

Litigation Lessons from Contesting a Corrupt Land Grab in Cambodia

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This paper is the ninth in a series examining the challenges and opportunities facing civil society groups that seek to develop innovative legal approaches to expose and punish grand corruption. The series has been developed from a day of discussions on the worldwide legal fight against high-level corruption organized by the Justice Initiative and Oxford University's Institute for Ethics, Law and Armed Conflict, held in June 2014.

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The Case of O-3 Village

In July 2013 a friend and former colleague asked if I would look into a land grabbing case near Sihanoukville City. Capital of the province of the same name, Sihanoukville is located on the Gulf of Thailand. It is home to the country's only international port and endowed with long stretches of pristine beaches. Tourism and industrialization are both booming and land values thus skyrocketing. My former colleague explained that a port authority executive connected to powerful government officials was trying to acquire a prime plot of land on the city outskirts, just west of the Angkor Beer Factory and near Route 4, a major national highway. Identified in the cadastre as the O-3 village, the land was occupied by 137 families, many of whom had farmed it for generations. The provincial court had ruled that the port authority executive was the rightful owner, and he had instigated a criminal case against the villagers for trespass.

Manipulating the judicial system to grab peasant land is unfortunately common in Cambodia.¹ A powerful or wealthy person fabricates evidence showing the land is "his" and then goes to court to have villagers removed. The judiciary goes along, accepting the evidence without question and ordering the villagers off the land. If the villagers resist, government security forces or private security guards forcibly remove them from the land, often with the consent of the local authorities. The confrontations frequently end in the villagers' arrest.

This is not surprising. It is normal when a person's land is taken away without consent or proper compensation for him or her to fight back, which can lead to verbal or physical violence between the victims and security forces. The security forces commonly provoke the confrontation to create circumstances allowing for the arrest of the victims of land grabbing. An arrest helps the land grabber for, with the threat of a criminal prosecution hanging over them, victims are often reluctant to resist the unlawful taking. The courts disregard of applicable legislation (in particular the 2001 Land Law), the unlawful use of security forces to threaten and evict people with legitimate claims to land, and the abuse of judicial processes to wrongfully rule on ownership and harass those who protest are all consequence of the weak rule of law in Cambodia and a corrupt judiciary.

Communities can fight land grabbing but those who confront the powerful and wealthy face many risks. The experience of those living around Lake Boeung Kak provides one example. The lake is in the center of urban Phnom Penh and the surrounding land was a residential area for some nine villages where more than 4000 families lived. It was also a major source for food and income generation for the residential families, based on the use of related natural resources (i.e. fishing, water plants), as well as an important local water source. When the villagers resisted the taking of the land for development, the government withheld all public services, leaving them with poor infrastructure and subject to frequent flooding.

¹ LICADHO 2012 in Review: *Land Grabbing, the Roots of Strife*, available at <http://www.licadho-cambodia.org/articles/20130212/133/index.html>

The difficulties of challenging land grab cases are exacerbated by an unequal legal playing field: while most seizures are carried out via the courts, because the government wants to avoid public criticism, most of the cases are settled outside the court due to lack of a lawyer to present the cases of affected people. Current data on access to legal aid and legal assistance in Cambodia primarily comes from two major reports: The Council for Legal and Judicial Reform's 2006 report and a 2010 survey conducted by the Cambodian Human Rights Action Committee (CHARC)². Both studies indicated the availability of legal aid services in rural Cambodia is grossly inadequate. Less than 5% of the lawyers practicing outside of Phnom Penh offer legal aid services, yet the demand for legal aid is very high, especially in the countryside where the majority of vulnerable poor populations live.

Fighting a corrupt legal system requires three things: motivation, knowledge, and financial resources. Going to court to overturn an unjust decision can be long, hard, and dangerous, and both the victims and their lawyers must be determined to see the case through to the end. The lawyer must know the law inside and out to ensure opponents cannot raise some technicality to escape justice. And resources are needed to defray the costs of litigation. This paper is the story of how all three elements are coming together to prevent the families of village O-3 from losing their land.

Facts of the Case

The Sihanoukville case I reviewed had all the marks of a corrupt land grab. The port authority official had brought a civil case in November 2005 claiming the villager's land was his and asking the court to order them off "his" property. This claim was based on a June 2005 contract for sale with a Chinese-Singaporean businessman who was said to be the previous owner—although under Cambodian law foreigners cannot own land.³ It should have been obvious to the court and provincial authorities that this individual could not have sold a valid land title to the port official. But they disregarded this issue, and in May 2011 the court ruled that the villagers were living on the port official's land.⁴

Other evidence also showed that this land title was defective. According to the local authority,⁵ some of the 137 families had been living on the land for more than ten

² Cambodian Human Rights Action Committee, *Legal Aid Services in Cambodia, Report of a Survey Among Legal Aid Providers*, Phnom Penh, 2010, p8 (hereinafter referred to as the *2010 Legal Aid Survey*)

³ Article 8 of the 2001 Land Law provides that only natural or legal entities of Khmer nationality have the right to ownership of land in Cambodia and a foreigner who falsifies national identity to become an owner of land in Cambodia shall be punished.

⁴ The court's decision was decided in absentia on May 20, 2011.

⁵ Letter of Commune chief Chit Sophat issued on 05 November 2012, recognizing the settlement of villagers in O-3 village. The letter was sent to the Sihanoukville provincial court asking it to take into consideration the duration of the settlement. However, the court refused to accept such certificate, alleging villagers did not have land title to prove their settlement.

years. Under Cambodian law, families gain ownership rights after living peacefully on land for ten years. And again according to Cambodian law, for the land to be legally transferred, the local authority would have had to be involved in the transfer. Despite all these flaws in the case, on October 19, 2011, the presiding judge ordered the villagers to voluntarily move off the disputed land within seven days. Otherwise, the court would have them removed forcefully and without any guarantee of compensation or damages caused by relocation process.

The public prosecutor should have charged the port authority executive with forging the title document. But he did not. Instead, in a criminal complaint dated January 6, 2006, only three months after the civil suit against the villagers was filed, the prosecutor charged the villagers with living on private property illegally and also asked the court to evict them.⁶ The court agreed with the prosecutor and in May 20, 2011 decision not only ordered that they be evicted but that each villager pay the land grabber 1,000,000 Riel, approximately \$250, in compensation—an enormous sum for a poor Cambodian villager.

The aim of the prosecution was to intimidate the villagers, and for some it succeeded. One group of families had given up hope, and after the criminal case was filed they fled the area to avoid arrest. A second group had decided to fight, however, and filed a lawsuit of its own in March of 2009 objecting to the removal. They also began demonstrating in front of the provincial hall to call attention to the injustice and win compensation for the damage caused by judiciary. Fearing that the demonstration might lead to unrest, possibly violence, and perhaps unwanted attention by the international community,⁷ the provincial governor called for reconciliation by asking the villagers to accept the Sihanoukville Provincial Court's decision.

As a result of the reconciliation process, in the spring of 2012 some 71 families were awarded plots of land in another area in return for settling their claims. The settlement plots were not as large or as valuable as those they were forced off, however. The settlement also did not compensate them for the value of the houses they had built on their land, and it further required that, as a condition of accepting the new plots, they stop any further legal action. The settlement split the claimants into two groups: those who accepted the plots to avoid lengthy judicial process and therefore had no motive to pursue the case further, and a second group who refused the offer and decided to continue to fight the court's decision instead.

Engaging with the clients

⁶ Provincial Court of Sihanoukville: *Criminal case N.15*, dated January 01, 2006.

⁷ Leah M. Trzcinski and Frank K. Upham, "Creating Law from the Ground Up: Land Law in Post-Conflict Cambodia," [Asian Journal of Law and Society](#) 1(1): 55-77, May 2014.

My co-counsel, Sam Chamroeurn,⁸ and I met this second group in February 2014. It soon became clear during our initial February meeting that the second group had the motivation to fight what they saw as the unjust taking of their land. What they needed was a lawyer with the requisite knowledge, one who understood their problem, the legal principles involved, and what was required to prevail. For a public interest lawyer, it is also critical to understanding the larger issues the case raises. Seeking a local remedy is one thing, but creating precedent to be an example or a guide in subsequent cases is another important thing. I felt I could help the victims of this particular land grab recover their land and contribute to the fight for broader change in the Cambodian legal system.

I began by asking the villagers to draw up a list the claimants who wanted to resist the taking of their land. After a series of phone calls and visits with different sources, they provided a list of 65 individuals willing to pursue legal battle. I told the group to find out how long each of the 65 had settled on the land using as evidence communications sent to their address by the local authority -- an announcement of a vaccination programs, a birth certificate registration, a national ID card, and any type of family registration. These are the types of documents needed to show they have been a peaceful occupant for ten years as required by the land law.

After receiving the documents, I started to look into case very carefully and cautiously before offering any advice to them. It was at this point that I learned about the case that the port authority executive had brought and the apparent collusion with the Sihanoukville provincial court. I concluded that the first instance court of Sihanoukville had seriously violated the villagers' ownership rights and that its decision did not conform to the provision of land law. The group could therefore file an appeal to overturn the provincial court's decision.

I also concluded that they also had a right to ask the public prosecutor to open a criminal investigation against the port authority executive for forging public documents. They did so on April 16, 2014. This demonstrated the villager's willingness to resist the arbitrary act of the court and to show they were aware of their right to seek a remedy as stipulated under Cambodian national constitution.⁹ Not only that, by their actions they showed that they were willing to pressure the judicial system to operate fairly and apply the same principles of justice to the poor as to the rich. They believed strongly that they deserved to be treated equally when it comes to justice.

At our February meeting I had asked the group to select five individuals to represent the group and to work on their behalf. An agreement among the group was quickly reached underlining the obligation of the representatives. The five were selected from among those willing to fight the eviction.

⁸ Mr. Sam Chamoeurn is a public interest lawyer and a member of Cambodian Defenders' Project <http://www.cdpcambodia.org/> which has engaged in public interest litigation for the past 10 years.

⁹ Article 39 of Cambodian National Constitution stated that "Khmer citizens have the right to denounce, make complaints, or claim for compensation for damages caused by any breach of the law by institutions of the state, social organizations or by members of such organizations. The settlement of complaints and claims for compensation for damages is the responsibility of the courts".

When the land grab began, the community had tried to hire a private lawyer, but they couldn't afford one. Even if they had, private lawyers rarely litigate public interest cases. They worry that the courts will resent their taking on public interest cases and take it out on them by ruling against them in cases where they represent businesses. They also fear they will lose future clients because of the way lawyering in Cambodia works: being a successful private, commercial lawyer required building a close relationship with the judiciary and other powerful individuals that will intervene in the lawyer's case to meet the expectations of the clients. That is not likely to happen if the lawyer becomes known for representing land grabbing victims or handling other public interest cases.

Public interest litigation requires not only a motivated client and a knowledgeable lawyer but money as well. My main constraint in taking the case was funding. I am neither affiliated with an NGO nor a law firm and I can't afford to work free of charge. Aside from my fee as the lawyer, I had to find a way to cover the costs of filing the case, traveling to Sihanoukville to copy the case records, and meeting with each member of the group to ensure they shared the objective of fighting against the unjust system.

In land grabbing cases, a fee is not only important to compensate the lawyer. It also strengthens clients' commitment to the case, ensuring that they are active in the case and collaborating with lawyer in gathering all necessary documents and to make them feel that it's their case. They have to fight alongside with their lawyer. There have been many instances where, when a lawyer offered services free of charge to victims of land grabbing, they simply ignored the case, relying heavily on lawyer to act alone, because they felt that they didn't have any money at stake. When lawyer works alone there is no impact on community after the case is ended because the main goal of lawyer working with community is more about transferring knowledge and training them to become an activist to defend their community's interest in future. If the victims rely solely on the lawyer, they won't learn anything.

The fee we agreed upon was based on economic ability of the victims. The minimum amount was \$10 per family. However, not all of the villagers could afford the \$10 fee. Some have given \$5 while some of them simply do not have enough money to pay even that. The fee will help lawyer to pay the costs of traveling to the court and other expenses such as the court fees.¹⁰ Not all of them could afford the \$10 fee. But the agreed formula was that those who have money would cover it for those who cannot pay. This helps build solidarity.

Representing victims of land grabbing requires that counsel be highly motivated. Lawyers who take such land cases risk being pressured by the government and in some instances may themselves face criminal charges. I took the case because I

¹⁰ Article 61 of the Cambodian Civil Code of Procedure provides for a sliding fee based on the amount in issue. Up to 10,000,000 (approximately \$2,500), the fee is 1,000 riels (\$.25) for each 100,000 riels. When the amount is above 10,000,000 but less than 100,000,000 riels the fee is 700 riels per 100,000 riels; for amounts exceeding 100,000,000 riels but less than 1,000,000,000 riels, the fee is 300 riels for each 100,000 riels; and for suits when amount exceeds 1,000,000,000 riels, it is 100 riels for each 100,000 riels.

wanted to test the legal culture of Cambodia. I had found the court had made many mistakes, especially in its interpretation of the rights of ownership and the transfer of rights of ownership. These mistakes included the failure to obtain the local authority's approval and the disregard of Cambodian land law. Had the court not made these mistakes, it would have rejected the port authority executive's ownership claim from the very beginning.

As I studied the background of the case more deeply, I learned that the villagers had even been cheated by a lawyer some had originally hired in March 2009 to contest the action. According to the villagers, he had collected a fee from them but he had never gone to court—perhaps because he did not want to upset the court. He is a corporate lawyer and must be on good terms with the court to win cases in the future.

I also learned that one week after the group had split into those who took the spring 2012 settlement and those wanting fight, bulldozers were sent in to destroy the houses remaining on the land. Those villagers who had refused to settle decided to take collective action. On August 14, 2012, they held a peaceful protest in front of provincial hall, requesting the provincial authority to intervene to stop the relocation process and the court to adhere to the law and respect the national constitution.

Two weeks later, one of those who would become one of the five representatives was summoned to Sihanoukville provincial court for questioning on allegations of illegal possession of private property—despite the fact that no evidence had been presented against the man. The summons was the result of a criminal complaint filed by the lawyer for the port authority official. The representative was imprisoned for six months on illegal possession of private property. The prosecution was meant as a warning to others not to stand against the system.

Outcomes

At this stage, it was not a matter of simply winning the case but educating the villagers to be united and determined to stand for their own cause. Using litigation to pursue a judicial solution is an enormous challenge in Cambodia, but it can help to set a precedent and combat corruption when the basic legal system is broken. Working together to prod the system and to set new precedents for justice is the main challenge. However, there has to be a starting point, where deterrence against those who operate through a corrupted system is created so that other affected communities can build on earlier cases to stand up against arbitrary acts of judicial and government authorities. In addition, challenging the system is a way to change the mindset of mainstream media to focus more on social injustice issues. Corruption is so ingrained that it is commonly accepted and thus hard to tackle. Challenging the corrupt system is a way to change their mindset to be more sensitive and aware of the impact of corruption. When the media fails to highlight social injustice issues, the corruption remains immune to accountability.

Since the villagers' appeal of the provincial court's eviction decision was filed in early 2014, no further steps have been taken to determine the legitimate owners of the land. To date the appeal has helped prevent the families from losing their lands although the final decision has not been made as yet. So we can see some positive results from the process of litigation even though we are not yet at the end of the legal battle.

As noted above, we also filed a request with the public prosecutor asking that a criminal case against the port authority executive, based on articles 247 and 248 of the 2001 Cambodian Land Law regarding his fraudulent acquisition and forging public document be opened. This is permitted by Cambodian law which provides that a victim of a crime can demand the prosecutor open a criminal case against the perpetrator of a criminal act when the prosecutor has failed to do so.

In this particular case, we highlighted all the provisions related to the unlawfulness of the port authority executive's act in the forging of the land title.

Under Cambodian law, the court cannot validate a land title without supporting documentation from the cadastral office. In this case, the cadastral office did not provide any documentation to the court, stating that the supporting documents had been lost. This means that the claim made against the villagers was completely illegitimate; he therefore has to be responsible for the relocation of the 137 families including the damages caused by his act.¹¹

Filing this case slowed down the lawsuit which the port authority executive brought against villagers living on land he claims is his. Although the prosecution against him has yet to commence—more than two years now after it was filed—the case shows him that not everyone will tolerate injustice and oppression by the powerful and wealthy. This is a message that must be sent to all affected communities through Cambodia to encourage them to stand up for the same cause.

There is always a challenge working with a large group for there is always the possibility of conflict among the members if the rules and objectives are not clearly understood. Ensuring members freely communicate among themselves honestly and that they keep internal communication confidential is critical. It is also important that members agree not to accept any deal from the other side without collective consent. In addition, the number of families must not be increased (keep the original list) to avoid creating any loophole to weaken the case. Lawyers working on the case have to thoroughly and rigorously study who is on the list to avoid including any that have fabricated claims. Moreover, the objective of the litigation must be clear from the outset. If there is no consensus among the group about it, holding members together and determining the direction of the case becomes difficult if not impossible.

¹¹ Art. 239 para 2 "Cadastral offices at all levels are legally responsible to ensure the due and proper maintenance of such Land Registers and the accuracy of survey operations and to preserve the documents".

The reason for this precaution is people who had already chosen to accept the deal from other party may change their mind and join the group seeking a legal remedy because they see the opportunity of winning the case. It may also be that a member or members of the group willing to pursue a legal remedy may sometime want to give up and accept a settlement instead to avoid the possibility of a lengthy legal battle.

After a clean list of claimants is created, the lawyer has to begin studying the case carefully to determine legal theory and strategy. First of all, looking into the legal aspect of the case whether there are any errors in the application the court relied upon in order that the community be evicted from their lands. Secondly, the lawyer must determine whether the relocation is for a public purpose or a private one.¹² The Land Law of Cambodia states that if the relocation is for a private purpose, compensation must be paid. In the Sihanoukville case, we found that the court applied the principle of relocation unlawfully. The Cambodia Constitution states that only “legal ownership” is protected by law.¹³

Legal protection means fair and just treatment in the case of relocation done by private investment. Relocation can take place only following appropriate procedure established by laws and regulations including public inquiry. Cambodian Constitution also guarantees legal private property and assures that the deprivation of the private property can be done only for the public interest with fair and just compensation in advance. But in this particular case, the relocation was carried out for private purpose. If they are private properties the court must follow the principle of fair and just compensation¹⁴. Article 17 of the Universal Declaration of Human Rights also stipulates that “[e]veryone has the right to own property alone as well as in association with others” and that “[n]o one shall be arbitrarily deprived of his property.”

This is the argument which lawyers in land grabbing cases should advance both in writing and orally. In the O-3 case, I strongly believe that the transfer of land ownership was done in the absence of local authority. That makes it illegal and the court should have rejected the port authority executive’s bid to assert control of the land the outset. One explanation for why it did not may be that the villagers’ previous lawyer colluded with the land grabbers and thus failed to raise a defense lawyer.

Lack of Legal Access

Strategy

Mobilization is the key—to ensure the community works together to organize itself to resist the arbitrary act of justice system and to prod the court to observe rule of law principles. Promoting the rights of vulnerable and poor for access to justice through judiciary can be very difficult. But building litigation strategy to work on land

¹² Article.4 para 3 of Cambodia National Constitution stated that the right to confiscate properties from any person shall be exercised only in the public interest as provided for under the law and shall require fair and just compensation in advance.

¹³ Article 4 para of Cambodian National Constitution

¹⁴ Article.1 para 2 of Law on Expropriation

grabbing case is even more difficult. In order to work in this particular field effectively, it essentially requires innovative experiences and knowledge of community's issues and understanding the mindset of the judges and prosecutors in corrupted and poor governance context. One of the main challenges in supporting communities through litigation is lack of funding because the Cambodian government fails to adequately support legal aid services to protect the rights of vulnerable and poor, and as explained above, not only is it unlikely that victims could afford a commercial lawyer but these lawyers are reluctant to represent the poor because paying client may then be reluctant to hire them.

Most public interest cases heavily rely on legal aid funded project through NGOs such as the Cambodian Human Rights and Development Association, the Cambodian League for the Promotion and Defense of Human Rights, and the Community Legal Education Center. The legal aid department in the Cambodia Bar Association only provides legal service in criminal cases. Despite all the challenges that lawyers in Cambodia are facing, there is always a solution to the problems. However, the solution depends on how innovative lawyer is and how he or she will exercises their legal skills and knowledge to bring about changes at their individual level in order to overcome such a problem. There have been many changes in term of strategy since the last ten years. Previously, only NGOs who provided legal service to the poor handled such cases. Nowadays donors are also willing to contract individual lawyer through NGO on case by case basis such as Cambodia Center for Human Rights.

On the other hand, as a result of people's increased awareness of their freedom of expression and assembly villagers are now more willing to fight illegal or unjust court decisions, and civil society now mobilizes to push the implementation of civil and political rights. This allows grassroots level to have an opportunity to work closely with lawyers on their collective problems. Especially, the engagement with lawyers to work on their cases such as land grabbing has significantly increased the people's ability to analyze their own issues more broadly and critically, from legal, social, and economic point of view. Particularly, they have learned how to be organized and coordinated themselves to resist against unjust and corrupted system. When people are organized and coordinated among themselves, it is easy for lawyer to work with them in determining the goal, the objective, and strategies to push for respect of rule of law.

Conclusions

Three conclusions emerge from the Sihanoukville case:

- 1) Considering the current ineffective law enforcement and unjust social situations, enhancement of governance of land policy urgently needs robust mechanisms of accountability to ensure that individuals and stakeholders granted decision-making authority are held responsible for the public consequences of their deliberation and do not abuse their authority.

2) When local stakeholders, particularly the poor, have a voice in decisions over policies, regulations and investments, it creates opportunities for their interests to be taken into account. Yet often more direct measures for decisions over lands management are needed to ensure public accountability of decision-makers at commune, district, provincial and national levels.

3) Given the slow progress in improving accountability through the courts, building institutions for conflict resolution and justice accessible to poor requires a multifaceted approach. This means simultaneous efforts to strengthen the judicial sector, administrative processes for dispute resolution, and alternative dispute resolution mechanisms, while protecting the ability of communities to organize and advocate for their rights.

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