

Law Harmonisation in Relation to Decentralisation

Robert Oberndorf, an independent legal consultant, examines the legislative context in which decentralisation reforms are occurring in Cambodia*

The Royal Government of Cambodia (RGC) is undertaking decentralisation reforms to devolve power to semi-autonomous elected governments at the Commune level, and to move towards enhanced roles for provinces and municipalities as deconcentrated entities of the centre.¹ In March of 2001 the RGC embarked on a bold experiment in decentralisation and deconcentration of government, with the enactment of the Law on Administration and Management of the Commune (LAMC), and the Commune Election Law, followed by elections of Commune Councils in February of 2002. A range of functions, spending authorities, and resources has been devolved to local governments and the provincial governors have been given responsibilities of support to and supervision of Commune Councils. In support of this effort, a large body of rules and regulations has been passed in a relatively short period of time. Understanding how these rules and regulations fit together with each other and already existing legislation, plus how the ongoing government efforts towards decentralisation fit within the overall legislative structures in Cambodia, is critically important for the continuing success of the decentralisation process.

Legislative Framework

To understand the rules and regulations that have been enacted in support of the decentralisation reforms, not to mention the rules and regulation that have yet to be drafted, a basic understanding of the legislative framework in Cambodia is needed. The laws and regulations of Cambodia are hierarchical, and each of these derives its validity and authority from a rule placed above it in the hierarchical structure of laws. The following is a general outline of the hierarchy of law within the Kingdom of Cambodia: i) Constitution ii) Laws (Chhbab) iii) Royal Decree (Reach-Kret) iv) Sub-Decree (Anu-Kret) v) Prakas vi) Circulars (Sarachor) vii) Deika.

Within this hierarchy of law are general observations that can be made on time and scope. The higher the level of the instrument that is being enacted, the greater

the amount of time for actual enactment due to various levels of reviews it must go through. For example, a law that is drafted at the level of the RGC must go through a review process within a line Ministry, at the Council of Ministers, the National Assembly and finally the Senate, while a Prakas is simply reviewed within the Ministry that is promulgating it.² Any decisions related to enactment or amendment of legislation must take into account this ever-present element of time.

Another aspect that should be considered is scope of the legal document. Laws have broad scope and apply to all government entities and geographic locations within the country, unless specifically limited within their text. Prakas tend to be only binding within the Ministry in which they are promulgated, and Deika only apply to the geographical area of the province or commune that enacts them.

Law: Laws, or Chhbab in Khmer, are the primary source of law in Cambodia. Chhbab are the laws passed by the National Assembly (lower house) and the Senate (upper house). The Chhbab is at times confused with the Kram, which is a form of Royal Decree used for the promulgation of a Chhbab by the King or Head of State.

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Royal Decree: The Constitution states that "upon proposal by the Council of Ministers, the King (or Head of State) shall sign decrees (Kret) appointing, transferring or ending the mission of high civil and military officials..."³

This provision has been utilized by the RGC to create high level multi-ministerial bodies such as

the NCSC and Supreme Council for State Reform.

Sub-Decree: Sub-Decrees, or Anu-Kret, are legislative documents that are generally used to implement and clarify specific provisions within Laws, though they are also utilized to outline the roles, duties and responsibilities of government entities, such as a ministry, or for the appointment of high-ranking government officials. Sub-Decrees tend to be drafted within a ministry or amongst several ministries that have subject matter competence on the area to be legislated. Once drafted, the Sub-Decree is submitted to the Council of Ministers for examination and adoption. Once adopted by the Council of Ministers, the Sub-Decree is signed by the Prime Minister and counter signed by the minister or ministers in charge of implementation and enforcement. Authorization for the Sub-Decree, whether direct or indirect, must come from a higher-level legal instrument, such as a Law. Since Sub-Decrees are adopted at the Council of Ministers level, their scope can be quite large.

Prakas: Prakas are ministerial or inter-ministerial regulations that are used, like Sub-Decrees, to implement and clarify specific provisions within higher-level legislative documents. They are also often used for the creation of guidelines that are necessary for the implementation of Laws or Sub-Decrees. Prakas are usually drafted at the technical department level and then signed into effect by the minister (or ministers) in charge of the

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ministry within which the regulation or guidelines apply. It should be noted that Prakas are largely used to implement Law in Cambodia, and that lessons learned can be quickly incorporated since the process for enacting a Prakas are relatively simple and quick. The drawback to Prakas is that their scope is limited to the subject matter jurisdiction of the ministries that enact them, such that other line ministries or government entities will not always feel bound to follow them.

Circulars: Circulars, or Sarachor, are instruments that are issued by the Prime Minister or a minister to explain or clarify certain legal or regulatory measures, or to provide instructions. Like Prakas, these are limited in scope, but easily issued.

Deika: Deika are orders given by provincial governors or Commune Councils that have the force of law within the geographical limit or their territorial authority. Deika cannot conflict with other rules and regulations at the national level. Deika at the commune level cannot conflict with provincial Deika.

Primary Legislation Enacted

The following is a list of the primary rules and regulations that have been enacted in support of the decentralisation reforms since 2001. The entire body of rules and regulations, including all of the Prakas and guidelines, is much larger than this.

Law on the Administration and Management of the Commune (LAMC): This is the Law, which has acted as the key policy document and blueprint for the program of decentralisation. It lays out the key elements related to the roles, duties and functions of the various entities involved in decentralisation, and gives authorization for the supporting legal documents that need to be enacted, though no time frames were spelled out for the enactment of these other documents. As is common with Laws in Cambodia, the LAMC is very broad and at times rather vague in terms of its provisions, as details are usually worked out in the supporting Sub-Decrees and Prakas that are authorized.

Law on the Elections of the Commune Councils: This Law spells out all of the relevant rules and provisions for the election of commune councils in the country. As opposed to other laws, this piece of legislation is very detailed and long. This is largely a function of the fact that all the rules and regulations had to be in place prior to the first Commune Council elections in February of 2002. It is indicative of the strong political commitment to the decentralisation process that this document was passed in the form that it was. It should also be noted that this was clearly drafted with substantial outside technical assistance.

Royal Decree on the Creation of the National Committee to Support the Commune (NCSC): This Royal Decree outlines the roles and responsibilities of the NCSC.

Sub-Decree on the Decentralisation of Powers, Roles and Duties to Commune Councils: This Sub-

Decree fills in much of the detail that is lacking within the LAMC and introduces concepts that are more fully explained in other supporting documents, such as the Prakas on the Commune Clerks.

Sub-Decree on the Establishment of the Commune Fund: This Sub-Decree provides details for the establishment and management of the Commune Fund, including basic rules for Commune Fund deposits to the Provincial Treasury, and rules outlining the roles and duties of the Provincial Governor and Provincial Treasury.

Sub-Decree on the Commune Financial Management System: This Sub-Decree provides details for commune financial management, including rules on the formulation, approval and implementation of the commune budget, the accounting and payment system, financial reporting, revenue and expenditure management, management of durable assets, and auditing of accounts and operations. An important piece of the puzzle, as financial planning and management is one of the few clearly defined roles of the Commune Councils. This Sub-Decree also further defines the role of the Provincial Treasury as accountant for the Commune Council.

Prakas on the Roles, Duties and Structures of the Department of Local Administration (DOLA): An important, and often times misunderstood, element of this Prakas is that it represents a delegation of many of the communication, monitoring and evaluation duties from both the NCSC and the Ministry of Interior (MOI) to Department of Local Administration (DOLA).

Prakas on the Delegation of Powers to Provincial Governors in Support of Commune Councils: This Prakas represents a temporary fix until the Organic Law on provincial and district government is drafted and enacted. This Prakas also acts as a further delegation of communication, monitoring and evaluation roles from the national level, specifically the NCSC, MOI and DOLA, down to the Provincial level. What is sometimes misunderstood is that the delegation is not just to the governor, but also to the provincial level of government, since one individual alone could never handle the delegated responsibilities.

Prakas on the Roles, Responsibilities and Organizational structure of the Provincial Rural Development Committee of the Seila Program: Like the Governors Prakas above, this Prakas represents a temporary fix until the Organic Law is drafted and enacted.

Prakas on Roles, Duties and Rights of Commune Clerks: This Prakas outlines the general functions of the commune clerks that primarily act as secretaries to the Commune Councils.

Inter-Ministerial Prakas on Commune Development Planning: This Prakas outlines the general structure and procedure for the commune development planning process. This Prakas is important since, like financial management, it is one of the few clearly defined roles of the Commune Councils that has been established and understood.

Comments on the Legislation Enacted to Date

Credit should be given to the RGC for managing to put into place this legislative framework in such a brief period of time, especially considering the fact that it has enabled the implementation of decentralisation policy in Cambodia. This large body of rules and regulations enacted in support of decentralisation is quite complex and can be difficult to understand, especially for those who have no legal training. In addition to this, the drafting is not always precise and is generally not up to the standards of more developed countries.⁴ With this being said, it is important to note that for those that are actually implementing the rules and regulations, there are few reports of stumbling blocks that are a direct result of problems in the legislation. This is most likely due to the fact that legislation in Cambodia tends to be implemented through Prakas/guidelines. To put it quite simply, the current body of rules and regulations can be implemented. The problems that are reported overwhelmingly relate to the critical rules and regulations that are currently missing.

What should be guarded against are calls for wholesale re-drafting of the body of rules and regulations that have been enacted due to issues surrounding problems in the drafting. Such an exercise would consume valuable resources that could be better spent elsewhere, and there is no guarantee that the system put in place to replace that which has already been drafted will be any better; in fact it could be worse.

Problems with Legal Interpretation

One of the problems with interpretation of the rules and regulations currently in existence is that different legal experts can come up with different interpretations depending on the conclusion they are trying to reach. This is the role of lawyers and advocates the world over. The situation is even worse when non-legal experts start interpreting the law. In the context of Cambodia, it is a commonly accepted principle that the government entity with the competence over a specific subject matter is generally the party responsible for interpreting the meaning of the rules and regulations within that subject matter. For example, the Ministry of Land Management Urban Planning and Construction (MLMUPC) would state that the only entity that can interpret the meaning of the Land Law is the MLMUPC. Likewise, MOI would argue that rules and regulations related to the Commune Councils should be interpreted by MOI. This can get complicated since the Ministry of Economy and Finance will argue that interpretation of provisions related to commune finance is their responsibility, etc.

Ultimately, if there is a conflict over the interpretation of the rules and regulations, it should be the role of the judiciary and the courts to be the final arbiter over the meaning and intent. Unfortunately the judicial

branch of government is quite weak, and there is no clear mechanism established in Cambodia for administrative appeals where such questions of interpretation can be handled.

Currently, the interpretation and implementation of the rules and regulations in Cambodia is more a question of political will than anything else. No matter how well a set of rules and regulations are drafted, there is no guarantee that they will be implemented as written. Government bureaucrats are left to interpret and implement the law based on directives and support from the superiors above or on their own.

Critical Rules and Regulations Currently Missing

In terms of identification of current legislative gaps, the most obvious is the lack of the Organic Law for provincial and district levels of government; drafting and enactment of this legislation is scheduled to take place in 2006, prior to the next Commune Council elections. In addition to this, the primary pieces that need to be put

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into place in the near to medium term include: Rules and regulations on the determination of types, rates and procedures for the collection of the revenues from the fiscal taxes, non-fiscal taxes and service charges for Commune Councils (this must be done in the context of the harmonization of fiscal management throughout the government at all

levels); Rules on administrative fees for delegated agency functions to the Commune Councils; Procedures for selection, taking office and changing of the village chiefs, appointment of assistants to village chiefs, and the working procedure and duties of the village chiefs; Guidelines on Commune Councils hiring staff as needed; Drafting of commune Deika (local regulations); Guidelines on creation of committees to assist in carrying out the Commune Council's duties; and Guidelines on the roles and responsibilities of multiple communes working together.

Conclusions and Key Issues Moving Forward

Though it can be criticized for not being perfect, the legislative framework that has been put into place is functional and is being implemented by the various parties involved. This is no small achievement in a country like Cambodia where legislation can at times take years to enact or is never properly implemented. With that being said, there are several key issues that need attention as legislation related to decentralisation is further developed.

One of these is the issue of granting or delegating agency functions to the Commune Councils. Any legislation that is enacted that gives additional roles and duties to the Commune level of government must be carefully aligned with already existing rules and regulations. In addition, budgets must be made available for the Commune Councils to carry out the mandated activity.

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