1 billion riel (US\$250,000).<sup>54</sup> An official at the Ministry of Interior told a local newspaper in 2013 that more than 700 foreigners had applied for citizenship since 2000, the majority of whom were Chinese and Korean.<sup>55</sup> But like most figures related to the economy, the number of foreigners holding Cambodian nationality through either formal or fraudulent means is unknowable.

In addition to citizenship, other methods for a foreigner to gain control of land are available. In some cases, a foreign investor uses a Cambodian national to buy a land title on her behalf. This relationship is bound by a contract. But this method is risky if the nominee passes away or disappears. While a few people I spoke with insisted that the nominee structure is simple and straightforward, others claimed that it is illegal.<sup>56</sup> In the majority of the accounts that I heard, the prevailing legal device for securing land was the landholding company, which can be coupled with other strategies – such as buying citizenship – to gain control of land and in the process obscure its ownership.

Of legal techniques, the landholding company is not only expedient, it makes land ownership “Cambodian.” I asked the two realtors which legal method was more common. Seiha responded:

Through a landholding company. It takes four months to get Cambodian citizenship which now costs over US\$ 50,000. So, if you’re a small-time investor with tens of thousands of dollars at most, spending money on Cambodian citizenship to buy and sell land is pointless. But for actual large-scale investors, you get citizenship. For regular individual investors, most will set up a landholding company to come into ownership of land. If you don’t, you run into problems, especially if you didn’t set up a landholding company [before buying].

Setting up a landholding company takes several weeks and costs approximately US\$1,200 in government fees. This includes an incorporation fee after an application is filed with the national authorities, which is usually approved within a month. Once approved, the landholding company can begin operations. The landholding company is incorporated in Cambodia as a joint venture with a majority share (at least fifty-one percent) owned by a Cambodian legal entity. This can be a Cambodian citizen, or it can be a Cambodian company with a registered local address. What this means is that the Cambodian counterpart is not always actually Cambodian; this can be a foreigner who holds Cambodian nationality. One French lawyer who advises local and foreign clients on Cambodian land issues told me that he uses his Cambodian nationality to serve as the

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<sup>54</sup>Market logics rule here. Buying citizenship centers on the calculus of a rational economic subject, divorced from distinctions made within a multiethnic Cambodian polity on who counts as a proper citizen (*jun jiet*) and the meaning of the Khmer nation (*jiet khmer*).

<sup>55</sup>Hruby and Khy 2013.

<sup>56</sup>The interpretation of its legality hinges on the Law on Investment, which forbids the use of nominee structures and limits foreign land practices to leases rather than ownership.

Cambodian legal entity for his foreign clients who want to buy land. Foreign developers with whom I spoke were quick to point out that they used landholding companies to buy land, but were more circumspect in identifying their majority shareholders. But through winks and nods many suggested that the majority shareholder usually was a foreigner who had bought Cambodian citizenship through a broker. A long-term lease, ranging from fifteen to ninety-nine years depending on when it is signed, or some other contract gives the foreign buyer, who technically is the minority shareholder, full control over the land, including its use and disposal.<sup>57</sup> For a fee, law firms will set up and manage landholding companies for their clients.

The landholding company is a legal fiction that accommodates Cambodian laws on land ownership. It takes the form of a limited liability company (LLC), for which the current thresholds are very low. The minimum registered capital required to set up an LLC is four million riel (approximately US\$1,000).<sup>58</sup> There are also no minimum requirements for foreign real estate investment. By way of contrast, in India the minimum project capitalization requirement for foreign real estate investment is US\$ five million for joint ventures and US\$ ten million for wholly owned subsidiaries.<sup>59</sup> These requirements reflect efforts by the Indian government to loosen restrictions in order to fuel construction and capital circulation in urban areas. In Cambodia, capital requirements have not just been loosened, they have been made bureaucratic and nominal. According to a local lawyer, company law (a precursor to commercial law) enacted in the 1990s was “an essential component in the creation of the legal infrastructure necessary for the operation of the market economy in Cambodia” including the formation and regulation of sole proprietorships, limited liability companies, and *sociétés anonymes* – public limited companies that are common in France and French-based corporate systems.<sup>60</sup> Drawing heavily upon pre-1975 company law, that law required foreign-owned companies to seek approval from the National Investment Board before they could even be registered.<sup>61</sup> Companies had to show proof that a minimum percentage of proposed registered capital had been remitted to the country. The registered capital requirements for limited liability companies varied: 100 million riel (US\$25,000 at the current exchange rate) for a *société anonyme* and twenty million riel (US\$5,000) for an LLC. These thresholds were lowered after Cambodia’s accession to the WTO in 2004 and passage of a 2005 Law on Commercial Enterprises, which changed the procedures and requirements for setting up a business. Under these revised regulations, the government does not require proof of capital investment or other forms of documentation as part of the registration process. Moreover, even though the landholding company is structured through majority-minority shares, the government does not maintain a registry of shareholdings. Instead, share transfers are managed internally and reported to the government through updated memorandums and articles of association. In effect, the landholding company is a shell company.

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<sup>57</sup>The 2001 Land Law allowed ninety-nine-year leases on private property. The maximum length of a lease was reduced to fifty years in 2011 when the 2007 Civil Code reforms came into effect. Leases signed before this can be recognized under the maximum cap of the 2001 Land Law.

<sup>58</sup>See Chapter 3 on the Law on Commercial Enterprise (2005).

<sup>59</sup>Searle 2016, 65–66.

<sup>60</sup>Popkin 1995a.

<sup>61</sup>Popkin 1995b. Law on Commercial Rules and Commercial Register, promulgated in June 1995.

## Legal fictions in real estate

Instead of looking exclusively at legal reform as it relates to property in Cambodia, my focus has been on the role of legal fictions, bureaucratic techniques, and corporate structures that make Cambodian land open and accessible to foreigners. With the onset of post-conflict transition and liberalization, Cambodia's legal infrastructure was reworked to adapt it to and uphold new market demands, respond to the urgent need for foreign investment and external support, and meet membership requirements for global and regional integration.

When I asked foreign developers and investors how they were able to buy land that I initially thought was legally off-limits to them, they invariably pointed to the landholding company as a common vehicle for land acquisition. It is by no means the only bureaucratic strategy for securing land, but nonetheless it is part of the institutional forms that mediate relations between people and the built environment, and formally ground speculation in Phnom Penh's property markets.

In a country that seems to make “a fetish of the rule of law”<sup>62</sup> through the repeated issuances of decrees and the rewritings of code, the law and its technicalities continue to constitute a key vector of authority over and access to Cambodian real estate. What enables opaque real estate transactions by local and foreign buyers are procedures rooted in above-board practices that include the widespread use of legally registered corporate entities. Even the fraudulent purchase of Cambodian citizenship is part of the official means of securing property ownership as required by law. This is to say that legal fictions have real world and material effects that are administratively and bureaucratically necessary. While a banal feature of corporate capitalism across the globe, these legal fictions are taken-for-granted pillars of property speculation in Cambodia.

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<sup>62</sup>Comaroff and Comaroff 2006.

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