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**Fabian Thiel**

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**Property, Planning, and the  
“Homo Cooperativus”**

**Land as a natural resource affected with a strong public interest**

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**Autor:** Fabian Thiel

ZBF-UCB / Zentrum für Bodenschutz und Flächenhaushaltspolitik

Postfach 1380  
55761 Birkenfeld

Tel.: 06782-17 1952  
Fax: 06782-17 1155  
Mail: [info.zbf@umwelt-campus.de](mailto:info.zbf@umwelt-campus.de)  
Internet: <http://www.zbf.umwelt-campus.de>

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## **Summary (deutsch)**

Die verfassungsrechtliche Eigentumsausgestaltung in der Bundesrepublik Deutschland ist gekennzeichnet durch ein interessantes Spannungsfeld zwischen Privateigentum (Art. 14 GG) einerseits und öffentliches Gemeineigentum sowie gemeinwirtschaftliche Organisationsformen (Art. 15 GG) für Produktionsmittel wie etwa den Grund und Boden andererseits. Suburbanisierung und Flächen-„verbrauch“ sind national wie international wichtige Themenfelder des Landmanagements. Von besonderer Wichtigkeit ist hierbei die Analyse und Implementierung vielfältiger Property Rights innerhalb bestehender Raumplanungssysteme. Geoinformationelle Instrumente können die Nachhaltigkeit der Landnutzung verbessern, wenn sie an ein innovatives Bodenrecht gekoppelt sind und sich im fruchtbaren Zusammenspiel mit der Bodenpolitik, Ökonomie, Geodäsie sowie der Raumplanung entwickeln. Das Erbbaurecht liefert den Planungsträgern vielfältige Möglichkeiten, das Bodeneigentum sozialpflichtig auszugestalten und die Eigentumspolitik an zeitgenössische Erfordernisse anzupassen. Der „Homo Cooperativus“, der sich in Boden bezogenen Genossenschaften, Verbänden, Stiftungen und Nonprofit-Organisationen engagiert, ist ein wichtiger Teil einer sozialen Boden- und Eigentumspolitik. Eine in Bälde reformierte Grundsteuer, die idealiter begleitet oder gar gänzlich ersetzt wird von einer modernen Variante der Bodenwertsteuer, könnte die Einnahmehasis für den deutschen Staat zukünftig erheblich verbreitern und als ein intelligentes Vorbild für die Bodenpolitiken in Entwicklungsländern wie beispielsweise Kambodscha dienen.

**Summary (english)**

In Germany exists an interesting constitutional balance between two forms of common public/private land property and the establishment of public, non-profit enterprises. Private property is protected through Art. 14 German Constitution, whereas common public property and special purpose public entities are promoted by Art. 15 German Constitution. Current German land management strategies try to avoid suburbanization and urban sprawl tendencies. One of the greatest challenges public/private property law and federal building law have to offer is to implement and adapt socially well-balanced property rights. Land use planning, urban renewal processes in Eastern Germany, and geo information tools may be much more efficient if they are flanked by communal common land ownership, leasehold systems, altruistic cooperatives and trusts which may create the modern “homo cooperativus”. Leasehold constructions allow numerous possibilities to the authorities to strengthen the social function of property affected with a strong public interest. Land policy as the comprehensive land development guideline in Germany can be interpreted as a property-steering application of spatial planning. It includes all aspects of land-related actions of the public sector and the private owners. In addition, revised real property taxation – ideally supported or eventually totally substituted by land value taxation – could serve as an important, sustainable source of the German national revenue and therefore as an intelligent blueprint for the land policies of developing countries like Cambodia.

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# I. Land Property in Germany: Past

## 1. Introduction

In the Federal Republic of Germany, the privatization of land and other assets of the former German Democratic Republic (GDR) began six months before the official “Unification Treaty” of 31 August 1990. All (formerly state owned) property holdings of the GDR, namely the companies, were converted into stock companies or legal entities. The shares were transferred to the ownership of the Trust Agency (Treuhandanstalt – THA) which was founded on 8 March 1990<sup>1</sup> The legal contract that privatizes all these shares was stated within the Trustee Act. As far as the agriculture and forestry sector of the GDR is concerned, the entities were organized either as socialist cooperatives (4.500) or as state-owned companies (515), consisting of the Socialist Agricultural Production Cooperatives (LPG) and the state-owned estates (VEB). All cooperatives and companies farmed agricultural and forestry land on the basis of extensive use rights by law. In 1990, state-owned land totalled 2.1 million ha of agricultural land or 35 % of all agricultural land, and 2.2 million ha of forestry land (90 %).<sup>2</sup>

## 2. What went wrong after the German reunification?

Although other land than agriculture areas had not been expropriated by 1989 – and was still owned by individuals or the church – these properties were more or less worthless because of land use rights guaranteed by the GDR. The organizational structure of the land property system includes public property for land, natural resources and means of production. Means of production could be agricultural and producer cooperatives. Agricultural cooperatives and the planning economy of the GDR were interpreted as not compatible with the (private) property-rights order in Western Germany. Hence, the transformation process of converting state properties into private assets was foreseen as a long-term project. However, in order to secure investments while reorganising ownership structures, the decentrally organized branches of the THA were often under enormous pressure. This was mainly political pressure to solve problems and property disputes efficiently<sup>3</sup>, since the intention of the unification legislator at that time<sup>4</sup> was the guideline of “Investment shall have the right of way”.<sup>5</sup>

In the early years of the property transformation process (in particular between 1989-1992) enactment of legal regulations had to be carried out in the absence of full

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<sup>1</sup> See Wolfram Fischer/Herbert Hax/Hans Karl Schneider (eds.), *The Trust Agency: to adventure the impossible*, Berlin, 1993.

<sup>2</sup> See German Agriculture Publishing House (ed.), *Land market 1 (2004/2005)*, Berlin, 2004.

<sup>3</sup> See Hartmut Dieterich/Egbert Dransfeld/Winrich Voß, *Urban land & property markets in Germany*, London, 1993, pp. 46-54.

<sup>4</sup> See the Investment Priority Act.

<sup>5</sup> See Hartmut Dieterich/Egbert Dransfeld/Winrich Voß, *Urban land & property markets in Germany*, London, 1993, p. 49.

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knowledge of the numerous problems connected with the situations of overlapping ownership rights and unclear legislation in regard to restitution and investment. In later reviews of the Property Law or the Allocation of Ownership Act, the German government enshrined “opening clauses” in order to enhance the use of consensually deviating, sub-statutory solutions to speed up the self-organization transformation process – and, moreover, to reduce state costs by unburdening the courts.<sup>6</sup> Within the decisions of the German Constitutional Court (*Bundesverfassungsgericht* – BVerfG) after the formal reunification on 3<sup>rd</sup> October 1990, legal questions about property, expropriation, and restitution were by far the most contested aspects of the re-unification process. Today, the protection of property in land is protected under the German Constitution (Article 14 para 1 sentence 1), but only after the finishing of the reunification process. The “reunified legislator” is not responsible for expropriations and confiscations that took place during the time of the GDR and the pre-period of the Socialist Occupation Zone (SBZ) which lasted from 1945 to 1949. The German land reform guideline “*restitution instead of compensation*” since 1990 for expropriated plots by arbitrary, politically motivated nationalization during the SBZ period without compensation as far as they are part of the reunification contract (Art. 41)<sup>7</sup>, cannot be subsumed under Article 14 German Constitution.<sup>8</sup> This means that the mentioned nationalizations of the GDR legislator are afterwards not protected by Art. 14 para 1 sentence 1 German Constitution.

In the second phase of the implementation of the privatization process, the farms in Eastern Germany were first given the opportunity to increase their property resources by purchasing formerly state-owned land at preferential conditions by federal land-purchasing programmes (Indemnification and Compensation Act (EALG) and the Land Purchase Implementing Regulation (FlErwV)). Due to better financial resources of the farmers nowadays, a price increase in the agricultural market is expected. Through the prioritization of sales at the full market value, the maximum advantage of the added value should be achieved, compared with a sale at a price level on the non-developed land market before 1990.<sup>9</sup>

### **3. The nature of the post-reunification problems: Migration and the loss of property value due to the “shrinkage” of population and real estate markets in certain regions of Eastern Germany**

Since mid 1990’s, the private property euphoria in the new eastern states was definitely over. As far as housing and industrial properties are concerned, some regions

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<sup>6</sup> See Gerhard Fieberg/Harald Reichenbach, *Property Law*, Munich, 2001.

<sup>7</sup> See Hans Willgerodt, *Re-privatizing to the former owners*. In: Wolfram Fischer/Herbert Hax/Hans Karl Schneider (eds.), *The Trust Agency: to adventure the impossible*, 1993, pp. 241-262.

<sup>8</sup> See the decision of the German Constitutional Court: BVerfGE 84, p. 90, 126; BVerfGE 94, p. 12 – No retroactive application of Art. 14 German Constitution regarding to the expropriation and nationalization measures undertaken by the SBZ authorities.

<sup>9</sup> See Detlev-Helmuth Kuchar/Andreas Gläsel, *Addressing good governance in the process of privatization and restitution of agricultural land during the German reunification process, land reform, land settlement and cooperatives*, No. 2007/2, pp. 57-66.

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in Eastern Germany are affected by “shrinking processes”<sup>10</sup> due to demographic changes (de-population) and migration of well-educated young people towards Western Germany or overseas. These migration trends cause low, but stable land values in “shrinking regions” and thus a partly massive loss of property investments. In the long run, these serious developments call for the intensification of transnational regional projects (e.g., trans-European networks<sup>11</sup>; territorial cohesion) and common spatial planning activities within the states of the European Union. Clear aim of such activities should be the balance of burden and advantages of the German aging population or intense internal migratory movements. Significant immigration from abroad and de-population on one hand and massive population growth in prosperous regions on the other hand might be the result of these movements.

Formidable tasks for creative research questions will surely arise: Will Europeans know how to carry out these demographic and spatial developments – and their impacts on the land properties and their values? Answers to these questions cannot be found quickly enough, not only in Germany. Demographics is a science that can predict with a fair degree of accuracy. The future skill lies within the process of description, knowledge (in the sense of wisdom instead of just information consumption), and the adjustment of predictable changes on the land markets into demand for space<sup>12</sup>; thus the distribution of future income streams and wealth surely will become more stratified in the German society.

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<sup>10</sup> See Klaus Spiekermann/Michael Wegener, *The Shrinking Continent: Accessibility, Competitiveness, and Cohesion*. In: Andreas Faludi (ed.), *European Spatial Research and Planning*, Lincoln Institute of Land Policy, Cambridge/Mass., 2008, pp. 115-139.

<sup>11</sup> See the program “ESPON” = European Spatial Planning Observation Network; see also INTERREG III B project to strengthen the transnational cooperation with the objective of an integrated European territorial development.

<sup>12</sup> “Known demographic changes with known consequences”; see the relevant discussion in the U.S.: Mike E. Miles et al. (eds.), *Real Estate Development. Principles and process*, 4<sup>th</sup> edition, Washington/D.C., 2007, p. 557.

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## II. Land Property, Planning, and the Homo Cooperativus in Germany: Present

*“No man made the land.”*<sup>13</sup>

### 1. The legal framework for planning and property rights

*“Urban planning determines the legal fate of urban land.”* (German Constitutional Court, “Legal Expertise on Building Responsibilities”<sup>14</sup>, 1954)

With respect to absolute land ownership and its restrictions, property is a “key player” for spatial development in Germany. The country is endowed with a highly sophisticated system of fundamental rights protection in general and of private property protection in particular. Private property in land is protected under the German Constitution and the legal system (federal law and state law). The most common form of land titling occurs as absolute, exclusive ownership (Art. 14 para 1 sentence 1 German Constitution; Section 903 Civil Code). The absolute owner, who is subject to any general restrictions imposed by law or any rights of third parties, has complete control of the land and the buildings as its immovable fixtures. *“Immovable property”*, which land ideally represents, includes:

***Land + Buildings (Immovable fixtures)<sup>15</sup> + Property Rights + Servitudes (Separately valued personal rights, combined with the property ownership).***

The term “land” has to be interpreted as land including buildings or improvements (e.g., real assets), property rights which are appraisable for mortgages and hypothecs, to determine co-ownership value or for capital gain, and servitudes. The concept of social obligations for ownership within the German Constitution has been a common concern ever since.<sup>16</sup> The same is true for Europe where the social responsibilities of the landowners have a long heritage, with special respect to German constitutional law, as Ian Williamson points out.<sup>17</sup> A formidable known statement of the social function of property is contained in Art. 14 para 2 of German Constitution<sup>18</sup>

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<sup>13</sup> See John Stuart Mill, *Principles of political economy and chapters on socialism*, 1848, reissued edition, Oxford, 2008, p. 233.

<sup>14</sup> See the decision of the German Constitutional Court: BVerfGE 3, p. 407.

<sup>15</sup> The term “building” may be interpreted in a broad sense; even golf courses and housing boats as immovable fixtures with the land can be subsumed under the term “building”.

<sup>16</sup> Art. 544 of the French Civil Code states: “Ownership is the right to enjoy and dispose of things in the most absolute manner, provided, however, they are not used in a way prohibited by statutes or regulations”.

<sup>17</sup> See Ian Williamson, *Land Administration and Sustainable Development*. In: Gary C. Cornia/Jim Riddell (eds.), *Toward a Vision of Land in 2015, International Perspectives*, Lincoln Institute of Land Policy, Cambridge/Mass., p. 172 (pp. 163-188).

<sup>18</sup> Similar social and environmental provisions appear in the Italian (Art. 42 para 2) and the Spanish (Art. 33 para 2) constitution.

which can be called a “social model” created by the German Constitutional Court. That model seems to contrast – and to conflict – with the individualistic appeal of Section 903 Civil Code: “*The owner of a thing may, to the extent that a statute or third party rights do not conflict with this, deal with the thing at his discretion and exclude others from every influence*”.

## 2. Socially just property order vs. private property protection: a contradiction?

“*Not the owners are representing the nation.*”<sup>19</sup>

The “social model” of property clearly requires landowners who act in a socially responsible manner, as determined by regulations authorized by the legislator. The contents and limits of property rights are aiming at a “socially just property order”. The social obligation must meet the principle of proportionality and allows under certain circumstances government’s interventions that depend on the social importance of the property type which may change over time.<sup>20</sup> The German Constitution distinguishes two forms of property restrictions (see figure 1 below):

- the determination of content and limits (Art. 14 para 1, sentence 2), and
- expropriation (Art. 14 para 3), e.g., as a last resort for the public interest in connection with urban land use planning and its implementation.

Meaning of „property“ according to Art. 14 German Constitution		
Property (Art. 14 para 1 sentence 1)	Content and Limit (Art. 14 para 1 sentence 2)	Expropriation (Art. 14 para 3)
↓	↓	↓
Private property rights; Rights given by public law and based on owner’s performance; <b>No</b> property: Possibilities, (business) expectations, chances and wealth	Government’s action to determine contents and limits; <b>Generally:</b> No compensation required; Balance between private and public interests (proportionality); Protection of interest	Legal and administrative action in the public interest; Civil court procedure for compensation; Compensation (not necessarily due to the market value)

Figure 1: The concept of “property” within Art. 14 German Constitution

Although, case law from the German Federal Constitutional Court has extensively tried to demarcate the realms of para 1 and 3 of Art. 14 German Constitution, the discussion and interpretation of the problems combined with Art. 14 are anything else

<sup>19</sup> See Helmut Rittstieg, *Eigentum als Verfassungsproblem*, 1975, p. 339.

<sup>20</sup> See Aileen McHarg, *The Social Obligations of Ownership and the Regulation of Energy Utilities in the United Kingdom and the European Union*. In: Aileen McHarg/Barry Barton/Adrian Bradbrook/Lee Godden (eds.), *Property and the Law in Energy and Natural Resources*, Oxford, 2010, p. 377 (pp. 360-387).

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than being ultimately solved. This is true in respect of the social and natural functions of non-renewable resources, and the legally justified governmental interventions to restrict and – even more essential – to re-define private property rights in the public interest. The content and limits of the instrument “expropriation” are entirely clear, at least on paper: “*Expropriation means a deprivation of property in an individual case directed at a transfer of property from one person to another in order to achieve an objective of public interest*”<sup>21</sup>, consisting of all general restrictions of property imposed by law that constitute a determination of content and limits in the sense of Art. 14 para 1 sentence 2 German Constitution.

However, the problem lies within the interpretation of Art. 14 para 1 sentence 2 German Constitution, since it does not say anything about compensation.<sup>22</sup> All general restrictions of property imposed by law do only constitute a determination of *content* and *limits* of property (Art 14 para 1 sentence 2) which are to be accepted by owners without compensation in certain cases.<sup>23</sup> Interestingly, according to the European Convention on Human Rights (ECHR) from 1950, the possibility to restrict private land use without compensation for general interest purposes is one of the three basic principles of ECHR which serves as an important legal document of the European Union.<sup>24</sup> McHarg concludes that the right to property is one of the weakest ECHR-rights. Art. 1 of Protocol 1 does permit deprivation and regulation of the property use in the public interest.<sup>25</sup>

In Germany, there is no such thing as a regulatory expropriation or takings by statute. Compensation serves as a consequence of expropriation<sup>26</sup>, but also as a balancing factor within the principle of proportionality. An expropriation for the benefit of private persons or companies is not excluded, as expropriation can be done for the public good. The expropriation of private real estate in favour of a car manufacturer for the purpose of building a car testing range in an economically weak region is considered as generally possible when pursuing a public interest.<sup>27</sup> In *sharp contrast*<sup>28</sup> to Art. 14

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<sup>21</sup> See the decision of the German Federal Constitutional Court: *Nassauskiesung* (BVerfGE 58, p. 300).

<sup>22</sup> See Inigo del Guayo/Gunther Kühne/Martha Roggenkamp, *Ownership Unbundling and Property Rights in the EU Energy Sector*. In: Aileen McHarg/Barry Barton/Adrian Bradbrook/Lee Godden (eds.), *Property and the Law in Energy and Natural Resources*, Oxford, 2010, pp. 326-359.

<sup>23</sup> *Id.* p. 346.

<sup>24</sup> Principle 1 ECHR describes the guarantee of property; Principle 2 ECHR allows the possibility of expropriation in the public interest.

<sup>25</sup> See Aileen McHarg, *Social Obligations of Ownership and Regulation of Energy Utilities in the United Kingdom and the European Union*. In: Aileen McHarg/Barry Barton/Adrian Bradbrook/Lee Godden (eds.), *Property and the Law in Energy and Natural Resources*, Oxford, 2010, p. 376.

<sup>26</sup> Compensation for expropriation and compensation for damages from public planning and building law damages as well can be made below the market value. A general prescription, let alone a “guideline” for any compensation is not possible. The compensation surely depends on the motivation and on rationalities of both involved parties – the private landowners *and* the government.

<sup>27</sup> See the decision of the German Constitutional Court from 24 March 1987, *Neue Juristische Wochenschrift* 1987, p. 1251.

<sup>28</sup> The question: “The earth – private or common” does not only arise in Germany, but is an academic, ideological and political “hot issue” throughout the world. See Ann Varley, *Private or Public: Debating*

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para 1 sentence 1 German Constitution/Section 903 Civil Code, according to Art. 15 German Constitution, land, natural resources, and means of production (e.g., factories, banks) may for the purpose of socialisation<sup>29</sup> be transferred to public ownership or other forms of public enterprise<sup>30</sup> by a law that determines the nature and extent of compensation. This innovative constitutional regulation needs a law by the federal government to be finally implemented. The implementation of new forms of communal (and collective) property<sup>31</sup> and/or public enterprises<sup>32</sup> for the sectors

- building industry and real estate (commercial developers; public building-principals);
- energy (e.g., coal, water or geothermal energy);
- industries (e.g., steel industry) and
- public and private banks or insurance companies<sup>33</sup>

has to be politically desired.<sup>34</sup> With respect to the compensation, the third and fourth sentences of para 3 of Article 14 German Constitution shall apply *mutatis mutandis*. The following figure 2 shows a possible future alternative to realize Art. 15 German Constitution as a contingency plan since the norm still represents a “constitutional terra incognita”<sup>35</sup> due to political obstacles against its implementation. Though, Art. 15 is part of the existing constitution; it could not become obsolete even after decades of neglect and missing implementation.

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the Meaning of Tenure Legalization, *International Journal of Urban and Regional Research*, 26(3), 2002, pp. 449-461.

<sup>29</sup> Socialization does not necessarily mean nationalization.

<sup>30</sup> Public enterprises can be organized as indeed workable within the existing structure of the market economy. Common property forms as institutional framework for companies may be built up beside private property. See Carl Dahlman, *The Open Field System and Beyond: A Property Rights Analysis of an Economic Institution*, Cambridge, 1980.

<sup>31</sup> See Jürgen G. Backhaus, *Gemeineigentum – Sozialgemeinschaften und Landesgemeinschaft: Eine ökonomische Analyse*. Research Memorandum RM 93-013, Limburg University, Maastricht, 1993.

<sup>32</sup> See Ludwig von Mises, *Die Gemeinwirtschaft*, Darmstadt, 1976.

<sup>33</sup> See Herbert Schui, *Wie ein öffentlicher Sektor funktionieren kann*. In: Hermannus Pfeiffer (ed.), *Land in Sicht?* Köln 2009, pp. 119-133.

<sup>34</sup> From the perspective of property analytic approach, good property management in the sense of good governance is the key. See the recommendations and conclusions in chapter III. and IV. of my paper.

<sup>35</sup> See Helmut Rittstieg, *Eigentum als Verfassungsproblem*, Darmstadt 1975, p. 401.



**Figure 2: “Terra Incognita”: The concept of democratic socialization and public participation for collective identity and community forces within Art. 15 German Constitution**

The German federal government may guide and restrict the use of real estate property and the property rights to protect and promote public interests via Art. 15 German Constitution or public planning law, provided it complies with the *principle of proportionality*: Any restriction on private property is unconstitutional, if it does not pursue a public interest effectively, if it does not use the least degree of force necessary to achieve the aim pursued, and if there is no reasonable relationship between the means employed and the aim pursued. But it is not just the task of the state to guarantee property rights and the inheritance of these rights. Another element of “regulatory quality” is that the state defines and implements underlying legal and institutional conditions. The state has to ensure that the “public good” of the ownership of land shall be used to the maximum possible value for all (Article 14 para 2 German Constitution) – and not to the market value.

<sup>36</sup> See the decision of the German Constitutional Court: BVerfGE 24, p. 367 (p. 420) – Hamburger Deichordnungsgesetz.

<sup>37</sup> See Jürgen G. Backhaus, *Die Überführung von Produktionsmitteln in Gemeineigentum*. Maastricht research school of Economics, of Technology and Organizations, University of Limburg/Maastricht Discussion Paper RM/95/004, 1995, pp. 7-9.

<sup>38</sup> See chapter II. 8 of my paper.

<sup>39</sup> See further: European Commission, *Local Development and Employment Initiatives*. Internal Document, March 1995 – SEC 564/95, Luxembourg, p. 7.



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Hence, one of the main principles of the social market economy is the guideline of “property entails obligations”. This sentence is of paramount importance for the land market in general, for investments and a comprehensive land policy. The assumption is made that what is known as the “freedom to build” forms an essential element of the individual land ownership, although it cannot be derived from Art. 14 para 1 sentence 1 German Constitution. But individual landowners are only entitled to make (personal) use of this right where it is possible to ensure that the building activity does not counteract public purposes (e.g., environmental issues), and qualifies to be permitted. The “right to build” is thus formed by urban development law and construction statutes. It does not include or create a right to profit from property – particularly not from the ground rent as the economic land use gain.<sup>40</sup>

### **3. The hierarchy of spatial planning, and the “social land policy”**

The German property and planning system is supposed to base on property market transparency and flexibility.<sup>41</sup> In theory, precautions in favour of competition over use rights and against speculation and the manipulation of prices are often structurally enshrined within the land use planning guidelines and mechanisms. However, reality is quite different: the decision about land use changes has to be made by the municipality during the planning process, due to the difficulties in assessing external effects and because of other problems. The planning process should be neutral – meaning, the competing claims of the diverse stakeholders should be balanced in order to optimize the use of the land as a common pool resource (CPR). Germany has a legal basis for a comprehensive hierarchic spatial planning system<sup>42</sup>, consisting of the

- Federal Spatial/Territorial Planning Act;
- Federal Building Code;
- Federal Land Utilization Ordinance and the
- Urban Renewal and Development Act.

These regulations give overall legal framework conditions affecting urban and regional development with detailed prescriptions for urban planning law and building permission applications (see figure 3). These applications are workable for land reallocation, village renewal, building regulation laws, and judicial control instruments.<sup>43</sup>

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<sup>40</sup> See Donald Krueckeberg, The difficult character of property: To whom do things belong? *Journal of the American Planning Association*, 61(3), pp. 301-309; Carl-Heinz David (ed.), *Law and Practice of Urban Development in the Federal Republic of Germany*, Bonn, 1993, p. 12.

<sup>41</sup> See Hartmut Dieterich/Egbert Dransfeld/Winnrich Voß, *Urban land and property markets in Germany*, London, 1993, pp. 190-203.

<sup>42</sup> See Carl-Heinz David (ed.), *Law and Practice of Urban Development in the Federal Republic of Germany*, Bonn, 1993, p. 18.

<sup>43</sup> See Gerd Schmidt-Eichstaedt (ed.), *Land Use Planning and Building Permission in the European Union*, Part Germany, Cologne, 1995, pp. 41-51.

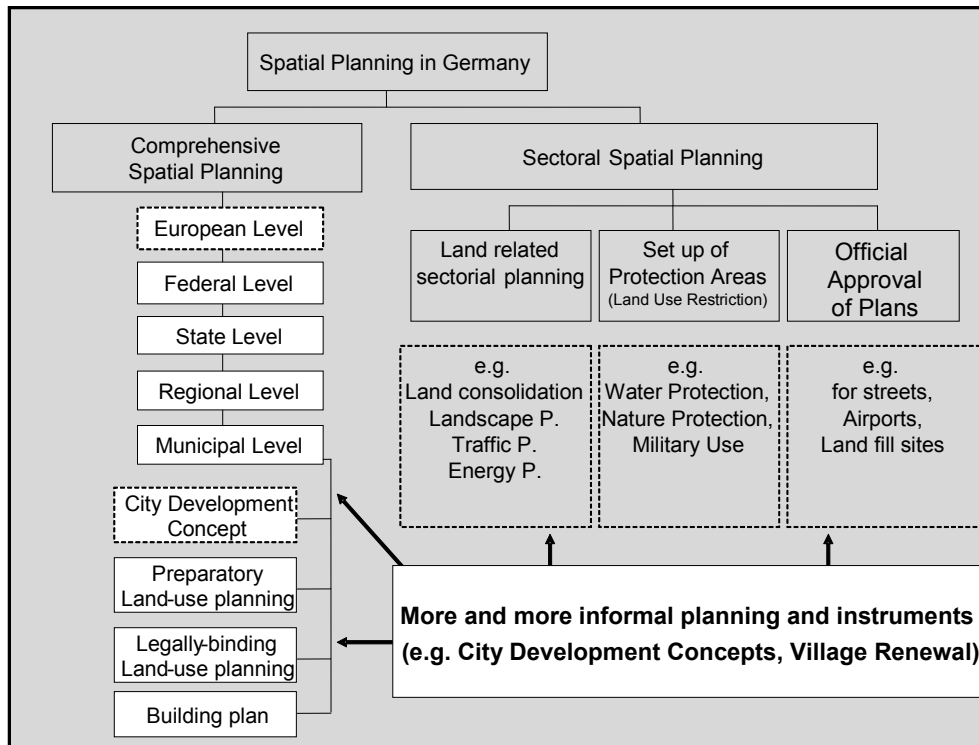


Figure 3: The hierarchy of spatial planning in Germany

The interlocking set of German land use plans on national, regional, and communal level (see figure 3) is necessary to avoid urbanization, urban sprawl tendencies, underused land hoarding, and the ongoing destruction of fertile farm land. Land use plans can protect land that has been designated for a special purpose, such as the protection of a landscape for biodiversity/agricultural uses, or the prevention of an open space from development. Land policy is part of the spatial planning system; it is defined as a systematic acting to achieve or maintain the optimal use of land and socially just distribution of land property (more precisely: of the property rights) and of windfall profits as the economical gain from the land use, in particular the ground rent.

Thus, land policy in Germany can be seen as a property-steering application of spatial/territorial planning.<sup>44</sup> It includes all aspects of land-related actions of the public sector *and* the private landowners. Social land policy deals with regulations (Leviathan), mechanisms and voluntary actions of landowners in order to strengthen the social function of the land as a non-renewal commodity. Considering in particular the local governments of Germany, the goals of the laws – public participation, empowerment and awareness of the local people for urban regeneration, consultation and social planning within urban development – are partly not achieved. In fact, despite of the differences of planning systems (that reflect the characteristics of the political system) the lower level is crucial for the implementation of higher level plans. However,

<sup>44</sup> See Holger Magel, *Land Management, Part 1: Spatial Planning and Land Use Planning*, Presentation at the Summer School of the Royal University of Agriculture/Faculty of Land Management and Land Administration, Phnom Penh, 19 September 2008, p. 6.

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the leaders of the local governments do not primarily pursue an optimizing of the common good, but of the individual benefits. For sure, local politicians want to be voted again. In order to achieve this “eternal goal”, they try to attain financial benefits for the municipality. The revenues from taxation or from the financial equalization scheme might rise if the number of habitants increases or if they attract new companies.

Seeking land rents and incremental value, some highly influential actors try to “capture” (local) governments by lobbying and manipulating them by legal and illegal means. A “captured” (local) government is no longer a neutral trustee of the common good. Furthermore, there are common financial interests: the (local) government also depends strongly on land use changes, mainly by taxation or the financial equalization scheme. The classical way of regulation is to introduce a “*great deal of red tape*” and leave a maximum of rights based on value and rent to the private sector actors. In Germany bureaucracy is hampering the economic activities of private sector actors; the regulations have impact as well on “usus” and “abusus” of the property. Indeed, this kind of regulation is nothing else than a dilution of private property rights through public law. Hence, from an economic point of view the so called “*full ownership title*” (see Section 903 Civil Code) is anything but full. In Germany, authorization of investments is a complicated procedure that takes a lot of time. Construction law is another complicated issue. The risk for architects of being sued due to a violation of construction law is considered as being very high.<sup>45</sup>

All public and private land is listed in the public land registry. Stakeholders are required to register their titles to obtain and convey property and other land-related rights. Private individuals have the right to bequeath, inherit, buy, sell, own, or mortgage real estate. Landowners have the right to use, improve, and to develop their property according to their own needs. This right entitles landowners to the profits of land use (land rent, use value, exchange value). Although the conveyance and use of urban land may be regulated or restricted, landowner’s rights are protected by law. Every person may seek protection for their rights from either the civil law courts or the administrative law courts. Municipal governments prepare and control the use of urban land through urban land use planning, through the development of infrastructure, the participation in the land market and expropriation of private land, including its improvements.

Land use planning safeguards are instruments which serve for development freeze purposes or the municipality’s statutory right to buy land (pre-emption right). Of special importance is the control of land use for certain purposes, e.g., developments restricted to designated building, the protection of open space or to provide compensation of landowners affected by legally binding land use plans. Generally, land use

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<sup>45</sup> See Dirk Löhner, *Land Conversion Out of Control – How to Achieve Better Governance*. Paper presented at the FIG conference, Sydney, 2010 (Online: [http://www.fig.net/pub/fig2010/papers/ts03e%5Cts03e\\_loehner\\_4666.pdf](http://www.fig.net/pub/fig2010/papers/ts03e%5Cts03e_loehner_4666.pdf)).

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plans determine the permissible use of each plot of urban land through preparatory land use plans (development plans) and binding land use plans (zoning ordinances).<sup>46</sup> *De jure*, local land use planning shall protect and promote sustainable urban development, social justice in land use, an environment worthy of human beings, and the natural foundations of human existence. However, *de facto* it is not uncommon that intermediate owners buy land zoned for buildings by a preparatory land use plan or farmland at the edge of the town and then re-sell the plots after they have been zoned in the binding land use plans. The profits from the increased values mainly remain with the intermediate landowners. Sometimes highly speculative purposes with land are common as well as “NIMBY”<sup>47</sup>-behaviour of private landowners affected by public planning, e.g., in the field of inner-urban restructuring (land conversion), gentrification, social segregation or the modernization of apartment blocks.<sup>48</sup> The planning instrument of land re-allocation comprises the adjustment of plot boundaries. The municipality is entitled to limited value capture. For the development of local public infrastructure, landowners may be charged with up to 90 % of the infrastructure costs.

#### 4. Property and land valuation: The “highest and best use”

The property rights theory – in environmental economics well known as the Coase-theorem – doesn’t play a dominant role in the scientific land management world. Property theory discusses property as society’s most powerful tool for the distribution of goods; scope and content of property rights, however, are defined by public law. Property rights, according to Ronald Coase, should be given into the hand of private owners who feel responsible for the asset.<sup>49</sup> Therefore, owners must be able to exclude others from using their property.<sup>50</sup> Property issues widely lack acceptance within the public, political, philosophical or even legal discussion. State and private land, private, public and common property rights according to the *Corpus Iuris Civilis* (Justinian), spatial/land use planning and value are undividable elements of land markets. When land is valued, the exclusive property rights form the basis for each determination: Without state and private property, no valuation and no land value.

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<sup>46</sup> See Gerd Schmidt-Eichstaedt (ed.), *Land Use Planning and Building Permission in the European Union, Part Germany*, Cologne, 1995, pp. 43-50; Wolfgang Usinger/Hans-Josef Schneider (eds.), *Real Property in Germany, Legal and Tax Aspects of Development and Investment*, 7<sup>th</sup> edition, Frankfurt am Main, 2009, pp. 59-78.

<sup>47</sup> NIMBY = “Not In My Backyard”. NIMBY describes the phenomenon that some private residents tend to oppose nearby development or to use land they see as undesirable such as homeless shelter buildings, wastewater treatment plants, nightclubs, petrol filling stations, and airports. See the excellent comprehensive glossary worked out by Mike E. Miles et al. (eds.), *Real Estate Development. Principles and process*, 4<sup>th</sup> edition, Washington/D.C., 2007, pp. 625-636.

<sup>48</sup> See Hartmut Dieterich/Egbert Dransfeld/Winrich Voß, *Urban land & property markets in Germany*, London, 1993, p. 128.

<sup>49</sup> See Ronald Coase, The Problem of Social Cost, *Journal of Law and Economics* 3 (1960), pp. 1-44.

<sup>50</sup> See Richard A. Posner (ed.), *The Economic Analysis of Law*, Boston, 1972, p. 29; Harold Demsetz, Towards a theory of property rights, *American Economic Review*, 57 (1967), pp. 347-359; Richard A. Posner, Creating a Legal Framework for Economic Development, *The World Bank Research Observer*, 13(1), 1998, pp. 1-11.

However, *the* land value does simply not exist. Controversies about the economic land value or about the exchange value between Adam Smith, David Ricardo, John Stuart Mill, John Locke or Karl Marx – the classical or neoclassical economists and political philosophers – mirror the difficulties in explaining the creation of the land value or the ground rent. A land valuation system in Germany implemented the fair market value according to the International Accounting and Valuation Standard (IAS) or the valuation standards of the Royal Institution of Chartered Surveyors (RICS).<sup>51</sup> In economic theory, at least three categories of land value – for state and private properties – have to be distinguished (see table 1):

Land value category	Legal plurality and content of land use
Territorial land value	Content, duration, and intensity of the land use rights (land tenure; plurality of property rights; see Art. 14 and 15 German Constitution)
Economic land value	Gain from the real estate use
Ecologic land value	Ecological quality (“ecological fitness”)

**Table 1: Plurality and meaning of land values**

Land valuation applications consist of two general families of German land valuer’s activities: Appraising (see table 2) and Assessment (see table 3). Both techniques are based on the same foundations and are thus subject to the same methods of valuation. Appraising means detailed expertise, while assessment is a mass-application through coded structures. Mass appraising aims at private expertises while assessment is ordered from governmental authority in view of territorial inventory and ad valorem taxation on immovable properties. Assessment is covered by law (land valuation ordinance) and submitted to a specific national policy; such a policy is limited to assessment practices.<sup>52</sup> Taxation and valuation are based on a fairly sophisticated assessment and appraisal for the rate-setting process according to the following tables 2 and 3.

<sup>51</sup> See Michael Blackledge, *Introducing Property Valuation*, New York, 2009, pp. 124-132.

<sup>52</sup> See Appraisal Institute of Canada and Appraisal Institute, *The Appraisal of Real Estate*, University of British Columbia, Second Canadian Edition, Real Property Ownership and Interests, Vancouver, 2005, chapter 5.13/5.14/5.15.

<b>Definition</b>	A formal opinion of value prepared as a result of a retainer, intended for reliance by identified parties, and for which the appraiser assumes responsibility.
<b>Characteristics</b>	Appraisal involves selective research into appropriate market areas, the use of appropriate analytical techniques, and the application of knowledge, experience, and professional judgement to develop an appropriate solution to a specific appraisal problem. The appraiser provides the client with an opinion of value on an immovable property that reflects market evidence.
<b>Examples</b>	An opinion of market value for an immovable property, leasehold estate, preservation easement, or other estate (to assist in mortgage lending decisions, to assist in purchase or sale decisions); an opinion of investment value or some other properly defined value of an identified interest in real estate at a specific date for specific objectives (for insurance and relocation purposes, or property tax appeals). <sup>53</sup>

**Table 2: Definition and meaning of “Appraisal”**

<b>Definition</b>	The act of valuating the totality of the properties within a global territory by using mass appraising applications and processes.
<b>Characteristics</b>	Assessment is mainly done as a base for ad valorem property taxation. It should be regularly actualized. Data actualization is permanently done; value actualization done on fixed cyclical base varying from yearly to once every three or five years. The quality of the results is inferior to the appraisal data, but the assessment has the advantage of producing permanent inventories and statistical data covering the entire country. Furthermore, assessment produces a neutral base for annual property taxation.
<b>Examples</b>	Assessment is mainly done to finance municipalities, to support the cadastral actualization or specific types of infrastructure. The better the municipal services are, the higher might be the property value and thus the tax rendering. <sup>54</sup>

**Table 3: Definition and meaning of “Assessment”**

<sup>53</sup> See University of British Columbia (UBC) (eds.), *Real Property Assessment*, Real Estate Division, Vancouver, 2003.

<sup>54</sup> *Ibid.*

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Appraisal and assessment require market monitoring and data storage in a timely and updated manner for the purchase of prices, for rent prices and statistics regarding to construction materials. The land-information-system (LIS), consisting of cadastral maps and land registry, serves both as data storage and land valuation mapping to combine property and site related data (e.g., size, location, condition). Actualization of data should happen to secure the updating of data bases and to ensure the integrity of the tax base on immovable properties to distinguish between data assessed values. It is essential to actualize the existing Data Bases (DB).

When there are many and frequent modifications taking place on the same territory, the actualization should take place permanently. When there are few modifications occurring, then the actualization is done at least once a year with a rolling-back effect to the date of the effective change. Such modifications could be: Ownership modifications, change of the owner, modification of references, the enlargement or reduction of the components of a property, the construction of an additional building or the demolition of a compound. To consider these modifications, the assessor revises the property record and recalculates the value, uses the same unit-rates of valuation as already existing, and amends the DB. This is essential to avoid distortions and unfair tax burden displacement. For many reasons, this type of actualization cannot – and actually does not – take place every year because of insufficient markets and/or economical indicators, the insufficiency of personal and of logistical means or excessive production costs. In most instances, this type of actualization is *ideally* being done between three to five year-cycles.<sup>55</sup>

Traditionally, specific appraisal techniques are applied in Germany within the three main land valuation methods to derive indications of immovable property value. One or more methods for property valuation may be used depending on their applicability to the particular appraisal assignment, the nature of the property, the needs of the client, or the available data. The sales comparison method can be interpreted as most reliable and transparent, but only if adequate comparable land transactions exist.<sup>56</sup> Each method requires the gathering and analysis of data that pertains to the property being appraised. To complete the valuation process, the appraiser integrates the information drawn from market research, data analysis and the application of the methods to form his individual value conclusion.

## **5. (“Free”) market economy and land information system**

The introduction of a concept of an open-market economy and the definition of “*market value*” strengthens good land governance and transparency. All participants in the land/real estate market in Germany have a uniform understanding of the “market

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<sup>55</sup> See Ian Williamson/Stig Enemark/Judd Wallace/Abbas Rajabifard, *Land Administration for Sustainable Development*, Redlands/Calif., 2010.

<sup>56</sup> See Dieter Kertscher, *Valuation of Real Estate in Germany, worked out for Lower Saxony*. Presentation at the FIG-workshop “Spatial Information for Sustainable Management of Urban Areas”, Mainz/Germany, February 2-4, 2009.

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value”.<sup>57</sup> The Federal Building Code, Section 192, establishes committees (assessment boards) of valuation experts which are charged with the task of collecting data of the land market. One important task of these public land assessment service agencies is to define standard ground values, which means constituting average values for a standard plot of land based on the sales process for other comparable plots of land, depending on location<sup>58</sup>, and physical characteristics.

The newly (2009) implemented Real Estate Valuation Ordinance (ImmoWertV) contains internationally recognized and nationally owner-binding rules for determining the market value using three standardized valuation methods: comparison method, income (investment) method, and the depreciated reconstruction (cost) method.<sup>59</sup> The ImmoWertV describes the necessary data, and refers to the data that were recorded by the committees of valuation experts. Publicly-appointed valuation experts refer to these methods and the data provided by the committees of valuers in order to guarantee a level of comparability and transparency on the land market (European Valuation Standards).<sup>60</sup>

Land valuation and property mapping are preliminary steps to be done on assessment applications. Land valuation mapping is complementary to the cadastral system; in fact it supports the GIS and fiscal cadastral system (see figure 4 below). Land valuation mapping consists of the integration of maps as a copy of the cadastral map and of satellite images. It clearly defines units of neighbourhood, units of assessment, economical indicators, unit-rates of assessment to calculate the assessed values, and some statistical data or symbols.

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<sup>57</sup> See Section 194 of the Federal Building Code.

<sup>58</sup> See William Alonso, *Location and Land Use: Towards a general theory of land rent*, Cambridge/Mass., 1970.

<sup>59</sup> See Michael Blackledge, *Introducing Property Valuation*, New York, 2009, pp. 133-318.

<sup>60</sup> See Hartmut Dieterich/Egbert Dransfeld/Winrich Voß, *Urban land & property markets in Germany*, London, 1993, pp. 105-116.



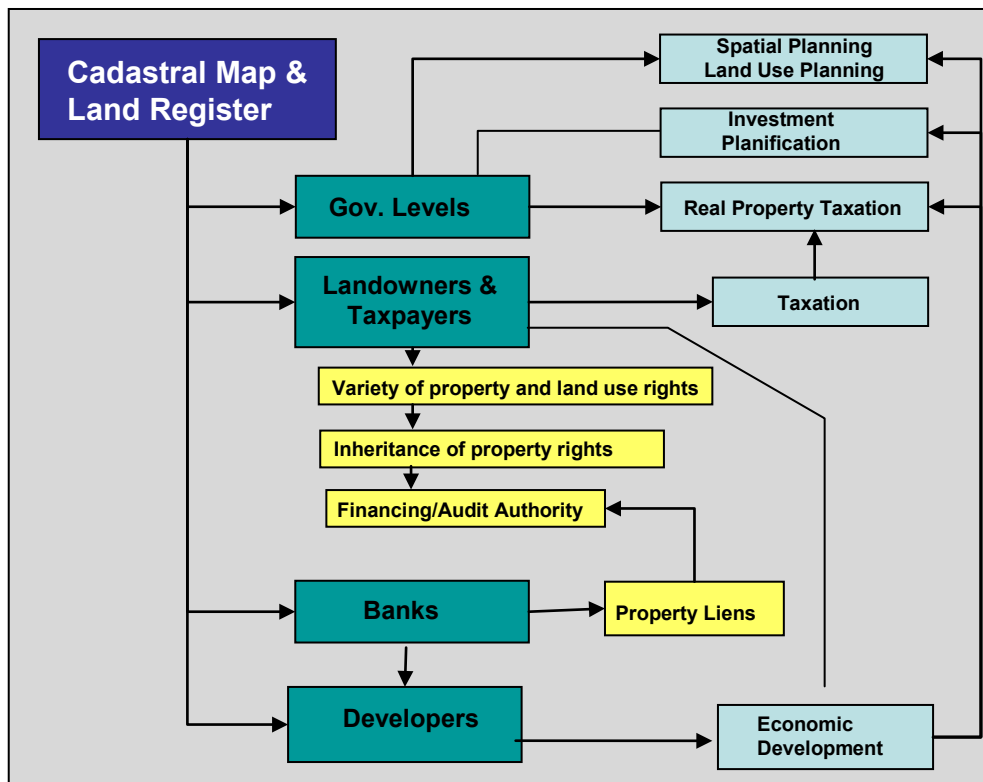


Figure 4: Land-Information-System (LIS) in Germany (simplified model)

The different levels of the government are highly dependent on shared taxes, e.g., through value-added-tax (VAT) and personal income tax. The legal basis of the German land (real) property tax is the Federal Land Tax Law of 7 August 1973 and its subsequent modifications. The tax code is uniform across the Federation although the tax is levied by the municipalities through different leverage factors. The object of the land tax is domestic land and buildings, including agricultural land and forests, but it lacks actualization of data (tax value at a specific date). The property tax value was fixed for the last time in 1964 in Western Germany – 1935 in Eastern Germany – resulting in generally not more than approximately 20 % of its current fair market value.

This unequal and not-updated treatment of land valuation for real taxation purposes leads to a legally – and ethical – unacceptable privilege of landowners in comparison to other forms of property assets. Even worse than that: *All* categories of land are under-valued similarly.<sup>61</sup> The landowner/beneficiary of the property is liable for paying the property tax, although very often it is passed on to the tenants.<sup>62</sup> The law distinguishes two categories of land: agricultural land/ forests; and other real property, resulting in two variants of the land tax: land tax A (agricultural businesses and forestry), and land tax B (for other land, including improvements).

<sup>61</sup> See Paul Bernd Spahn, *Land taxation in Germany*. In: Richard Bird/Enid Slack (eds.), *International Handbook of Land and Property Taxation*, Cheltenham/UK, 2004, pp. 98-106 (especially p. 101).

<sup>62</sup> See Wolfgang Usinger/Hans-Josef Schneider (eds.), *Real Property in Germany, Legal and Tax Aspects of Development and Investment*, 7<sup>th</sup> edition, Frankfurt am Main, 2009, p. 293.

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**To sum up, the land market economy in Germany is mainly determined by:**

- the preferences of public and private landowners and tax payers;
- the rule of law and territorial planning regulations that are legally binding;
- public and private finance institutes, real estate banks and insurance companies;
- the land market, based on land and business valuation methods to identify the land rental value under the general principle of the desired “highest and best use” of all useable plots;
- agreements meeting international leasing tenure standards for urban and rural agricultural state public and private land and
- land taxation.

## **6. Easily levied land value increment taxation: A steady source of government income in the long perspective**

A proper land and property taxation system is crucial for a successful and sustainable land use policy. “*The property tax is, economically speaking, a combination of one of the worst taxes – the part that is assessed on real estate improvements (...), and one of the best taxes – the tax on land or site value*”.<sup>63</sup> The burden of a land tax falls entirely on landowners; a land tax is neutral.<sup>64</sup> It does not distort economic decisions and thus does not generate an excess burden. A land tax has no impact on the timing of site development, it helps to support an inner-city land policy, particularly via brownfield<sup>65</sup> (re-)development, reduced housing or land prices, and decreased urban sprawl.<sup>66</sup> Land taxation remains one of the most misunderstood concepts in public finance; but the German legislator has the chance to bring the ideas and advantages of a land value taxation back in the political discussion, when it comes to a new round of tax reforms, in particular of income taxation and property taxation, in the near future.

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<sup>63</sup> See William Vickrey, cited in: Richard F. Dye/Richard W. England (eds.), *Land Value Taxation. Theory, Evidence and Practice*, Lincoln Institute of Land Policy, Cambridge/Mass., 2009, p. 3.

<sup>64</sup> See John Stuart Mill: The property tax supports utilitarian justice. It helps to maximize the “greatest happiness of the greatest number” (in the sense of Jeremy Bentham), since the utilitarian moral means the use of the individual utility plus the social utility. Additionally, Mill supported the idea of the taxation for windfall profits and increased values of real estates through a house-tax: “A house tax is a nearer approach to a fair income tax than a direct assessment on income can easily be”. See John Stuart Mill, *Principles of Political Economy with Some of Their Applications to Social Philosophy*, 1848, reprinted 1987, Fairfield/NJ, p. 834. See also Birger Priddat, *John Stuart Mills Theorie der Freiheit*. In: Erich W. Streissler (ed.), *Studien zur Entwicklung der ökonomischen Theorie XIX*, Schriften des Vereins für Socialpolitik, Berlin, 2002, pp. 17-42.

<sup>65</sup> “Brownfield” = A Site previously used for industrial or certain commercial uses and possibly contaminated from these former uses (residual pollution), but – in economic prosperous regions with a functioning urban property market – developable upon cleanup. See Mike E. Miles et al. (eds.), *Real Estate Development. Principles and process*, 4<sup>th</sup> edition, Washington/D.C., 2007, p. 626.

<sup>66</sup> See Wallace E. Oates/Robert M. Schwab, *The Simple Analytics of Land Value Taxation*. In: Richard F. Dye/Richard W. England (eds.), *Land Value Taxation. Theory, Evidence and Practice*, Lincoln Institute of Land Policy, Cambridge/Mass., 2009, pp. 51-71 (p. 71); see also Dick Netzer (ed.), *Land Value Taxation: Can It and Will It Work Today?* Lincoln Institute of Land Policy, Cambridge/Mass., 1998.

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For these and other reasons, the site value tax could be accompanied by a land value increment tax (LVIT). For LVIT, taking only site (land) values for public purposes is characteristic. This tax was highly influenced by the book “Progress and Poverty” from Henry George (1879).<sup>67</sup> George developed a “single tax”-approach as a value capture instrument based on the land value only, without improvements or salaries, meaning a recurrent tax by which annual “windfall for wipeout” profits on land ownership from community growth or public investment are consequently taxed away.<sup>68</sup> George considered the land and its commodities (oil, gas, minerals etc.) as a gift of nature and as such owned by the whole community.<sup>69</sup> Hence, the value of a site is calculated out of the net present value of the extra surplus – a surplus which normally can be achieved through public land use planning without any investment by the landowner. Based on the theory of David Ricardo, the ground rent for agricultural land rises proportionally to the population and is therefore not directly related to the efforts and enterprise of landowners.<sup>70</sup>

The rate for the LVIT should be fixed, without being changed according to the actual use of the site. A fixed tax rate always results in the same tax burden for the landowner. The landowner cannot avoid the tax if it has the character of a fixed cost. The only way to lower the effective burden of the tax is to use the site efficiently. However, to implement LVIT, the national, regional and local public authorities would face the difficulties of partly skimming-off the potential rent-seeking gains (windfall profits) of the landowners to achieve an even distribution of wealth between the population. Windfalls are caused by increased land values and demand for land by private and institutional investors, e.g., insurance companies, real estate investment banks or German Real Estate Investment Trusts (G-REITs).<sup>71</sup>

*Today*, basic information on land and property sale prices records and on land valuation systems and techniques for real property taxation are given in Germany. But there are measurement problems and city-/country-specific peculiarities as well as political obstacles against LVIT. Surely, the theory and practice of land taxation, combined with the Ricardian rent in particular of unimproved land, is highly controversial. Much more detail is needed to justify about the sustainability of a future simple revenue generation system.<sup>72</sup>

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<sup>67</sup> See Henry George, *Progress and Poverty*, Garden City/New York, 1879 (Online: <http://www.progressandpoverty.org>).

<sup>68</sup> See Robert V. Andelson, *Land-Value Taxation Around the World*, 3<sup>rd</sup> edition, Malden/Mass., 2000.

<sup>69</sup> See Michael Blackledge, *Introducing Property Valuation*, New York, 2009, p. 12.

<sup>70</sup> See David Ricardo, *On the Principles of Political Economy and Taxation*, 3<sup>rd</sup> edition, London, 1821 (Online: <http://www.econlib.org/library/Ricardo/ricP1.html>).

<sup>71</sup> G-REITs were introduced in Germany in 2007 after long and controversial discussions regarding the legal status, tax paying responsibilities, and the liability in general. G-REITs are tax-exempt companies holding and managing real property and – the most of them – distributing their profits amongst their shareholders.

<sup>72</sup> See Dieter Kertscher, *Valuation of Real Estate in Germany, worked out for Lower Saxony*. Presentation at the FIG-workshop “Spatial Information for Sustainable Management of Urban Areas”, Mainz/Germany, February 2-4, 2009; see also Dirk Lühr, *Land Conversion Out of Control – How to*

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## 7. Alternative to “full” private property rights: Public land leasing

Private land use (land rights; land tenure) does not automatically have to be linked with private property.<sup>73</sup> Private property-oriented western states have effectively created a situation in which private property rights have negative consequences for land use planning, land allocation, and land distribution because of the incremental economic value of the land. A modern and sustainable agriculture policy needs to ensure access to land in a flexible and low-cost way that protects the liquidity of the land users, especially of farmers and low-income households. Condominium ownership with common property for important parts of the building<sup>74</sup>, proprietary (sub-)lease or registered building/land lease are important and popular *rights in rem* similar to individual ownership in land under the German land and property laws.<sup>75</sup>

Land leasing arrangements via the Heritable Building Rights Act<sup>76</sup> secure income from assets for owners who are no longer engaged in agriculture as well as providing access to this land for farms. The holder of a registered hereditary building lease will become the unrestricted owner of such building or improvement erected in compliance with the leasing agreement between the lessor and the lessee.<sup>77</sup> One in eight farms in Germany is a leased farm. In 2005, 63.9 % of farmed land was secured by leasing contracts. In Eastern Germany, the proportion of leaseholds for farms is even higher (81.2 %).<sup>78</sup> The most important underlying conditions for this kind of private land leasing beside the Heritable Building Rights Act are regulated within the Sections 585-597 of the German Civil Code. In general, German lease law does not stipulate durations for leasehold rights<sup>79</sup>, but registered hereditary building leases are usually granted for terms between 50 and 99 years. They may also be granted for an unlimited term. Leasehold models can be combined with property taxation. The government could be able to partly skim-off the economic ground rent through incremental land value taxation which has to be constitutional before implementation.

### 7.1 Neutrality of spatial planning in combination with public land leasing

Land use planning by the state would become neutral when private property on land would be replaced by public land leasing. The combination of public land leasing, but private land use rights and partly skimmed-off ground rents bases on a land re-

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*Achieve Better Governance*. Paper presented at the FIG conference, Sydney, 2010 (Online: [http://www.fig.net/pub/fig2010/papers/ts03e%5Cts03e\\_loehr\\_4666.pdf](http://www.fig.net/pub/fig2010/papers/ts03e%5Cts03e_loehr_4666.pdf)).

<sup>73</sup> See Steven C. Bourassa/Yu-Hung Hong (eds.), *Leasing Public Land*. Policy Debates and International Experiences, Lincoln Institute of Land Policy, Cambridge/Mass., 2003.

<sup>74</sup> See the German Condominium Act (WEG).

<sup>75</sup> See the detailed leasing agreements (sample) by Frank Stellmann, in: Wolfgang Usinger/Hans-Josef Schneider (eds.), *Real Property in Germany*, Legal and Tax Aspects of Development and Investment, 7<sup>th</sup> edition, Frankfurt am Main, 2009, pp. 401-425.

<sup>76</sup> See the Heritable Building Rights Act (Erbbaurecht).

<sup>77</sup> See law company Droste (ed.), *Transactions in Real Property in Germany*. Acquisition, Development, Leasing, Bicester/UK, 1994, p. 8.

<sup>78</sup> See German Farmers Association, *Report on agriculture*, Berlin, 2006.

<sup>79</sup> Land Lease Transaction Act; Ordinance to the Land Lease Transaction Act.

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former's approach. Land reformers like Henry George<sup>80</sup>, Adolf Damaschke<sup>81</sup>, Franz Oppenheimer<sup>82</sup>, Michael Flürscheim<sup>83</sup>, but also economists like John Stuart Mill or Léon Walras and political philosophers like Immanuel Kant and Pierre Joseph Proudhon criticised private property for land and natural resources.<sup>84</sup> "*No man made the land*", diagnoses John Stuart Mill.<sup>85</sup> The main arguments for such a sceptical interpretation of private property for immovable, public and non-renewable goods like land are:

- If all property rights are left in the hand of private people, any land use plan will become useless. Economic interests dictate, and the arrangement is not effective. Negotiations will often fail.
- Because of high opportunity costs, only a certain part of the possible investment(s) can be executed.
- Land distribution is socially unequal; the access to land is not guaranteed for the majority of the population. Low-income housing communities and housing cooperatives for affordable housing programs in favour of economically disadvantaged people are necessary, but underdeveloped and out-of-scope of politicians, developers, financiers, and private landowners. Most Germans, approximately 55 % of the population, live in rented apartments or houses.<sup>86</sup> In Germany, no ownership society has been created yet where Germans are opening their doors and say: "*Welcome to my house, welcome to my piece of property.*"
- The way of land use is mostly determined by economic power of the landowners and real estate developers.<sup>87</sup> This fact is doubtlessly not a sound legitimating base for a sustainable land use management.

The land property should strictly belong to the municipality or commune. This strategy was the idea of Hans Bernoulli, a Swiss architect.<sup>88</sup> Everybody should have the

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<sup>80</sup> See Henry George, *Progress and Poverty*, 1879 (Online: <http://www.progressandpoverty.org>).

<sup>81</sup> See Adolf Damaschke, *Die Bodenreform*, 19<sup>th</sup> edition, Jena, 1922.

<sup>82</sup> See Franz Oppenheimer, *Gemeineigentum und Privateigentum an Grund und Boden*, Berlin, 1914.

<sup>83</sup> See Michael Flürscheim, *Auf friedlichem Wege. Ein Versuch zur Lösung der sozialen Frage*, Braunschweig, 1884.

<sup>84</sup> See Harold Demsetz, "*Property Rights*", *The New Palgrave Dictionary of Economics and the Law*, 1998, row 144a.

<sup>85</sup> See John Stuart Mill, *Principles of political economy and chapters on socialism* (1848), reissued edition, Oxford, 2008.

<sup>86</sup> Because of different, stricter financial regulations and control through the German Federal Financial Supervisory Authority with respect to equity capital, loan-to-value ratio, and products within the real estate banking sector, so-called "subprime" loans (mostly mortgages) which were common in the USA and caused the global financial and property crisis of 2008, are very seldom in Germany. However, a few of the German banking institutes that have to be recognized as "global players" were (and still are) heavily involved in the U.S.-subprime mortgage market, with numerous risks and "toxic papers" hardly be calculated in the long run.

<sup>87</sup> See Mike E. Miles et al. (eds.), *Real Estate Development. Principles and process*, 4<sup>th</sup> edition, Washington/D.C., 2007.

<sup>88</sup> See Hans Bernoulli, *Die Stadt und ihr Boden*, 1946, reprinted version 1991, Basel.

same chance to get access to land and its products via leasehold rights, auctions or competitive bidding processes based on clear land use objectives for the private people. But such an innovative land allocation and distribution system causes higher rents, land values and thus higher leasehold fees, if an adjustment to ground rents is made. A revolving (local) land fund can solve this problem by pooling of the paid ground rents and by redistribution of these ground rents in equal shares to the people.<sup>89</sup> The whole concept of the prime objective of the pooling and redistribution of land value capture (windfalls) comprises four essential steps (see table 4):

<b>1. Level</b>	Allocating	Neutral land use planning and implementing of a public land leasing system
<b>2. Level</b>	Sucking	Skimming-off a portion of the ground rent by leasing fees
<b>3. Level</b>	Funding	Pooling the partly skimmed-off ground rents
<b>4. Level</b>	(Re-)Distributing	Paying the skimmed-off and pooled ground rents in equal shares to the people

**Table 4: Granting and redistributing of incremental ground rent**

Doubtlessly, public leasing rights cannot solve any specific problems that threaten land tenure security such as separation, divorce or abandonment of the land (“absentee landlord”). But leasehold tenure can reduce transaction costs for the access to agricultural and residential land since it is the market mechanism that offers the greatest near-term potential for increasing the affordable housing approach.<sup>90</sup> Leasehold tenure regulations are excellent land tenure alternatives to private property rights and absolutely equivalent to secure land tenure rights. The granted land use rights have to be paid by the users due to their economic capability. The lower the income per household, the lower the cost for the leaseholds and the transaction costs for this household. Hence, public land leasing is economically and legally “fair”. Having a sound public land leasehold system, land hoarding for speculative purposes and “rent seeking” (windfalls) would not longer exist to that extent like on the today’s globalized land and property markets that caused the financial and property crisis

<sup>89</sup> See Dirk Löhner, *Public Land Leasehold Tenure Approaches – A Way towards an Efficient and Effective Land Use Management*. In: UNESCO (ed.), ERSEC International Conference Proceeding Sustainable Land Use And Water Management, Beijing, 2009, pp. 287-313.

<sup>90</sup> See John W. Bruce/Renee Giovarelli/Leonard Rolfes/David Bledsoe/Robert Mitchell, *Land Law Reform, Achieving Development Policy Objectives*. Law, Justice, and Development Series, The World Bank, Washington/D.C., 2006.

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with its beginning on the 15<sup>th</sup> September 2008, the date of the Lehman Brothers bankruptcy. – The next global property crisis is already under way.

## **7.2 Excursion and comparison: Public land leasing and the advent of (nearly) property rights for land in the P. R. China**

The dominant fields of action within the current land management in the P.R. China include: the upgrading of financial services such as banks and other financial institutions which grant (micro-)credits to farmers in rural areas, the support to agricultural or production cooperatives as well as, for the first-time, the implementation of tradeable land leasing and using rights for collectively-owned agricultural plots.<sup>91</sup> By creating new land markets, the farmers will have the possibility to sell, exchange or lease<sup>92</sup> out their land use rights on a voluntary basis and for an appropriate price or to bring it in into capital companies (land development rights).<sup>93</sup> Land use rights are furthermore registered publicly for the first time in order to prevent arbitrary land grabbing. China, until today, has been getting along with a remarkably simple but utterly efficient land and property policy model. It is based on state ownership of urban premises and collectively-owned property, and therefore also ultimately state-owned, agricultural land plots in the villages.<sup>94</sup> Private land usage and cultivation rights should be thought of as separate from state-owned land property, as it is characteristic for public land leasehold models. The state as lessor is the owner of the land, the private people as lessees are the owner of the buildings. A new property law and the Land Management Law from 1998 support the goal of tradeable usage rights (circulation) and runtime of public land leasing contracts with a duration of 30 years in average, with extension. The laws try to achieve the transfer of the land to the “best Chinese proprietor” and to gain an increase of efficiency for the agricultural use of public land, due to political aims and expectations of the CPC Central Committee.

Land policy measures must be implemented in order to minimize transaction costs for accessing land as a natural resource and to create taxation and land use regulation instruments. This was for example the case in the Land Management Law of 1998 which skimmed-off increased values of the land as a consequence of the conversion from farmland to building land for the benefit of local authorities. Private land usage rights are not to be changed during the runtime of the lease contract. A pledging –

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<sup>91</sup> See Frederic F. Deng, Public land leasing and the changing roles of local government in urban China, *The Annals of Regional Science*, 2005, 39, pp. 353-373.

<sup>92</sup> „Usually at only nominal prices or even the so-called ‘zero-price’, the prepared land was leased out for 30 years”. See Ming Xing Liu/Ran Tao/Fei Yuan/Guangzhong Cao, Instrumental land use investment-driven growth in China, *Journal of the Asia Pacific Economy*, Vol. 13, No. 3/2008, p. 317; see also Dwight H. Perkins, *China’s Land System: Past, Present, and Future*. In: Gregory K. Ingram/Yu-Hung Hong (eds.), *Property Rights And Land Policies*, Lincoln Institute of Land Policy, Cambridge/Mass., 2009, pp. 70-92.

<sup>93</sup> See Jieming Zhu, From land use right to land development right: institutional change in China urban development, *Urban Studies*, 41(7), 2004, pp. 1249-1267.

<sup>94</sup> See Peter Ho, Who Owns China’s Land? *The China Quarterly*, 166 (June 2001), pp. 394-409.

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and therefore capitalization – of these public land leasing rights is not in planning at present. One important and certainly contentious challenge for P.R. China will be the integration of transferable and payable land leasing rights into the land management, land administration, and land policy system. The legal bindingness of the different planning levels within the Chinese “spatial planning system” partly derives from the German spatial planning model and hierarchy.

The P.R. China tries to prevent speculation tendencies and the acquisition of land usage rights by privileged people or newly rich and to follow an active distribution policy.<sup>95</sup> As a consequence of such property liberalisation, there is a danger that, in a qualified sense, the allocation of usage and cultivation rights will lead to the fact that these rights end up in the hands of a very few privileged people or of “outsiders” and transnational (foodstuff) companies. The number of landless farmers and itinerating migrant workers would clearly increase further. According to the Chinese Property Law of 1997, the passing on of usage rights within the village community is only allowed with the approval of the local administration and the superior authorities. But in how far this can be applied for the whole territory of China or whether in the future there will be differing regulations in the provinces concerning the decentralised liberalisation of the market for land leasing rights, is entirely unclear at the moment. A concluding law regulating this delicate question has yet to be introduced in China.

### **7.3 Excursion and comparison: Public land leasing in Cambodia**

Leasehold tenure on land can reduce transaction costs for the access to agricultural and residential land since it is the market mechanism that offers the greatest near-term potential for increasing the access of the poor to land. Private land use (land rights; land tenure) does not have to be linked with private property. Private property-oriented western states have effectively created a situation in which private property rights have negative consequences for land use planning, land allocation, and land distribution because of the incremental economic value and rent of the land. Private property rights are to some degree obstacles for a sustainable land use planning policy and for a social land law. The “control of ownership concentration for speculative purpose” – as one of the clear political aims of the National Strategic Development Plan (NSDP) from 2006-2010 – would not be that necessary if there were no exclusive private property rights for non-renewable natural resources such as land, soils, and other commodities.<sup>96</sup>

Cambodia can achieve a land use system similar to the land leasehold tenure regulations in many modern States. In addition, they could be able to partly skim-off the economic ground rent through taxation like income tax, unused land tax and other tax

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<sup>95</sup> See Xu Xuelin, *Ensure the food security through implementing stringent land policies*. Presentation at the workshop „South-South Dialogue of Food Security and Land Policies in Asia and Africa”, organized by the German Technical Cooperation (GTZ) in Siem Reap/Cambodia, 1-5 December 2008.

<sup>96</sup> See Fabian Thiel, *Land Law and Planning Law in Cambodia: Problems and Perspectives*. In: *Cambodian Yearbook of Comparative Legal Studies*, Vol. 1, Phnom Penh, 2010, pp. 71-85.



forms that have to be constitutional before implementation. *Ex pressis verbis*: Land use planning by the State would become neutral when private property on land would be totally replaced by public land leasing. Everybody should have the same chance to get access to land and its products via leasehold rights and auctions of the private land use rights. But such an innovative land allocation and distribution system causes higher rents, land values and thus higher leasehold fees, if an adjustment to ground rents is made. A revolving (local) land fund can solve this problem by pooling of the paid ground rents and by redistribution of these ground rents in equal shares to the people.<sup>97</sup>

A leasehold tenure and distributed ground rents can prevent against tenure insecurity for indigenous rural landowners and for communes. Instead, the Land Administration Sub Sector Program (LA-SSP) as the previous program of the LAMDP (see figure 5) in Cambodia focuses on systematic land registration rather than registering time restricted *public land leasehold rights* in order to gain more tenure security than at present.

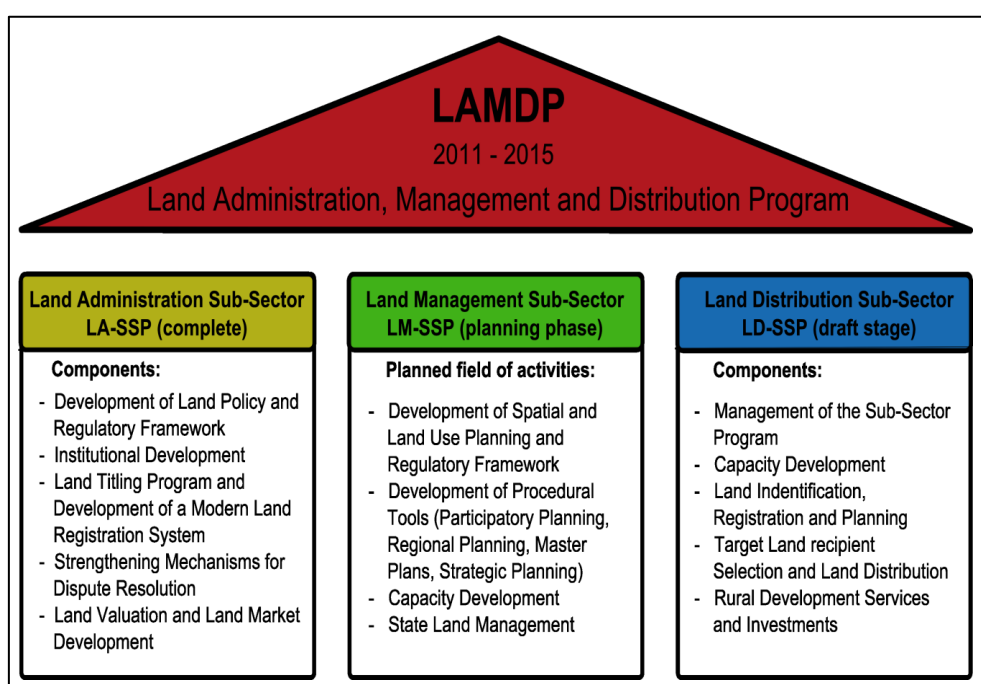


Figure 5: LAMDP in Cambodia (draft, currently under discussion)

Leasehold tenure can reduce transaction costs for the access to agricultural land. Leasehold tenure regulations that already exist in the Cambodian Land Law 2001<sup>98</sup> (Art. 106-113) are excellent land tenure alternatives to private property rights and absolutely equivalent to secure land tenure rights. The granted land use rights have to be paid by the users due to their economic capability. The lower the income per

<sup>97</sup> See Dirk Löhner, *Public Land Leasehold Tenure Approaches – A Way towards an Efficient and Effective Land Use Management*. In: UNESCO (ed.), ERSEC International Conference Proceeding Sustainable Land Use And Water Management, Beijing, 2009, pp. 287-313.

<sup>98</sup> See Kingdom of Cambodia, Land Law from October 18, 2001.

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household, the lower the cost for the leaseholds and the transaction costs for this household. In a sound public land management system land hoarding for speculative purpose and “rent seeking” would no longer exist to that extent. Moreover, leasehold tenure can avoid the lack of tenure security for indigenous land rights and for rural communes. It can help to register land systematically to women who primarily tend to achieve secure land use rights for their families to do subsistence farming or small-holder business. However, to ensure effective land ownership security for farmers and the equality in access to land for marginal groups like women, the young and the poor remain major challenges. This is valid for the land policy not only in Cambodia, but in particular for all developing countries.

## **8. Self-help cooperatives, associations, and collective entrepreneurship firms for the homo cooperativus – a “third way” for the land use?**

Land use models with the concept of common property resources – as constitutionally prepared by Article 15 German Constitution<sup>99</sup> – or common-pool resource systems with internal regulations, participation and decentralization strategies to avoid a natural resource-free-for-all-mentality<sup>100</sup> are underdeveloped in Germany. Art. 15 German Constitution does not mean total nationalization. Today, it can be seen as a constitutional norm that represents the “Strategic State”, engaging a variety of socio-economic actors and comprising special public entities, public common property, *and* private companies and assets (see Figure 6).

Moreover, land management and socio-ecological land policy also need a sound land use planning system. As an innovative land use alternative, (agricultural<sup>101</sup>) associations and service/producer cooperatives or group rights on common property resources (land, forest, water, energy) and collective entrepreneurship<sup>102</sup> are additional and important instruments for secure land rights. These are part of social land policies not only in Germany, but also on global scale in view of the Social Economy and the people-centred development context.<sup>103</sup>

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<sup>99</sup> See chapter II. 2. of my paper.

<sup>100</sup> The design principles for governing sustainable resources are mainly derived from long-enduring studies of institutions undertaken by the 2009 Nobel-prize winner Elinor Ostrom. See Elinor Ostrom, *Governing the commons: The evolution of institutions for collective action*. Cambridge/UK, 1990; see also Elinor Ostrom, *Design Principles of Robust Property Rights Institutions: What Have We Learned?* In: Gregory K. Ingram/Yu-Hung Hong (eds.), *Property Rights And Land Policies*, Lincoln Institute of Land Policy, Cambridge/Mass., 2009, pp. 25-51.

<sup>101</sup> See Constantine Iliopoulos, *Organisational Remodelling of Agriculture Cooperatives*. In: Hans Jürgen Rösner/Frank Schulz-Nieswandt, *Beiträge der genossenschaftlichen Selbsthilfe zur wirtschaftlichen und sozialen Entwicklung*, Münster, 2009, pp. 627-642.

<sup>102</sup> See Mancur Olson, *The Logic of Collective Action: Public Goods and the Theory of Groups*, Harvard, 1965.

<sup>103</sup> See Hans-H. Münkner, *Ten lectures on co-operative law*, Friedrich-Ebert-Stiftung, Bonn, 1982; see also Jost W. Kramer, *The Allocation of Property Rights within Registered Co-operatives in Germany*, Wismar Discussion Papers, No. 10/2003, pp. 5-15.

**Within the “Economie Sociale”-family, various definitions coexist:**

- social economy;
- solidarity-based economy;
- social enterprises;
- cooperatives, foundations or associations;
- non-profit (NPO) or third sector organizations (see figure 6 below).

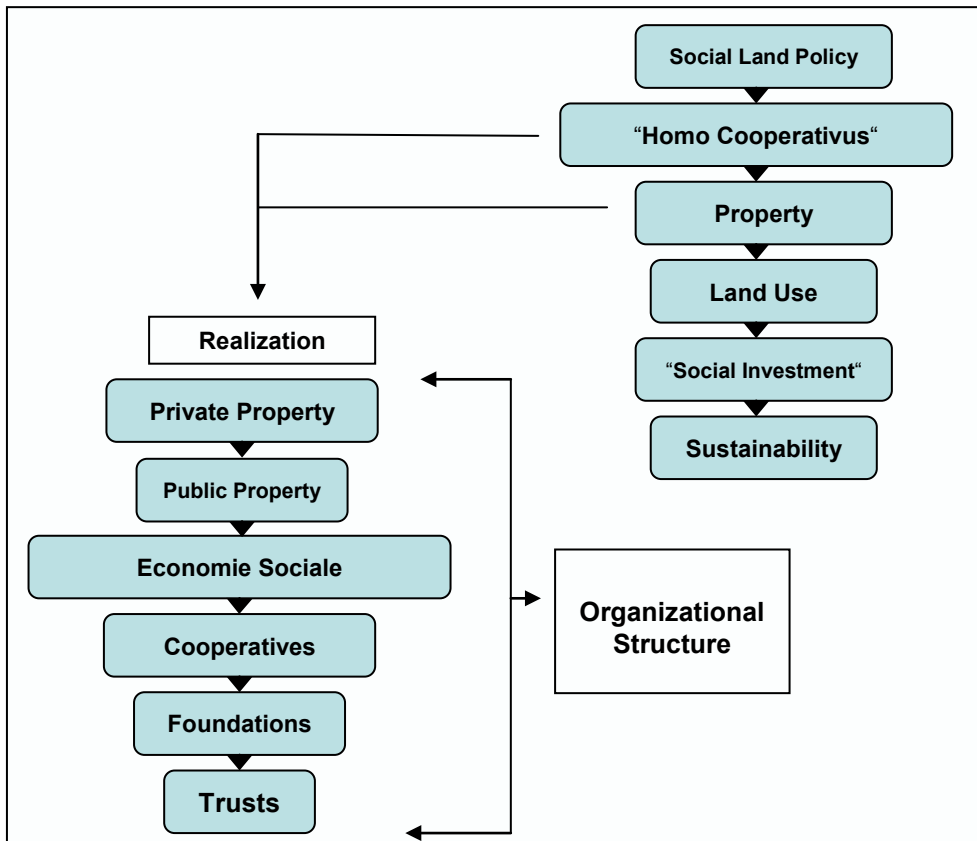


Figure 6: Social land policy and the elements of the “Economie Sociale”

**“Économía popular y solidaria”, “Community Economy”, and “Économie Solidaire” base on key principles like**

- strictly voluntary membership and exit options;
- autonomy and solidarity (self-help organizations as elements of subsidiarity);
- democracy amongst the stakeholders (principle of “one member – one vote”);
- independence from the State;
- common property for resources and means of production;
- equal distribution of profits;
- independence from government activities (“the third way”);
- self-organization, and
- good governance instead of deregulation.

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This means that autonomous decisions about objectives, output, strategies, marketing, sales, and management have to be made by the participants and shareholders.<sup>104</sup> *Economie Sociale* does not mean “slow economy”. Moreover, there is hardly any adequate translation for this terminus technicus into German language. In this context, “*Economie Sociale*” is used due to the French understanding and should not be mixed up with “*économie solidaire*” which aims at small, local and regional companies working with a social performance.<sup>105</sup> Cooperatives encourage self-help groups<sup>106</sup>, house construction and business communities, income generation for women and agriculture food processing. Moreover, cooperatives and associations can provide the access to (micro-)credit institutions. The Grameen Bank in Bangladesh may serve as a popular example, although there are numerous cases and best-practices of smaller, but unknown credit cooperatives in developing countries. Cooperatives could build up credit/loan/or mortgage communities including long-term value chain business strategies or (micro-)insurance services.<sup>107</sup> In particular, self-help cooperatives – which are strongly supported by the Food and Agriculture Organization (FAO), the International Labour Organization (ILO) and diverse Non-Governmental Organizations (NGO) – need institutional arrangements and an institutional environment of political commitment and financial support.<sup>108</sup>

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<sup>104</sup> See German Cooperative and Raiffeisen Confederation (DGRV), *Support of Self-Help Structures, Shaping the future with cooperatives*, Bonn, 2008.

<sup>105</sup> See Hans-H. Münkner, *Anmerkung des Übersetzers*, in: Thierry Jeantet, *Economie Sociale*, Neu-Ulm, 2010, pp. 16 and 46 f.; see also [www.ica.coop](http://www.ica.coop) (30.8.2010).

<sup>106</sup> See Hans-H. Münkner, *Co-operatives and the State beyond Europe*, Marburg, 2000.

<sup>107</sup> See German Technical Cooperation (GTZ), *Regulation and Supervision of Microinsurance*, Eschborn, 2004.

<sup>108</sup> See Nicole Göler v. Ravensburg, *Genossenschaftliche Selbsthilfe in der Entwicklungspolitik*. In: Thomas Brockmeier/Ulrich Fehl (eds.), *Volkswirtschaftliche Theorie der Kooperation in Genossenschaften*, 2007, pp. 741-807.

### III. Conclusion and Recommendations for Action in Germany: Future

A general prescription of the Pros and Cons of private property rights – in particular as a backview compared with public land use rights and leasing rights in the former socialist system of the GDR – is not possible. Hence, a viable formula for a socially equal distribution of land as of paramount importance for a just and sustainable planning and property system (property policy) has yet to emerge in Germany. Property policy does not only consist of property rights and the attempts to balance private and public interests. A system combining (different forms of) property and governance may be better able to bridge the gap between the private “right to acquire” – which is easily exercised by those who understand the system and can bear the transaction costs that legal ownership entails. The needs and actions of the Leviathan<sup>109</sup> (real government efficiency) in order to divide land up in a comprehensive and equal way between the inhabitants is an ever-lasting task for the European legislators.<sup>110</sup>

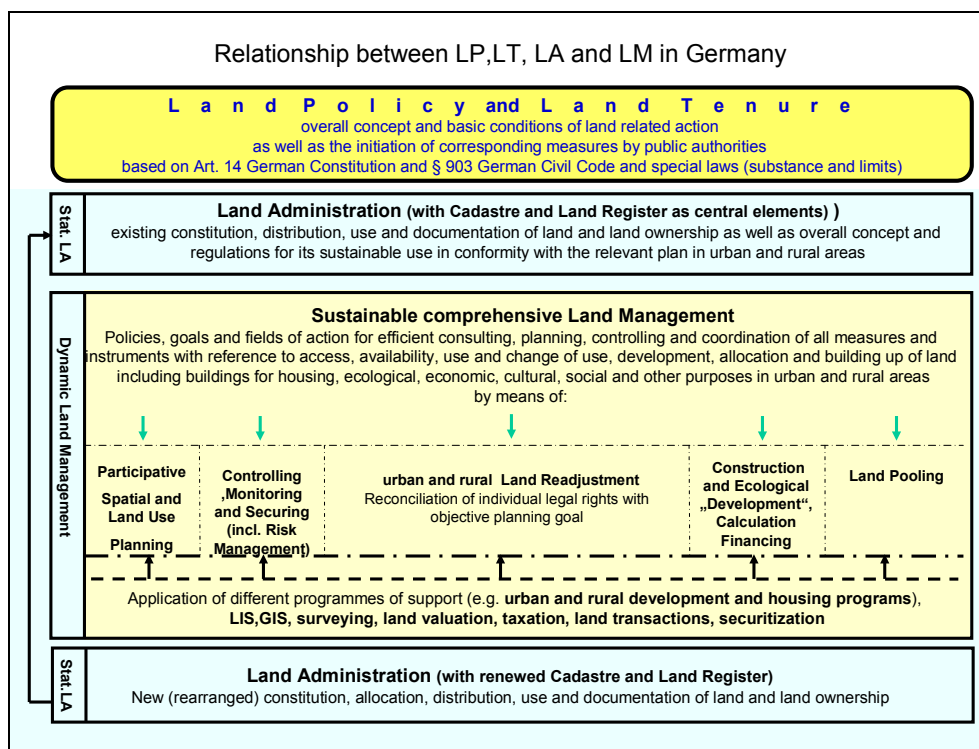


Figure 7: Relationship between land policy, land property, land administration, and land management in Germany<sup>111</sup>

<sup>109</sup> See the recently published, excellent edited book by Ian Shapiro, *Leviathan* (Thomas Hobbes), Yale, 2010.

<sup>110</sup> See Vincent Renard, *Property Rights Protection and Spatial Planning in European Countries*. In: Gregory K. Ingram/Yu-Hung Hong (eds.), *Property Rights and Land Policies*, Lincoln Institute of Land Policy, Cambridge/Mass., 2009, p. 227 (pp. 216-229).

<sup>111</sup> See Holger Magel, *Land Management, Part 1*. Spatial Planning and Land Use Planning, Presentation at the Summer School of the Royal University of Agriculture/Faculty of Land Management and Land Administration, Phnom Penh, 19 September 2008.

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**According to Figure 7, land property, planning mechanisms, and social land policy in Germany – and from the global perspective as well – include<sup>112</sup>:**

- Just and equal distribution of property: Different property forms and tenure securities for land beyond the private property rights solution for the use of non-renewable natural resources and any immovable property;
- effective and efficient state land management (based on Art. 15 German Constitution) with non-transferable public property;
- leasehold tenure contracts, eventually combined with innovative land taxation models (redistribution of the ground rent for the benefit of the people as an “add up”);
- rural development and village renewal as essential elements of land use planning policy;
- property steering function of the spatial/land use planning policy (property policy), and
- reduced transaction costs for the access to urban and rural land, but avoiding the “tragedy of the commons”.

My review allows a number of conclusions; some policy priorities and consequences follow. Formidable tasks for creative research questions on land tenure will surely arise: Will Germans know how to carry out such a (property) change – and will they be willing to do it? How can better governance be achieved in view of uncontrolled land consumption, urban sprawl, and a socially still unbalanced distribution of property rights for land? Private landowners mostly hope to increase and bag the ground rent (“rent seeking”). Neutral land use planning – consequently bare of private speculative interests – can only be achieved by skimming-off the ground rent through incremental land value taxation. Spatial and binding land use planning are to be developed as prime instruments of national property policy which perceives fair and equal land allocation, land distribution, and land use intervention.

Due to the globalization, the bilateral and multilateral donor organizations involved in the rule of law – and land reform – processes in developing countries are more focused on property rights reform than at any time in the last half century. In the year 2000, “neoliberal” interpretations of property models dominated and were seen as a necessary foundation for development according to the “Washington Consensus”. However, times and property interpretations are changing rapidly nowadays: The recent national elections in Venezuela, Brazil, Bolivia and Ecuador show that the private property rights orientation no longer holds everywhere in the world.<sup>113</sup> *To sum this up*, it is an interesting time for land tenure students since – from global

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<sup>112</sup> See Fabian Thiel, *Land Law and Planning Law in Cambodia: Problems and Perspectives*. In: Cambodian Yearbook of Comparative Legal Studies, Vol. 1, Phnom Penh, 2010, pp. 71-85.

<sup>113</sup> For an excellent overview of the current (property-)discussion in Latin America see Lila Barrera-Hernández, *Got Title; Will Sell: Indigenous Rights to Land in Chile and Argentina*. In: Aileen McHarg/Barry Barton/Adrian Bradbrook/Lee Godden (eds.), *Property and the Law in Energy and Natural Resources*, Oxford, 2010, pp. 185-209.

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perspective – there is less agreement on how to go about resolving land allocation decisions than it was at the end of the previous decade where the “neoliberal” model of the private property rights had nearly universal acceptance.<sup>114</sup>

Social land policy, public and private land property management and spatial/land use planning policy need framework arrangements guaranteed by the institutions responsible for land use and land property development. Different institutions for the management of the non-renewable resource land have to be built up in the future. In summary, this cross-cutting strategy comprises different public and common property forms and tenure securities for land beyond the private property rights which are typical for the present Germany.

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<sup>114</sup> See Jim Riddell, *Toward a 2015 Vision of Land*. In: Gary C. Cornia/Jim Riddell (eds.), *Toward a Vision of Land in 2015, International Perspectives*, Lincoln Institute of Land Policy, Cambridge/Mass., 2008, pp. 307-323; see also Daniel W. Bromley, *Land and Economic Development: New Institutional Arrangements*. In: Gary C. Cornia/Jim Riddell (eds.), *Toward a Vision of Land in 2015, International Perspectives*, Lincoln Institute of Land Policy, Cambridge/Mass., 2008, pp. 217-236.

## IV. Comparison with the Kingdom of Cambodia: The view abroad

### 1. Land use regulations in the public interest

Land use regulations must satisfy the public interest. Art. 44 of the Cambodian Constitution<sup>115</sup> says, “*Expropriation of ownership from any person shall be exercised only in the public interest as provided for by law*”.<sup>116</sup> Additionally, Art. 58 Cambodian Constitution declares, “State property comprises land (...)”. The term “*public interest*” should be integrated into Art. 58 Constitutional Law in order to clarify that state public property is in the best interest of the public. The elimination of land speculation and illegal claims of state land must be a demanded goal within Art. 58 to guarantee a use of state public land that is in the public's best interest. Social housing and any sustainable use of forest, fishery, and other resources must also clearly be defined as land uses that are in the public interest of the Cambodian State.

At present, public interest is (yet) not mentioned within Art. 58 of the Cambodian Constitution. The Constitution and the Cambodian Land Law of 2001 could empower the Government to guarantee a competitive market economy in a country still mainly composed of state public property which should not be allowed to be sold to private citizens. Of course, this is a big “could”. In the future, public interest would be satisfied if the ground rent – or any economic gains from the land use – are pooled and redistributed to all Cambodians in equal shares.

Planning Level	Planning Instrument	Legal Basis
National	<b>Specific Development Plan</b> e.g., Phnom Penh Strategic Development Plan	1994 Law on Land Management (Art. 5; Art. 10)
	<b>Provincial/Municipal Development Plan</b> e.g., Provincial Master Plan	1994 Law on Land Management (Art. 5)
	<b>National/Provincial/Municipal/District Land Use Master Plan</b>	1994 Law on Land Management (Art. 6; Art. 7; Art. 9)

<sup>115</sup> See Hor Peng, *German Basic Law and Cambodian Constitution in Comparative Perspective*. Presentation at the international conference “The German Constitution after 60 years: International and Asian Perspectives”, Phnom Penh, 8 October 2009.

<sup>116</sup> See Kingdom of Cambodia, Constitution (as amended) from July 13, 2004.



<b>District</b>	<b>District Strategic Development Plan</b>  Piloted in some districts; Strategic policy document for district development, based on the results of scenarios and guided by development theories; plan reflects the political will of the district population and complies with national planning guidelines (legal bindingness)	2008 Law on Administrative Management of the Capital, Provinces, Municipalities, Districts and Khans (Organic Law) (Art. 100)
<b>Commune/Village</b>	<b>Participatory Land Use Planning (PLUP)/Commune Land Use Planning (CLUP)</b>  Piloted in some communes/villages  <b>Initial State Land Use Plan (I-SLUP)</b>  Using of selected components of the CLUP for implementing of Social Land Concessions through the Provincial authorities and Commune Councils	Sub-decree on Commune Land Use Planning

Table 5: Planning regulations in Cambodia

## 2. Constitution

Another element of “regulatory quality” of the Cambodian legislator should be that the state defines and implements underlying legal and institutional conditions. The state has to ensure that the “public good” of the ownership of land shall be used to the maximum possible value for all. The concept of socially embedded property – “*property entails obligations*”<sup>117</sup> – should be implemented within Art. 44 of the Cambodian Constitution from 1993. However, this concept clearly requires property owners to act in a socially responsible manner, as determined by regulations authorized by the legislator. The contents and limits of property rights should aim at a “socially just property order”, e.g., the social obligation must meet the “proportionality test” and allows under certain circumstances government’s interventions that depend on the social importance of the affected property type. This property type can change over time according to the necessities of a modern, well-balanced Cambodian property policy.<sup>118</sup>

<sup>117</sup> See Article 14 para 2 sentence 1 German Constitution.

<sup>118</sup> See Aileen McHarg, *Social Obligations of Ownership and Regulation of Energy Utilities in the United Kingdom and the European Union*. In: Aileen McHarg/Barry Barton/Adrian Bradbrook/Lee Godden (eds.), *Property and the Law in Energy and Natural Resources*, Oxford, 2010, p. 377.

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Social land policy in Cambodia should try to answer these core questions: What kind of arable land and how much of that should be allocated (land reform)? Which types of land uses are envisaged? Are the beneficiaries of State's interventions on the land markets landless households or also land-poor people? Approximately 80 % of the Cambodian territory consists of State property. The management of public land is of crucial importance for the rural development. But the implementation faces numerous problems like the often confusing difference between State public land (Art. 17 Land Law 2001) and State private land (Art. 14/15 Land Law 2001), unclear boundaries in urban and rural areas, a weak rule of law and the still unfinished recovery of administrative land market- and legal documents for titling, property mapping, and taxation.

### **3. Approaches for the “Social Economy”: Community forces and collective identity**

Land use models with the concept of Common Property Resources (CPR) or community-based natural resource management (CBNRM) with regulations, participation and decentralization strategies for avoiding a land-free-for-all-mentality are underdeveloped in Cambodia. Land management and socio-ecological land policy also need a sound land use planning system which is incomplete<sup>119</sup>, apart from some pilot planning at regional and communal level (see table 5 above). As an innovative land use alternative, (agricultural) associations and service/producer cooperatives or group rights under control of women's groups on common property resources (land, forest, water) are additional instruments for secure, gender-equal land rights. Cooperatives base on key principles like strictly voluntary membership and exit options, autonomy and independence from government activities, self-organization, and governance, e.g., autonomous decisions about objectives, strategies, and management.<sup>120</sup>

#### ***Social and cooperative producer enterprises for the modern-day Cambodian civil society***

In the 1970s, agriculture and producer cooperatives achieved impressive results in Asia; it had more than 400.000 cooperatives totalling 75 million members. Cooperatives work as a central element of the Thai and Vietnamese economies – to name just a few. Due to historical reasons and a private property-oriented land titling policy, Economy Sociale-approaches were limited in Cambodia. Links among existing organizations and associations (NGOs or trusts) are weak. At present, there seem to be hardly any reasons for this underdevelopment. Due to its agricultural potential, Southeast Asia (besides of rural regions in southern Africa where numerous experiences with self-help organizations exist<sup>121</sup>) could serve as a model for the “worldwide

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<sup>119</sup> See Fabian Thiel, Law for State Land Management in Cambodia. In: *Rural21*, International Journal for Rural Development, 43 (3), pp. 34-36.

<sup>120</sup> See Michael Kirk, *State Land Economics in Cambodia*, Land Policy Discussion Paper, Marburg/Phnom Penh, 2004.

<sup>121</sup> See Nicole Göler v. Ravensburg, *Kooperative Selbsthilfeorganisationen im ländlichen Südafrika*, Göttingen, 1999.

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making of the Economy Sociale” in order to resemble cooperative models and movements. The social economy can be interpreted as the “child of necessity”.<sup>122</sup> Special interest associations and local neighbourhood councils could make a significant contribution to civil society which will continuously become independent from donor’s money at the same time.

Cooperatives may be suitable for landless and land poor female headed households for residential, rural and agricultural community empowerment. They encourage self-help groups/initiatives, house construction and business communities, income generation for women and agriculture food processing. Agricultural extension services are the basis for food security and poverty reduction in Cambodia since the majority of the population lives in rural areas. Moreover, cooperatives and associations can provide access to (micro-)credit institutions and build up credit/loan/or mortgage communities including value chain business approaches.

**Preconditions for cooperatives, associations, and self-help organizations in Cambodia are in view of legal and economic necessities:**

- constitutional law and related sub-laws (“rule of law”, consisting of land laws, business and commercial enterprise laws, competition laws, cooperative laws etc.);
- property rights, consisting of land as a primary public (local) commodity, but not as an “open access”-resource affected by unlimited and unregulated (over-)use;
- democracy and human rights;
- decentralization/localization, but not necessarily deregulation;
- good governance;
- fair competition, and
- stable financial support.

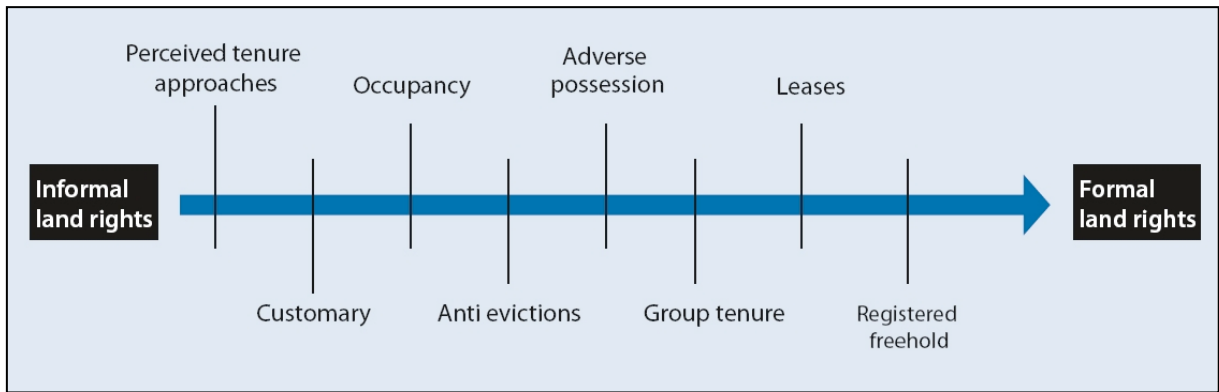
#### **4. Land policy: various flexible land use rights**

The problem of (private) encroachment on State (public) land raises the question whether there is enough public – and political – awareness in particular for the need of a socially well-balanced land distribution and thus State responsibility to provide flexible “secure land rights for all” (UN-HABITAT/Global Land Tool Network<sup>123</sup>; see figure 8), and social citizenship in Cambodia.

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<sup>122</sup> See Jacques Defourny and Patrick Develtere, *The Social Economy: The Worldwide Making of a Third Sector*. In: Jacques Defourny, Patrick Develtere, Bénédicte Fonteneau and Marthe Nyssens (eds.), *The Worldwide Making Of The Social Economy*, Leuven/Den Haag, 2009, pp. 15-40.

<sup>123</sup> See Clarissa Augustinus, *Social Tenure Domain Model: What It Can Mean For The Land Industry And For The Poor*. Paper presented at the FIG conference, Sydney, 2010 ([http://www.fig.net/pub/fig2010/papers/inv02%5Cinv\\_02\\_augustinus\\_3724.pdf](http://www.fig.net/pub/fig2010/papers/inv02%5Cinv_02_augustinus_3724.pdf) (20.4.2010)).



**Figure 8: The concept of “Flexible Land Tenure” (GLTN/UN-HABITAT)**

However, social land policy and flexible land use rights as shown in figure 8 above, provide insufficient results in implementation, in spite of increasing capacities and political commitment from the Cambodian Ministry of Land Management, Urban Planning and Construction (MLMUPC). At present, a demand for mapping in the context of tenure security of indigenous communities can be observed, since land disputes and “land grabbing” of the rich and the powerful are on the rising trend in face of an “elite capture of law”. Practices of public administration which are not foreseen by law fill the gaps between traditional and modern concepts of law; land disputes are mostly decided in the interest of private individuals or wealthy urban investors.<sup>124</sup>

Ground rent-seeking, speculation, a massive competition for land in particular through Economic Land Concessions (ELC) and Foreign Direct Investments (FDI)<sup>125</sup> cause deforestation and a decreased amount of land available, latent conflicts, and anarchic encroachment. Both legal and illegal land transactions as immediate threats are faster and seem more rational to some members of the indigenous communities than mapping, registering of collective title, and legislation processes for indigenous land rights. Individualist’s rationalities of the indigenous people in remote Cambodian areas towards the short-term profit – in particular for cash needed for health treatment, motorcycles, education, and household consumption – from the resource land is stronger than the long-term management and maintaining of community ownership.

<sup>124</sup> See Daniel Adler et al., *Towards Institutional Justice? A Review of the Work of Cambodia’s Cadastral Commission in Relation to Land Dispute Resolution*. GTZ-Cambodia, Land Management Project, Phnom Penh, 2006.

<sup>125</sup> See German Technical Cooperation (GTZ), *Foreign Direct Investment in Land in Cambodia*, Eschborn, 2009.

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## 5. Conclusion

### ***Future land development without destruction***

Based on the “*Declaration of the Royal Government on Land Policy*” from 2009<sup>126</sup>, the Cambodian legislator has a unique opportunity to elucidate and improve social land policy throughout the whole territory, in particular for rural areas where 80 % of the population lives. Therefore, land policy should include:

- different property forms and tenure securities for land beyond the private property rights solution for the use of non-renewable natural resources and any immovable property;
- effective and efficient State land management with non-transferable public property;
- leasehold tenure contracts, eventually combined with innovative land taxation models (redistribution of the ground rent for the benefit of the people as an “add up”) and “flexible land tenure” according to the UN-HABITAT guidelines; Foster the implementation of social enterprises for collective production, autonomy at local and regional (sub-national) level and for the benefit of the local people, decision power not based on capital ownership, participatory nature and a limit profit distribution;
- indigenous, customary and other informal land use rights, eventually combined with leasehold rights, in particular for agriculture land;
- rural development and village renewal as essential elements of land use planning policy;
- property steering function of the spatial/land use planning policy (property policy), and
- reduced transaction costs for the access to arable land.

Social land policy, flexible land tenure, State land management and spatial/land use planning policy need framework arrangements guaranteed by the institutions responsible for land use development in Cambodia. The Council of Ministers, national ministries, the legislature, the Council for Land Policy, the institutions of the provinces, districts, municipalities and the civil sector must consider these planning and property issues for the Cambodian people. Different institutions for the management of the non-renewable resource land have to be built up in the future.

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<sup>126</sup> See Royal Government of Cambodia (RGC), *Declaration of the Royal Government of Cambodia on Land Policy*, Phnom Penh, July 1, 2009.

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## Annex



**KINGDOM OF CAMBODIA**  
**NATION RELIGION KING**

### **8**

**ROYAL GOVERNMENT OF CAMBODIA**  
N°. 27 Sar Chuor Nor.A.K

### **Declaration of the Royal Government on Land Policy**

Considering the necessity of administering land and natural resources in a way that is effective, productive and environmentally sustainable, and, in order to alleviate poverty of Cambodian people, the Royal Government of Cambodia decides to set out visions, goals, and activities in land sector as follow:

The vision of land policy, in Cambodia, is “to administer, manage, use and distribute land in an equitable, transparent, efficient, and sustainable manner in order to contribute to achieving national goals of poverty alleviation, ensuring food security, natural resources and environmental protection, national defense and socio-economic development in the context of market economy”.

The Council for Land Policy has duty to promote and monitor implementation of land policy in compliance with the direction of the Supreme Council for State Reform as well as to coordinate among the three land sub-sectors (land administration, land management, and land distribution) to strengthen implementation of the land law and other legislations related to environment, forest, fisheries, water resources, civil code, decentralization and de-concentration, etc.

Goals and activities involved in the three land sub-sectors are :

#### **A. Land Administration Sub-Sector**

**The goals of land administration** are to clearly register ownership and other rights over immovable properties (State and private), to conduct official transfer of those rights, to prevent and resolve land disputes in order to strengthen land tenure security, and ensure reliability and efficiency of land market.

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Land registration shall comply with principles of good governance, transparency, decentralization and de-concentration, and gender equity in order to develop a culture of land registration, and to increase trust in land registration system. This has to be simple, clear, quick, accessible and at low cost. It shall develop Land Information System to provide accurate information regarding immovable properties at a reasonable cost.

**Field of activities for land administration sub-sector:**

1. To develop and strengthen the implementation of laws and regulations in relevant fields such as expropriation law, pre-emption law, law on agricultural land, land transfer, land consolidation, land sub-division, land taxation, land valuation and land market, land banking, and land survey etc. as well as to amend certain articles of laws and regulations related to the land law, fiscal law...in accordance with the evolution of the country situation;
2. To gradually establish a clear and complete inventory of State immovable properties (land and buildings) in a unified database system in order to enhance the efficiency of State immovable properties management;
3. To conduct land registration throughout the country in a transparent and effective way for both State land (public and private State land), and individuals' private land :
  - 3.1 To proceed with both sporadic and systematic land registration procedures;
  - 3.2 To carry out subsequent registration and update cadastral information in a timely manner/rapidly so as to increase State revenue;
  - 3.3 To carry out inscription of all mortgages, antichrists, immovable property pledges long-term leases, economic land concession or easement that are created over an immovable properties;
  - 3.4 To accelerate co-ownership registration;
  - 3.5 To pay attention to land registration of indigenous communities;
  - 3.6 To accelerate State land registration (public and private State land);
  - 3.7 To develop Land Information System (LIS) that can be able to provide customers with accurate information. Land Information System is a basis for National Spatial Data Infrastructure and for multi-purpose use.
4. To establish geology information system and soil classification based on natural characteristic of land.
5. To develop a unified Geography Information System across the country:
  - 5.1 To develop a unified Geography Information System under the coordination of the Ministry of Land Management, Urban Planning, and Construction. It shall create a unit in charge of printing and distributing master maps.
  - 5.2 To continue to install Geodetic Network throughout the country and create Leveling Network;
  - 5.3 To establish Permanent GPS Base Station.

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6. To develop a participatory, transparent, and officially recognized Land Valuation System. Land Valuation shall base on the natural quality of soil and also include land and improvements in order to create a basis for sale, purchase, lease, investment, loan, taxation (annual tax, tax on land transfer, tax on lease, tax on profit, tax on unused land), cadastral service and compensation.
    - 6.1 To issue licenses to private immovable property valuers;
    - 6.2 To build and enhance capacity of immovable property valuers;
    - 6.3 To continue to implement the policy of not imposing tax on family-sized agricultural land. In the meantime, research shall undertaken on an annual tax on immovable properties besides family-sized farming land;
    - 6.4 To develop immovable properties valuation maps;
    - 6.5 To carry out valuation of immovable properties in urban and rural areas, and monitor the valuation.
  7. To encourage participation of private sector in land surveying under the control of the cadastral administration;
  8. To continue the extra-judicial mechanism for land disputes resolution through administrative commission, cadastral commission at all levels (National level, Capital/Provincial level and Municipal/District/Khan levels, and mobile teams), and National Authority for Land Dispute Resolution especially for multi-party cases;
  9. To develop self-financing system for land administration, starting from revenue from land registration and cadastral services in order to support and speed up a nation-wide land registration process.

## **B. Land Management Sub-Sector**

**The objective of land management** is to ensure management, protection and use of land and natural resources with transparency and efficiency in order to preserve environmental sustainability and equitable socio-economic development in rural and urban areas as well as to prevent disputes over land use by regulating land development, land conversion, land readjustment, construction, resettlement in compliance with the Law on Land Management, Urban Planning and Construction, the Strategy of Land Policy Framework, decentralization, de-concentration, and good governance policies.

In the meantime, land management shall be conducted in accordance with principles of equity, transparency, participation, consensus and respect for planning hierarchy and relevant regulations and procedures.

### **Field of activities for land management**

1. To Develop national policy and legal framework as well as appropriate procedures for land development management in rural and urban areas including land used for agriculture production, construction and resettlement;

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2. To develop Spatial Planning System indicating that the management of an area or any location is based on the natural characteristic of soil and the need for equitable socio-economic development. Spatial Planning System shall be developed by:
    - 2.1 Defining contents and hierarchy of planning (including National Strategy for Urban Development);
    - 2.2 Defining competence in developing and approving of the planning;
    - 2.3 Developing laws and regulations for supporting the implementation.
  3. All land use planning for priority areas such as coastal development plan, tourism and investment zones, economic potential zones, key urban areas and major road corridors shall comply with principles of transparency, participation, consensus, equity and ensure sustainability.
  4. To administer and control the use of land and natural resources through tools such as:
    - 4.1 Spatial Planning;
    - 4.2 Land Use Planning;
    - 4.3 Urban and Rural Development Plan;
    - 4.4 zoning;
    - 4.5 Control of construction site plan including procedures for sub-division control;
    - 4.6 Urban Code;
    - 4.7 Construction Code and construction standards; and
    - 4.8 Development control.
  5. To foster National and Provincial Spatial Planning as well as Sub-national Land Use Planning, with the participation of all stakeholders; i.e. (i). National Spatial Planning, (ii). Provincial Spatial Planning (iii). Capital Land Use Planning and Master Plan (iv). Municipal Land Use Planning and Master Plan (v). District Land Use Master Plan (vi). Khan Land Use Master Plan and (vii). Commune/Sangkat Land Use Planning.
  6. To speed up the development of guidelines on local land use in order to support decentralization and de-concentration of land management under national technical support provided to local authority;
  7. To accelerate decentralization of land management. State land trustee authority shall provide the Ministry of Economy and Finance with annual inventory so that this ministry produces reports on the use of state land for the Royal Government. The public can receive this information from relevant institutions. State land trustee authority along with territorial authority of all levels shall be responsible for protection and ensuring accountability for public and private State land management;
  8. To introduce land readjustment to increase economic productivity and local development including Village Development.

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## **C. Land Distribution Sub-Sector**

**The objective of land distribution** is to provide clear direction for allocation and use of State land for public and private purposes in a transparent and equitable manner in response to the needs for land of the people, particularly the poor, disabled soldiers, and family of deceased soldiers who have no land or lack land by implementing social land concession program.

Land distribution shall ensure equity, social stability, food security and facilitate investment based on the natural characteristic, type and quality of soil for sustainable socio-economic development, prevent land concentration and promote productive and effective use of land.

### **Field of activities for land distribution**

1. To accelerate collection and establishment of State land inventory to reserve land for present and future land distribution and use with equity, transparency and accountability;
2. To develop and implement medium and long-term strategies and frameworks of land distribution planning in order to use and distribute land for social and economic purposes in accordance with planning at national, capital/provincial, municipal/ district/ Khan and Commune /Sangkat levels by ensuring transparency and efficiency, and avoiding negative environmental and social impacts;
3. To foster land distribution for social purposes on due time in order to help tackle social problems and prevent illegal State land clearing;
4. To implement partnership between small and large-scale plantation holders, and corporations in agricultural production, and between economic land concessions and social land concessions in order to generate employment opportunities and creating market for local residents.

The Royal Government strongly believes that all ministries, institutions and stakeholders shall effectively implement this policy with high commitment by performing its respective roles and duties according to their specialized field. The policy of the Royal Government as summarized above will be further developed as "Comprehensive Land Policy" in the future.

*Phnom Penh, 1<sup>st</sup> July 2009*

Seal & Signed

Prime Minister

Samdech Akka Moha Senabaddei Techo HUN SEN