

Law Harmonisation in Relation to the Decentralisation Process in Cambodia

Working Paper 31

Robert B. Oberndorf, J.D.



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Responsibility for the ideas, facts and opinions presented in this research paper rests solely with the author. The opinions and interpretations do not necessarily reflect the views of the Cambodia Development Resource Institute.

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Foreword

The Cambodia Development Resource Institute (CDRI) established a Policy Oriented Research Programme on Decentralisation (PORDEC) in November 2002, with support from the United Kingdom's Department for International Development (DFID) and the Swedish International Development Cooperation Agency (SIDA). PORDEC aims to provide policy-relevant information and analysis to decision makers and stakeholders in the decentralisation process in Cambodia to help them make well-informed decisions. During the consultative process that preceded the establishment of PORDEC, several stakeholders emphasised the need to address the legal framework for the decentralisation reforms, to look at overlaps, gaps and inconsistencies. This special report on Law Harmonisation in Relation to the Decentralisation Process in Cambodia is a response to this request.

The study aims at identifying the major challenges posed by the legal framework, and presents concrete suggestions of possible ways forward. It emphasises that the Royal Government of Cambodia has made very significant progress given the cultural and capacity challenges faced by the reforms. The consultant outlines the laws and regulations that need to be put in place as a priority, and those that should be addressed before the next commune council elections. He also notes that although there are some problems with the body of rules and regulations passed to date, this does not currently impact seriously on implementation, and can be addressed at a later stage of the reforms.

The study provides useful advice and possible policy options to the Royal Government of Cambodia, and we hope it will help guide the legal aspects of the reform implementation in the near and medium term. I would like to take this opportunity, on behalf of CDRI, to thank Robert Oberndorf for this constructive and relevant contribution to policy debate on the future of the decentralisation reforms in Cambodia.

The study has been designed and financed as a collaborative effort between PORDEC and the DFID/SIDA funded SEILA Permanent Advisory Team (PAT).

*Larry Strange
Executive Director
Cambodia Development Resource Institute
Phnom Penh, May 2004*

Acronyms and Abbreviations

ADB	Asian Development Bank
CAR	Council for Administrative Reform
CARERE	Cambodia Area Rehabilitation and Regeneration Project
CAU	Contract Administration Unit
CDRI	Cambodia Development Research Institute
CDRI PORDEC	CDRI Policy Oriented Research for Decentralisation
CCSP	Commune Council Support Project
CDC	Council for the Development of Cambodia
CoM	Council of Ministers
CRDB	Cambodian Rehabilitation and Development Board
DFID	Department for International Development
DFT	District Facilitation Team
DOLA	Department of Local Administration
ExCom	Executive Committee (PRDC)
GAP	Governance Action Plan
GTZ	Gesellschaft für Technische Zusammenarbeit (German Agency for Technical Cooperation)
LAMC	Law on the Administration and Management of the Commune
LAU	Local Administration Unit
MAFF	Ministry of Agriculture, Forestry and Fisheries
MIME	Ministry of Industry, Mines and Energy
MEF	Ministry of Economy and Finance
MoI	Ministry of Interior
MoP	Ministry of Planning
MOWRAM	Ministry of Water Resources and Meteorology
MWVA	Ministry of Women's and Veterans' Affairs
MLMUPC	Ministry of Land Management, Urban Planning & Construction
MRD	Ministry of Rural Development
NGO	Non-Governmental Organisation
NCSC	National Committee for Support to Communes
NPRS	National Poverty Reduction Strategy
NREM	Natural Resources and Environmental Management
PFT	Provincial Facilitation Team
POLA	Provincial Office of Local Administration
PRDC	Provincial Rural Development Committee
SEILA	Social Economic Improvement Local Agency
SIDA	Swedish International Development Agency
STF	SEILA Task Force
TSU	Technical Support Unit
UNDP	United Nations Development Programme
VDC	Village Development Committee

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This report was commissioned by the CDRI Policy Oriented Research Programme for Decentralisation (CDRI PORDEC) and the SEILA Permanent Advisory Team established by SIDA and DFID.

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The views and opinions expressed in this report are those of the author and do not represent the opinions of any other individual, the government or CDRI. Any errors in analysis are likewise those of the author.

Executive Summary

Decentralisation and deconcentration are part of the government's reforms to promote democracy, improve development opportunities, reduce poverty and ensure sustainable development.

The government is undertaking decentralisation reforms to devolve power to semi-autonomous¹ elected governments at the commune and *sangkat* (urban commune) level, and to move towards enhanced roles for provinces and municipalities as deconcentrated entities of the centre. In March 2001 the government embarked on a bold experiment in decentralisation of government, with the enacting of the Law on Administration and Management of Communes (LAMC) and *Sangkats*, and the Commune Election Law, followed by elections of commune councils in February 2002. A range of functions, spending authorities, and resources have been devolved to local governments, and the provincial governors have been given responsibilities of support to and supervision of commune/*sangkat* councils. In support of this effort, a large body of rules and regulations has been passed in a relatively short period of time. How these rules and regulations fit together with each other and already existing legislation, plus how the ongoing government efforts towards decentralisation fit within these structures, are the focus of this report. Several primary observations can be made as a result of analysing the current situation in Cambodia.

1. Much credit should be given to the government for enacting such a large number of rules and regulations in support of decentralisation in such a short period of time.
2. There was no policy document approved by the government when the primary legislation was drafted, so there was no clear guidance available for the drafting of the legislation. Essentially, the LAMC became the policy document. This, in addition to the short time frame involved, has led to a rather complex and poorly linked body of rules and regulations that contains significant amounts of overlap and lack of clarity due to poor drafting. The body of rules and regulations is, however, consistent with the quality commonly found in Cambodia, and they are implementable.
3. Although there are problems within the body of rules and regulations passed, these do not seem to be impacting the implementation in the field in any serious way due to the use of *prakas* (ministerial decision) for that implementation. Over time, as problems arise, they will need to be addressed.
4. The current pace of decentralisation appears to be moving in accordance with the desire of the government and, according to many commentators, at a speed that is appropriate considering the cultural and capacity context within Cambodia.
5. Prior to the next mandate, clear policies that will guide the drafting of new rules and regulations, as well as amending existing rules and regulations, need to be drafted for both decentralisation as it relates to commune councils and

¹ Commune councils are described here as semi-autonomous due to the fact that there is substantial control from the governmental hierarchy that lies above them.

deconcentration as it relates to provincial and district levels of government (the organic law). The drafting of these policies must be done in conjunction with one another since decentralisation and deconcentration are inextricably linked.

6. In terms of current legislative gaps, the most obvious is the lack of the organic law for provincial and district levels of government. In addition to this, the primary pieces that need to be put in place in the near to medium term include: rules and regulations on the determination of types, rates and procedures for the collection of revenues from fiscal taxes, non-fiscal taxes and service charges for commune councils (this must be done in the context of the harmonisation of fiscal management throughout the government at all levels); rules on administrative fees for delegated agency functions of the commune councils; procedures for selection, taking office and changing of village chiefs, appointment of assistants to village chiefs and the working procedures and duties of the village chiefs; guidelines on commune councils hiring staff as needed; drafting of commune *deika* (local regulations); guidelines on the creation of committees to assist in carrying out the commune councils' duties; and guidelines on the roles and responsibilities of multiple communes working together.
7. The issue of extending the mandate of the National Committee for Support of Communes (NCSC) needs to be addressed within the policy on decentralisation mentioned in point 4 above. If it is extended, then the LAMC and related rules and regulations will need to be amended accordingly.
8. There needs to be a comprehensive, systematic review of the financial/budgetary system if commune councils are to start generating actual tax revenue, as opposed to fees, as envisioned in the LAMC. There needs to be a clear system in terms of what revenue is gathered by the national treasury, the province and the commune in order to avoid issues of over-taxation or double taxation of the citizenry.
9. Nothing has really been done on commune boundary redistricting, though the goal is to have this issue addressed before the next commune elections in 2007.
10. Drafting of the organic law will inevitably impact upon the existing rules and regulations related to decentralisation. In light of this fact, and other issues which are having an impact on the current rules and regulations, a comprehensive, systematic redrafting of the LAMC and the sub-decrees and *prakas* thereunder may be called for. If so, this must be carefully handled, with a clear policy document in place to guide the drafting. If the goal is to have the Organic Law passed before the next commune elections (the government is stating that this is the goal), then this must also be completed before the next commune elections. The two issues are inextricably linked and must be addressed at the same time. This will require coordination and cooperation between the main policy bodies involved (NCSC, CAR, MoI & SEILA), along with strong political commitment by the government.
11. The organic law should address the issue of horizontal coordination of deconcentration amongst the line ministries at the provincial and district levels of government.
12. The NCSC has not had time to review legislation that has an impact on the commune councils, such as the recently passed Social Land Concession Sub-decree. The problem is that agency functions are being delegated without the necessary mechanisms in place to ensure that the required resources (capacity and fiscal) are included.
13. Commune councils have an important role to play in land use and natural resource management, even though they may not have any direct decision-making authority within certain areas, such as the forestry sector, at the moment.

Law Harmonisation in Relation to the Decentralisation Process in Cambodia

1. Introduction and Overview

The primary purpose of this report is to give a general overview of how the current system of rules and regulations is supporting the Cambodian government's commitment to decentralisation.² The report also explores how the body of rules and regulations related to decentralisation links with other governance issues such as deconcentration, fiscal and judicial reform, and land use/natural resources management.

The report will orient the reader with background information on the historical evolution of decentralisation in Cambodia, discuss the development of decentralisation policy, provide an explanation of the legislative system in Cambodia and the rules and regulations that have been enacted related to decentralisation within that system, provide an overview of government structures created or enhanced in support of decentralisation (including commentary on weaknesses within the structures), give a brief overview of the commune councils' roles and duties and provide comment on the current body of rules and regulations enacted, focussing on major issues identified and critical gaps that need to be filled in the short term. In addition, the report will discuss issues surrounding commune boundary demarcation, linkages with deconcentration initiatives, judicial and financial reform and land use/natural resources management. Capacity building will be touched upon only briefly, as this subject matter has been covered extensively in other available documentation. The report concludes with a list of primary findings and recommendations.

2. Historical Evolution of Decentralisation in Cambodia

The present system of local government in Cambodia is a legacy of historical experience dating back before the arrival of the French in the 19th century. The throne exercised supreme authority over its territories through a system that linked villages through a village headman to the higher authority. Structured communes, as distinct administrative units, did not exist as they are currently understood until the arrival of the French. The royal decree of 5 June 1908 marked the legislative origin of the Cambodian commune. The decree established a simple administrative framework by combining family units into a commune. It provided for the election of the commune chief by the inhabitants of the commune.

To bring the administration closer to the people and free the central authority for other duties, the French colonial government from 1919 to 1943 introduced two decrees. The decree of 24 September 1919 gave the commune its own budget and finances, and increased power to the commune chief; a greater role of the communes in governance naturally

² The terminology "rules and regulations" includes laws (*chhabab*), sub-decrees (*anukret*), *prakas* and other legally binding instruments, including guidelines and implementation manuals that are often treated as binding. It should be noted that most guidelines are enacted via *prakas* and therefore are legally binding.

developed as a result. During subsequent years, central authority was strengthened through the introduction of central administrative reforms. This was followed by the decree of 15 November 1925, which gave precise instructions on the administrative, judicial and financial organisation of the commune. It established an elected commune council as a collective body from which a commune chief was selected who was responsible for implementing the council's decisions.

In 1943 there was a reorganisation of communes due in large part to World War II. The communal election system was eliminated and the commune chief and deputy were directly appointed by the provincial governor, with the approval of the French resident. While there was an attempt to restore commune elections in 1955, this was not effectively implemented.

In 1959 a royal decree provided for the "complete overhaul of the law respecting the territorial and administrative restructuring of the Cambodian commune ..." The law was designed to restore the legality of the commune as an institution and mandated the election of both the commune chief and the commune council along the lines of the 1925 decree. However, these provisions were suspended for an indefinite period after the referendum in 1959. As a result, commune councils were not elected, and the commune chief continued to be appointed by the provincial governor. This situation persisted until 1970, when fundamental changes in the country's political system were introduced.

From 1970 to 1992, Cambodia experienced major political upheavals accompanied by a humanitarian crisis of massive proportions from which the country is only beginning to recover. During that period, the country went through five changes in its constitution. In 1970, Cambodia changed from a monarchical to a republican form of government. A new constitution was adopted on 10 May 1972. Following the adoption of a new constitution on 5 January 1976, Democratic Kampuchea was established under the Khmer Rouge regime. Local administration was envisaged at three levels: regional or province, district and collective, divided into commune collective and village collective. Rather than purely local administration per se, the purpose of this tier also related to military strategy and leadership.

Following the collapse of the Khmer Rouge regime, a new constitution was adopted on 25 June 1981, creating the People's Republic of Cambodia. The new constitution called for the reorganisation of the country reflecting the older divisions of provinces into districts and communes, and municipalities into quarters. It required the election of commune and quarter chiefs, while provinces had appointed provincial committees and provincial governors.

The constitution of 13 April 1989 introduced the "State of Cambodia." It also introduced new territorial classifications. At the provincial level, it introduced provincial towns (similar to municipalities, with quarters under their jurisdiction) and district towns (similar to rural towns, with communes under their jurisdiction). The provincial towns constituted the seat or capital of the province. The constitution required election of commune chiefs and quarter chiefs. However, only one election was held under this political dispensation. Governors continued to exercise power over the appointment and dismissal of commune chiefs.

Following the signing of the Paris Peace Accords in October 1991, the present constitution was adopted on 21 September 1993. It introduced a constitutional monarchy. The constitution divides the territory of the Kingdom of Cambodia into provinces and municipalities. There are currently 20 provinces and four municipalities. Each province is divided into districts (*srok*), and each district into communes (*khum*). Each municipality is divided into sections (*khans*), each section into quarters (*sangkat*).³ The constitution stipulates that provinces, districts and communes be governed according to an organic law. An organic

³ The English term "commune" will be used to cover the Khmer terms "*khum*" and "*sangkat*," the English term "district" will be used to cover the Khmer terms "*srok*" and "*khan*," and the term "provincial" will be used to cover both provincial and municipal government entities.

law is one passed by the National Assembly that refers to the creation or organisation of a state institution and its structures.

It should also be noted that although there have been several rules and regulations enacted relating to local levels of government, previous efforts have been largely aimed at consolidating central governmental control and supervision of commune councils' activities. Moreover, there is as yet no comprehensive law defining the relationships, powers and functions between provinces, districts and communes. Except for the organic law that created the roles, duties, and functions of the commune and commune councils, provinces and districts remain in "legal limbo"—a critical issue that needs to be addressed in the country's decentralisation and deconcentration policy reform. As will be discussed later in some detail, the organic law on the structure, roles and duties of the provincial and district levels of government has not been drafted, though there seems to be strong commitment by the government to have it enacted before the next commune elections in 2007.

3. Background and Current Status of Decentralisation in Cambodia

Cambodia takes a unique approach to decentralisation. In most cases decentralisation is considered to be made up of three sub-sets: political decentralisation (devolution of authority), administrative decentralisation (often referred to as deconcentration) and fiscal and market decentralisation (privatisation of government services). Cambodia has made political decentralisation a stand-alone policy and reform initiative that has focussed on the commune level of governance, in which executive and legislative authority has been devolved to the local level with democratically elected councils. Separate from this concept of decentralisation is deconcentration, which individuals in the government commonly view as the delegation of administrative functions and decision-making from the central level of government down to the provincial, district and commune levels. Deconcentration is generally focused on the provincial and district levels of government; administrative deconcentration down to the communes, such as occurs with the granting of agency functions, is often referred to as decentralisation by many within the government. Many within the government seem to view decentralisation as anything that has to do with commune administration and authority, while deconcentration has to do with anything related to governance reform at the district and provincial level.

This disconnection between decentralisation and deconcentration is problematic on the legislative front since the two concepts are interlinked and must be considered in conjunction with one another as rules and regulations are enacted. Unfortunately, a lack of clear policy documents on decentralisation and deconcentration only leads to further confusion within the government on what these two terms actually mean. The concern at this time is that rules and regulation that will be enacted related to deconcentration, such as the organic law, will not link well with rules and regulations that have been and will be enacted, not to mention amended, related to decentralisation.

The current decentralisation process in Cambodia has grown out of the CARERE/SEILA initiatives that began back in 1996, as well as from the initial agenda setting of the government in 1999, with its first steps towards getting the legal framework in place for decentralised governance. With enactment of the Law on Elections of Commune Councils (14 February 2001) and the Law on Administration and Management of the Commune (19 March 2001), the government officially set the decentralisation process in motion. These crucial pieces of legislation were firmly in place to carry out the commune elections held in February 2002, when 1,621 commune councils were elected.

The election of commune councillors was regarded as largely successful and also seen as representing a significant step towards attaining the goals of the reforms. Since the election, much work has been done by the government to support the ongoing decentralisation process. The government has completed the issuance of most, but not all, supporting legal

instruments, organised a network of Provincial Offices of Local Administration (POLA) in all provinces⁴, established various commune council support systems, developed commune council capacity development programmes, prepared various training materials, created a pool of master trainers (trainer of trainers concept) and extended training to the commune councillors and clerks on concepts of decentralisation, commune planning, commune finance and commune project design, implementation and evaluation. Although the efforts to date are commendable, decentralisation is a continuous process, and further work must be done if the reforms are to truly take root and become sustainable.

4. Decentralisation Policy

4.1 Overview of Existing Decentralisation Policy

Conceptually, the decentralisation policy of the government adheres to the subsidiary principle of good governance. The government believes that decentralisation is a system in which the state transfers authority, thereby giving responsibility over certain matters to the local level (communes) to manage and administer locally with the aim of allowing citizens to assist and accept responsibility for managing their own affairs (*Governance Action Plan*, April 2001).

There currently is no clearly written policy on decentralisation in Cambodia that has been formally adopted by the government; mention is made within the Council of Administrative Reform's (CAR) Government Action Plan, the Second Five Year Socioeconomic Development Plan (2001-2005), the Council of Land Policy's Strategy of Land Policy Framework (September 2002) and the National Poverty Reduction Strategy (2003-2005), but these documents do not give any clear guidance on the scope and direction of decentralisation.⁵ It is unfortunate that there is no clear government policy on decentralisation, since there is no guidance on interpretation of the law or directive on how the law is to be further developed, amended, mainstreamed etc.

Though there is no clear policy, it is accepted that the government's programme of decentralisation has three primary objectives:

- Promote pluralist participatory democracy at the local level (including local level democracy and good governance) by the creation of popularly mandated and autonomous local governments (communes) that are responsible to the citizens, represent their interests and make decisions over delivery of public goods and services;
- Promote the culture and practice of participatory development (planning, management, resource mobilisation) at the local level through the commune councils for social and economic development of people; and
- Contribute to reduction of poverty in the country through improvement of service conditions, and create and give access to opportunities for the poor and deprived in local development and delivery of services (inclusiveness in practice).⁶

Unfortunately, these overarching objectives do little to help in terms of developing a clear and comprehensive set of rules and regulations related to decentralisation, nor do they assist in interpreting the rules and regulations once enacted.

⁴ The POLAs are not actual offices with administrative structures in place, but merely DOLA focal points within the province.

⁵ The Ministry of the Interior did issue a memorandum outlining the scope and content of decentralisation in Cambodia (April 2000), but this document was not formally adopted as policy by the government.

⁶ National Poverty Reduction Strategy, p. 108.

In the absence of a clearly written policy paper on the decentralisation process in Cambodia, the government has had to rely solely on the provisions within the constitution⁷ relating to governmental administration in the Kingdom of Cambodia, the Law on the Election of Commune Councils and the Law on Administration and Management of the Commune.

4.2 Entities Involved in Decentralisation Policy Development

In terms of decentralisation policy development, including legislative development that functions as policy in the absence thereof, there are several entities that are involved to varying degrees. Three multi-ministerial bodies are involved: the Council for Administrative Reform, the SEILA Task Force (STF), and the National Committee for Support to Communes. The CAR's involvement is indirect, through its general governance reform initiatives and influence over deconcentration. The STF has been mandated to “design decentralised and deconcentrated mechanisms and systems to manage sustainable local development” and also “evaluate the effectiveness of the decentralised and deconcentration systems in contributing to the implementation of national goals and provide lessons learned to relevant government institutions for preparation of policy and regulations.”⁸ The NCSC has the primary duty of overseeing the decentralisation policy development prior to the next election, with its mandate explicitly stating that it is responsible for “preparing and carrying out the decentralisation policy.”⁹

In addition to these entities, the various line ministries also provide input into the development of policy and legislation based on their jurisdictional areas of competence. The primary ministry involved is MoI, which has jurisdiction over provincial and district levels of government, the Department of Local Administration (DOLA), and Provincial Offices of Local Administration (POLA), and is also responsible for assigning and managing the Commune Clerks. The Ministry of Economy and Finance (MEF) also plays a key role, because it has primary oversight over the commune financial system and will develop and regulate the system of commune own-source revenues. The Ministry of Planning is responsible for development of commune development planning procedures. The Ministry of Rural Development traditionally has assisted with village planning and village interaction with the communes, and thus will have a say in any rules and regulations related to the role of the village in decentralised governance. The multitude of other sector ministries—for example Agriculture, Forestry and Fisheries; Health and Land Management, Urban Planning and Construction—can provide input into their areas of expertise, and also delegate agency functions to the communes in support of the decentralisation policy.¹⁰

With so many parties having potential input into decentralisation policy, it is important to have a primary coordinating body that has oversight of policy development, including legislative developments, as law often takes the place of policy when clear policy documents are not in place. This role has been handed to the NCSC, but there are questions as to how well the coordination takes place. For example, the NCSC has been so busy with its other duties, such as assisting with the drafting of the rules and regulations directly affecting the administration of the commune, that it has had little time to review other rules and regulations that may have an impact on communes, such as the Social Land Concession Sub-decree, which delegates rather complicated duties to the commune councils but does not appear to make any provisions for providing capacity or financial support as required by law.¹¹

⁷ Articles 145 and 146.

⁸ STF Sub-decree, Article 3.

⁹ NCSC Royal Decree, Article 3.

¹⁰ MLMUPC has done just this with the enactment of the Social Land Concession Sub-decree.

¹¹ See Section 10.1.1, on the granting of agency functions to commune councils, for further discussion of this important issue.

Besides being overburdened by its current mandate, this important decentralisation policy coordinating body will face the end of its term, as required in the LAMC, nine months before the next commune elections.¹² Policy and legislative development will continue beyond that time; who will continue the current role of the NCSC? If the NCSC is to continue its mandate, then the LAMC may have to be amended accordingly by the National Assembly. Due to the amount of time it takes to have laws passed or amended, a decision on whether the NCSC's mandate will be extended should be made no later than early 2005.¹³

4.3 Current Decentralisation Policy Development

As already stated, other than the rules and regulations that have been put into place and some rather broad statements on the concept, there is no clear policy guiding the decentralisation process at the moment. In conversations with individuals working within DOLA, it is reported that the government is currently reviewing the experiences gained and lessons learned to date with the objective of creating a long-term decentralisation policy implementation strategy. The NCSC is reported to be taking the initiative to mobilise technical support to develop this long-term implementation strategy, with completion scheduled for sometime in 2004. In support of these reports are comments made by the prime minister during his closing remarks at the First National Congress of Commune Councils in May 2003, where he stated that a clear policy implementation strategy has to be developed that addresses important thematic areas, including the establishment of provincial and municipal governance structures. This statement illustrates both a political commitment to long-term strategic decentralisation policy development and the important link between decentralisation and deconcentration.

4.4 Recommendation for Policy Development

A clear decentralisation policy should be put into place that not only outlines what future steps need to be taken, but also clearly spells out what the roles, rights and responsibilities of the various entities are and how procedures are to be properly followed. In other words, a single policy document needs to be drafted that outlines in simple, easy to understand language, what structures are created, who has what authority, who does what when, and what remedial procedures are in place when there are breakdowns in the system. In this way the policy acts as a clear guide that is used for the drafting and amending of rules and regulations, and can also be used for interpretation and educational purposes.

In conjunction with the development of such a policy document, the development of a similar policy document related to deconcentration and the roles and structures of provincial and district levels of government, which will lead to the effective drafting and enactment of an organic law, needs to be completed. It is essential that there is close coordination and cooperation between the various entities involved in the development of these policy documents and the drafting of the related rules and regulations.

5. Legal Framework

This section provides a general overview of the legislative system in Cambodia and the Primary rules and regulations that have been enacted in support of the existing policy on decentralisation.

5.1 Overview of the Legal System in Cambodia

The legal system in Cambodia exists within the overall governance structure that is created under the constitution, which is the supreme law of the land. The governmental system is intended to maintain a clear separation of powers between the legislative, executive and

¹² LAMC, Article 87, Para. 3.

¹³ See section 5.1, Overview of the Legal System in Cambodia, for an understanding of the time involved in the legislative process.

judicial branches. “The separation of powers ensures that no element or branch of government can assume absolute or dictatorial power, and it is a safeguard for the people against abuses of state power.”¹⁴ Due to weakness and lack of capacity within both the legislative and judicial branches, this separation of powers does not work as effectively as it should, with the executive branch, headed by the prime minister, wielding most of the power and influencing the decision-making in the other two branches. The judicial branch is the weakest of the three, though efforts are being made to rectify this situation, such as the recent adoption of a legal and judicial reform policy drafted by the Council for Legal and Judicial Reform.

The legislative branch is divided into the National Assembly and the Senate, with the authority to approve and amend legislation initiated by them or by the government. The executive branch consists of the prime minister, the Council of Ministers (or the Royal Government) and the various line ministries. The judicial branch consists of 19 provincial courts, two municipal courts, a military court, and an Appeals and Supreme Court in Phnom Penh. The Ministry of Justice and the chief prosecutor implement criminal law and procedure and oversee judicial police in the enforcement of all legislation through the courts.¹⁵

The laws and regulations of Cambodia are hierarchical, and each 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:

1. Constitution
2. Laws (*chhabab*)
3. Royal Decrees (*reachkret*)
4. Sub-decrees (*anukret*)
5. Ministerial decision (*prakas*)
6. Circulars (*sarachar*)
7. Local regulations (*deika*)

Within this hierarchy, general observations can be made on time and scope. The higher the level of the instrument that is being enacted, the greater the amount of time required due to the various levels of review it must go through. For example, a law that is drafted at the level of the government must go through a review process at the (CoM), the National Assembly and finally the Senate, while a *prakas* is simply reviewed within the ministry that is promulgating it.¹⁶

Another aspect that should be considered is the 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* are binding only within the ministry in which they are promulgated, and *deika* apply only to the geographical area of the province or commune that enacts them. These issues of time and scope are more fully explored in the detailed explanation of the different legal documents below, and as illustrated with the “time vs. scope” chart in Annex A.

Law: *Chhabab* are the primary source of law in Cambodia. *Chhabab* are the laws passed by the National Assembly (lower house) and the Senate (upper house). The *chhabab* is often

¹⁴ Legal and Judicial Reform Policy, p. 8, as adopted by the Council of Ministers (20 June 2003).

¹⁵ Constitution, Chapters 7-11.

¹⁶ After promulgation, laws may also be reviewed for constitutionality by the Constitutional Council, but only upon the request of the King, the President of the Senate or National Assembly, the Prime Minister, one-fourth of the members of the Senate, one-tenth of the members of the National Assembly or the courts. The Constitutional Council has no authority to review laws on non-constitutional issues, nor does it have authority to review other legal instruments such as Sub-decrees or *Prakas*.

confused with the *kram*, which is a form of royal decree used for the promulgation of a *chhab* by the king or head of state. The process of promulgating a law that is proposed by the government is rather time consuming, as already mentioned, and generally goes ahead according to the following procedure:¹⁷

1. Preparation of a draft law by a technical line ministry, such as MoI;
2. Discussion of the draft law in inter-ministerial meetings (or, if need be, within the concerned ministry itself). Interested stakeholders (donors, civil society, private sector etc.) are often also consulted;
3. Study of the draft law by the Council of Jurists under the Council of Ministers to check conformity with the constitution, coherence with existing legislation etc.;
4. Discussion of the draft law at the inter-ministerial level under the Council of Ministers;
5. Examination and adoption of the draft law by the Council of Ministers;
6. Submission of the draft law to the National Assembly. Draft laws are submitted in a written format accompanied by a “Statement of Purpose” to the Permanent Committee of the National Assembly for distribution to all deputies. The Permanent Committee forwards the draft law to a specialised commission for review. After such review, the chairperson of the commission presents the opinions of the commission to the National Assembly;
7. Examination and debate of the draft law, including modifications, at the plenary session of the National Assembly;
8. Vote on the draft law by the National Assembly (simple majority);
9. Submission of the adopted law to the Senate, which has to review and provide a recommendation within no more than one month. For urgent matters, the period is reduced to seven days. If the Senate does not provide a recommendation within the time limit stipulated, the law is promulgated. If the Senate calls for changes, the National Assembly shall take them into account immediately. In the second review of the adopted law, the National Assembly must adopt it by an absolute majority;
10. Promulgation of the law by the king or the head of state (*kram*).

Any decisions to amend the LAMC will have to take into account the procedures and time constraints involved.

Royal decree: The constitution states, “... 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 ...”¹⁸ This provision has been utilised by the government 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 used 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 in the area to be legislated. Once drafted, the sub-decree is submitted to the Council of Ministers for

¹⁷ This procedure applies to amendments to laws as well.

¹⁸ Constitution, Article 21.

examination and adoption.¹⁹ Once adopted by the Council of Ministers, the sub-decree is signed by the prime minister and countersigned by the minister or ministers in charge of implementation and enforcement. Authorisation 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 wide.

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 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 ministry within which they 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* is 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 *sarachar*, 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*, they 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. Likewise, commune level *deika* cannot conflict with provincial level *deika*.

5.2 Primary Rules and Regulations Enacted in Support of Decentralisation

As evidenced by the list of rules and regulations that have been passed, listed in Annex B, a very large, complicated and rather difficult to follow body of legal documents has been enacted in support of decentralisation over a relatively brief period of time. Credit should be given to the government for managing to put into place this legislative framework in such a brief period, especially considering the fact that this overall structure has enabled the implementation of decentralisation policy in Cambodia. The following is a list of the primary rules and regulations that have been enacted.

Law on the Administration and Management of the Commune: This is the law which has acted as the key policy document and blueprint for the programme of decentralisation. It lays out the key elements related to the roles, duties and functions of the various entities involved in decentralisation, and gives authorisation for the supporting legal documents that need to be enacted, though no timeframes 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*.

Law on the Elections of 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 2002. It is indicative of the strong political commitment to the decentralisation process that this document was passed in this form.

Royal Decree on the Creation of the NCSC: This Royal Decree outlines the roles and responsibilities of the NCSC.

¹⁹ The steps taken for passage of a sub-decree essentially mirror steps 1-5 for the passage of a law.

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 commune clerks.

Sub-decree on the Establishment of the Commune Fund: Provides details for the establishment and management of the commune fund, including basic rules for commune fund deposits with 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: Provides details for commune financial management, including rules on the formulation, approval and implementation of the commune budget, the accounting and payment systems, financial reporting, revenue and expenditure management, management of durable assets and auditing of accounts and operations. This is an important piece of the puzzle, because 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: An important, and often 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 MoI to DOLA.

Prakas on the Delegation of Powers to Provincial Governors in Support of Commune Councils: This *prakas* represents a temporary fix until an organic law on provincial and district government is drafted and enacted.²⁰ 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 to the provincial level of government, since the delegated responsibilities could never be handled by one individual alone.

Prakas on the Roles, Responsibilities and Organisational Structure of the Provincial Rural Development Committee of the SEILA Programme: Like the governor's *prakas* above, this *prakas* represents a temporary fix until an 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, who 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. It is important since, like financial management, it is one of the few clearly defined roles of the commune councils that have been established and understood.

6. Government Structures Created in Support of Decentralisation

The purpose of this section is to give an overview of the governmental structures that have been created in recent years as a result of the government's decentralisation policy, particularly as it relates to commune councils and their interaction with other levels of government. This analysis focuses on those structures and lines of communication created under the LAMC and the related rules and regulations, and the structures created at the provincial and district level under the "*Prakas* on Establishment of Structure, Roles and Responsibilities of the Provincial/Municipal Rural Development Committee of the SEILA Programme," (PRDC *Prakas*). Included are the structures and entities that have been created at the national, provincial, district, commune and village level under the various legislative

²⁰ See also Section 6 on government structures created in support of decentralisation.

constructs, and those previously existing entities that have new responsibilities in direct relation to the commune councils.²¹

This section not only attempts to give the reader an overview and understanding of the general structures that have been created within a rather complex and confusing set of rules and regulations, but also points out areas where there are administrative gaps or conflicts within the newly created structures. As was previously mentioned, the existing rules and regulations have been passed in a relatively short time, and the system cannot be expected to be perfect.

6.1 National Level

The entire government at the national level, including the prime minister, the Council of Ministers, the various ministries and other government entities (such as the Council for the Development of Cambodia, CDC), are involved in the programme of decentralisation to varying degrees. This section focuses only on those entities that are directly involved in implementing the programme or that have been created specifically for this purpose.

6.1.1 National Committee to Support Communes

The NCSC was established, under authorisation found in the commune law, by royal decree. The NCSC is a multi-ministerial committee, intended to be temporary in nature,²² which is responsible for policy and legislative development, monitoring, coordination, guidance, support and enforcement²³ issues related to commune councils and decentralisation. In addition, the NCSC is responsible for certifying whether rules and regulations are consistent with the commune law and policy of decentralisation, including granting prior authorisation to any ministry or government institution that intends to delegate power or responsibility to the commune councils (granting of agency functions).²⁴

The NCSC is chaired by the minister of interior²⁵, co-chaired by the minister in charge of the Council of Ministers, and has ministerial level representation from the Ministry of Economy and Finance, Ministry of Rural Development (MRD), Ministry of Land Management Urban Planning and Construction, Ministry of Planning (MoP) and Ministry of Women's and Veterans' Affairs (MWVA). Direct hierarchical lines of communication exist between the NCSC and DOLA, which acts as the secretariat to the NCSC. In addition, horizontal lines of communication and coordination exist between the NCSC and other ministries.

Within the NCSC there are five multi-ministerial subcommittees that study, evaluate and provide reports on their respective subject matters and responsibilities to the NCSC. Coordination and support to the subcommittees are provided by DOLA as secretariat to the NCSC. The five subcommittees created are as follows:

- Subcommittee of planning and commune socioeconomic development
- Subcommittee of commune financial affairs

²¹ The Council for Administrative Reform is not included in this analysis, since it represents a stand-alone policy board located within the Council of Ministers that should not be considered as part of a newly created government structure.

²² The mandate of the NCSC ends nine months prior to the next commune council elections in 2006.

²³ Ensuring proper implementation and compliance with relevant provisions.

²⁴ The legal review function of the NCSC has not been exercised to date. The NCSC has been so burdened by the process of putting in place the many rules and regulations related to commune councils and decentralisation that there has been no time to handle this additional duty. This issue needs to be addressed, since legislation granting agency functions to the communes, such as the Social Land Concession Sub-decree, are being passed without proper review from the NCSC.

²⁵ In instances where there are co-ministers of interior, they will both be co-chairs of the NCSC.

- Subcommittee of urbanisation and commune boundaries
- Subcommittee of commune structure and functioning
- Subcommittee of education, training and capacity building

It should be noted that something will need to be done regarding the limited mandate of the NCSC prior to the next commune council elections. A permanent body should be created to take up the ongoing responsibilities of the NCSC, the responsibilities should be delegated to an already existing body, such as DOLA, or the mandate of the NCSC should be extended. Whichever course is taken, the LAMC and the rules and regulations thereunder that are impacted will need to be amended.

6.1.2 Department of Local Administration

DOLA was established, under authorisation found in the commune law, by *prakas* issued by MoI. DOLA acts as an assistant to the Department General of Administration of the Ministry of Interior on decentralisation and commune administration; in addition, it acts as the secretariat to the NCSC.

DOLA has been given a laundry list of responsibilities and duties related to the administration of the commune at the national level and the overall implementation of the government's programme of decentralisation. These responsibilities and duties include, but are not limited to, ensuring implementation of decisions of the NCSC, monitoring and evaluating both the overall implementation of decentralisation policy and delegated activities of the commune, supporting and coordinating education, training and capacity-building activities for the commune, establishing and supporting mechanisms for conflict resolution related to the commune, maintaining and extending the rules, regulations and guidelines related to decentralisation, coordinating to prevent any interference into the affairs or management of the communes etc.

The overall DOLA structure is broken down into six offices with specific roles and functions as follows:

- Office of Administration
- Office for Monitoring, Control and Support of the Commune
- Office for Education and Capacity Building
- Office for Planning, Statistics and Information
- Office of Finance
- Office for Technical Research

In terms of the lines of communication within the hierarchical structures of the government, DOLA acts as the primary channel of communication between the MoI/NCSC and the provincial levels of government²⁶ (which then filters down to the district, commune and village levels), between MoI/NCSC and other ministries and government agencies on issues related to the commune and decentralisation, and between MoI/NCSC and international organisations, civil society (NGOs) and the private sector.

²⁶ The Ministry of Interior has created a Provincial Department of Local Administration. These offices, which are really just DOLA focal points at the provincial level of government, are understaffed but augmented by personnel from the Local Administration Units that are authorised under the *prakas* on the Delegation of Power to the Provincial/Municipal Governor in Support of the Commune/*Sangkat*. The roles and duties of the Local Administrative Units are clarified in the *prakas* on the Establishment of Structures, Roles and Responsibilities of the Provincial Rural Development Committee.

6.1.3 SEILA Task Force

The SEILA Task Force is the government entity that has been created, through the Sub-decree on the Establishment and Operations of the SEILA Task Force, at the national level to offer structural support to the government's SEILA programme. Defined broadly, the SEILA programme's primary purpose is to contribute to poverty alleviation through good governance, institute decentralised systems and strategies to manage sustainable local development, and act as an aid mobilisation and coordination framework in support of the government's commitment to decentralisation.

The STF sub-decree outlines the primary duties of the STF, including overall implementation of the SEILA programme, facilitating the discussion and formulation of government policies related to decentralisation, monitoring and evaluating the effectiveness of decentralisation policy implementation, and conducting capacity building within government structures. These duties apply from the national down to the local level as they relate to the implementation of decentralisation reforms. At the national level, the STF links horizontally with both the NCSC and DOLA and other relevant ministries. Vertically, the STF links to the Provincial/Municipal Rural Development Committees (PRDC).

Similar to the NCSC, the STF is a multi-ministerial body made up of the following members:

1. Minister of Economy and Finance	Chairperson
2. Minister of Water Resources and Meteorology	Deputy Chairperson
3. Secretary of State, Ministry of Rural Development	Deputy Chairperson
4. Secretary of State, Ministry of Planning	Member
5. Under-Secretary of State, Ministry of Agriculture, Forestry and Fisheries	Member
6. Under-Secretary of State, Ministry of Women's and Veterans' Affairs	Member
7. Under-Secretary of State, Ministry of Social Affairs and Labour	Member
8. Director-General, Department of General Administration, Ministry of Interior	Member
9. Deputy Secretary General of Council for Administrative Reform	Member
10. Deputy Secretary-General of CDC, Secretary-General of CRDB	Secretary-General

The STF includes a secretariat, located within the compound of the CDC, which includes two units: the Programme Operations Unit and the Policy Monitoring and Evaluation Unit. The two units function on an equivalent level as departments within a line ministry and are essentially responsible for the day-to-day operation and implementation of the SEILA programme.

It should be noted that the STF, like the NCSC, has the ability to draft sub-decrees for submission to the CoM and to implement *prakas* directly. This is evident in the fact that the STF drafted and implemented the “*Prakas* on the Establishment of Structures, Roles and Responsibilities of the PRDC of the SEILA Programme” (PRDC *Prakas*).

6.2 Provincial, District and Commune Level

6.2.1 Background on Structure

It is important to understand that the current governmental structure at the provincial and district level is essentially in the process of being put in place. The existing legislation outlining the overarching roles of government at the provincial level, known as the “*Prakas* on the Roles, Responsibilities and Organisational Structure of the Provincial and Municipal Administrations,” was enacted in 1994, long before the concepts of decentralisation were adopted by the government. An illustration of just how out of step this existing *prakas* is with

the current programme of decentralisation is the fact that it mandates an “office of centralisation” within its framework.

The ultimate solution to this problem will be the enactment of an organic law on provincial and district government that will repeal the *prakas* in question.²⁷ A task force has been established within MoI to draft this law, and a draft is expected to be released in the coming year. This law will permanently establish the structures, roles and duties at the provincial and district levels that will support and tie into the current framework of decentralisation.

It was recognised by the government that putting this permanent structure in place prior to the creation of the new commune councils would not make strategic sense, as time was needed to pilot temporary structures and explore what systems would actually work in support of the system of decentralisation. The creation of these temporary pilot structures was handled through the passage of the “*Prakas* on Delegation of Powers to the Provincial/Municipal Governors in Support of Commune/Sangkat Councils” (Governor *Prakas*, passed by MoI) and the PRDC *Prakas*.²⁸

There tends to be confusion regarding the PRDC *Prakas*, with some people misinterpreting the structures created by it as being somehow parallel to other structures in the government at the provincial and district level. The truth of the matter is that there are currently no other structures for these to be parallel with, which is precisely why they needed to be created in the first place. These structures act as a temporary “fix” that is applied nationwide, the lessons from which will feed directly into national policy on decentralisation and the drafting of the organic law. Upon passage of the organic law, those employed within the PRDC structures will most likely move into the newly created structures, and the old structures will cease to exist. In the meantime, the PRDC and structures created therein should be considered as an integral part of the government structure at the provincial and district level.

6.2.2 Provincial Governor’s Office

The Governor *Prakas* essentially delegates the monitoring, evaluating, capacity building and support functions of the NCSC, MOI and DOLA down to the provincial level of government. There is some confusion caused by the language used for the delegation, as it refers directly only to the provincial governor. The delegation, which is quite broad and contains many functions and duties, could not possibly be handled by one person alone, and therefore it should be understood that the delegation is to the various staff and departments at the provincial level, with the governor acting as the focal point. This is evident from the fact that the Governor *Prakas* establishes the Local Administration Unit (LAU), otherwise commonly known as the Provincial Office of Local Administration,²⁹ within the provincial governor’s

²⁷ The constitution explicitly states that provincial and district levels of government shall be governed in accordance with organic law.

²⁸ It should be noted that the PRDC *Prakas* has been rewritten several times, replacing previous versions, based on lessons learned during the ongoing pilot process, with the most recent version being enacted in November 2002. This *prakas*, along with the Governor *Prakas*, will be replaced by the organic law on provincial and district government.

²⁹ The Governor *Prakas* states that the organisation and functioning of the Local Administration Unit shall be determined by a separate *prakas* of the Minister of Interior. This was done through the inter-ministerial *prakas* on commune/sangkat development planning, which uses the term “Provincial Department of Local Administration,” not the Local Administration Unit terminology. This causes some confusion because the PRDC *Prakas* creates an entity called the Local Administration Unit that is under the direct supervision of the Provincial Office of Local Administration (See section 6.2.4). The POLA terminology is what is commonly used, and is the term that shall be used throughout this paper. This confusion should be clarified in the enactment of the organic law, as already mentioned.

office acting as the secretariat of the governor in implementing the government's policy of decentralisation. The delegation of the duties is also carried down to the various management units created under the PRDC Prakas.³⁰

Another important role of the governor's office that should be mentioned is that the provincial treasury handles all of the commune fund receipts from the national level and disbursements to the communes. The provincial treasury, which is technically part of the MEF, acts as the commune councils' bank and accountant. The basic rules for commune fund deposits to the provincial treasury, and rules outlining the roles and duties of the provincial treasury, are outlined within the Sub-decree on the Establishment of the Commune Fund (Commune Fund Sub-decree) and the PRDC *Prakas*; additional roles duties and functions of the provincial treasury are spelled out in the Commune Financial Management System Sub-Decree mentioned earlier. There is language within the Commune Fund Sub-decree authorising the commune councils to open an account with a commercial bank for the deposit of commune funds, but authorisation for this alternative has not been granted by the MEF. At this time the provincial treasury manages nearly all commune financial activities, including the collecting and acknowledging receipt of commune revenues (after transfer from the commune to the provincial treasury), execution of payment orders issued by the commune chief, management and release of funds, recording transactions in accordance with government procedures, preparation of monthly, mid-year and annual financial reports, which are to be checked (in practice, by the commune clerk) and approved by the commune council (signed by the commune chief), and maintaining the filing system for all commune financial documents and records. Because of the high level of involvement of the provincial treasury in commune financial affairs, the decentralisation of financial management can be described as rather weak at the moment.³¹

In terms of lines of communication and hierarchy, the provincial governor is the official link between DOLA and the MoI/NCSC at the national level and lower levels of government at the district, commune and village levels. It should be noted that communication from lower levels is supposed to be done through the POLA.³² There is also some confusion as to how the provincial governor's office links to the STF at the national level. Since the governor is chair of both the PRDC and the executive committee of the PRDC, the governor links to the STF directly through these structures.

6.2.3 Provincial Rural Development Committee

As previously mentioned, the PRDC *Prakas* establishes this committee. The primary roles and functions of the PRDC are related to the provincial planning and support activities supported by the SEILA programme, though the structures created beneath the PRDC provide direct support to the commune councils through the provincial and district levels of government. The PRDC also provides an important collaboration and coordination role between the various line ministries and government institutions, the private sector, civil society and national/international donor agencies as they relate to the planning and management of development at the provincial level.

The PRDC is composed of the provincial governor, deputy governor, directors of the departments of Rural Development and Planning, directors from technical departments, and district chiefs.

³⁰ See Section 6.2.3

³¹ This is not to suggest that the current level of financial decentralisation is incorrect. The fact of the matter is that commune councils do not have the capacity at this time to handle these complicated financial matters.

³² The Commune Development Planning *Prakas* states that the POLA shall provide a single interface to the commune councils for all their contacts with the provincial administration.

The execution of the annual work plans and budget of the PRDC, or what can be considered the day-to-day work of the PRDC, is carried out by an executive committee (ExCom). The ExCom is made up, at a minimum, of the governor, deputy governor, directors from the departments of Rural Development, Planning, Economy and Finance, Agriculture, Forestry and Fisheries, Water Resources and Meteorology, Women's and Veterans' Affairs, the director of the provincial treasury, and the chief of the LAU.³³ The governor, acting as chair of the ExCom, may appoint any members as permanent members, and can appoint additional directors from other departments as members in accordance with work requirements.

In order to assist the ExCom in fulfilling its responsibilities in implementing the annual work plan and budget, the PRDC *Prakas* establishes four management units that report directly to the ExCom: the Contract Administration Unit (CAU), the LAU, the Technical Support Unit (TSU) and the Finance Unit (FU). The existence of these management units complicates the lines of communication between the commune councils and the governor and presents a possible conflict of law.³⁴ Instead of the POLA being the direct link and focal point between the commune council and the governor, the existence of these units creates a line of communication from the commune council to the management units, which then report directly to the ExCom, thereby completely bypassing the POLA. This is especially true with the TSUs, due to their direct involvement with contracting services related to infrastructure/construction projects. This is probably not a major problem, since the governor chairs the ExCom, and any issues related to lines of communication and inefficiencies in the system can be worked out in the development of the organic law.

6.2.3.1 Contract Administration Unit

The CAU is under the direct supervision of the provincial Planning Department and is responsible for a broad range of duties, including but not limited to assisting in the preparation of the annual work plans and budgets, monitoring and evaluating the work plans and budgets, handling all matters related to contract administration at the provincial and district levels of government (including contractual activities of the various ministerial line departments), handling personnel matters for the ExCom, and management of structures and equipment. In terms of how the CAU is directly involved with decentralisation at the commune level, it is to coordinate with the LAU to ensure consistency between monitoring and evaluation systems at the commune and provincial levels, and also collaborate with the LAU in preparation of materials that can be understood by villagers to promote an understanding of decentralisation principles and local awareness of activities mandated to commune councils and commune development plans.

6.2.3.2 Local Administration Unit

The LAU is under the direct supervision of the POLA, and includes in its organisation both Provincial Facilitation Teams (PFT) and District Facilitation Teams (DFT). The LAU is the primary body under the ExCom that is directly involved with supporting decentralisation at the commune level. The LAU has two primary functions: capacity building aimed at the commune councils and commune clerks, and monitoring, evaluation and data collection on the activities of the commune councils. The capacity building functions are carried out with assistance from the PFT and DFT, with one of the stated roles of the LAU being training of the PFT and DFT (training of trainers), including collaborating with line ministry departments or other government entities that have competence in specific subjects.³⁵

³³ In many areas of the country, the chief of the LAU is the POLA/DOLA focal point at the provincial level.

³⁴ See footnote 28 above.

³⁵ An example of this would be where the LAU collaborates with the Department of Economy and Finance and the provincial treasury to provide training to the PFT and DFT in the procedures of the commune fund system.

6.2.3.3 Technical Support Unit

The TSU is under the direct supervision of the provincial Department of Rural Development and provides technical services to provincial and commune levels of government on matters related to infrastructure/construction projects, including advice to commune councils on competitive bidding procedures, procurement of contracts, and monitoring of construction/infrastructure project implementation. As part of their duties, the TSUs maintain information on current prices of construction-related goods and services, pre-qualified contractors who have the right to bid on contracts and other data related to construction/infrastructure projects.

6.2.3.4 Finance Unit (FU)

The Finance Unit is under the supervision of both the provincial Department of Economy and Finance and the provincial treasury. The FU is responsible for providing assistance to provincial and commune levels of government, including the ExCom itself, on all aspects of proper financial management, including monitoring and evaluation services.

6.2.4 Provincial Office of Local Administration

The POLA is essentially the line ministerial office that is directly under DOLA. As already mentioned, this office is created through grants of authority from both the Governor *Prakas* and the Commune Development Planning *Prakas*. The Commune Development Planning *Prakas* states that the POLA is responsible for instructing the communes on what they should do to comply with the development planning process, and that the POLA shall provide a single interface for *all* their contacts with the provincial administration.

The issue of the POLA providing a single interface is backed up with language stating that before the procurement of any works, goods or services to implement projects, the commune chief shall seek technical clearance from the relevant provincial departments through the POLA. However, as already mentioned, this is really not the case.

As previously mentioned, the POLA is not an office at all at the moment, but an appointed focal point for DOLA at the provincial level. Usage of the term “office” has predictably caused some confusion.

The actual role of the POLA and its interaction and oversight of the LAUs are unclear. How the system is implemented through lines of communication is handled differently from province to province, but the system seems to work. The lack of clarity in relation to these different entities will be handled through the drafting of the organic law, so no short-term fix within the current body of legislation is necessary at the moment.

6.2.5 District Level of Government

The roles and functions of the district level of government, including the roles and functions of the district chief, are not well defined, as explained in section 2.³⁶ The various line ministries have district level offices, with the district chief playing a coordinating role. The district chief and the line ministry district offices largely operate based on direct instruction from the province, with little autonomous authority.

Traditionally, the district chiefs exercised quite a bit of control over the commune councils, with the district chief presiding over all commune council meetings, according to law. How much influence the district chief continues to have is uncertain. It is probably more likely that the district chiefs now act largely, in addition to their coordination role, as conduits

³⁶ The terms district chief and district governor are used interchangeably. In this paper, the term district chief will be used.

of information from the commune level to the provincial level, as many district chiefs often bring all the commune chiefs together for weekly meetings.

The roles and functions of the district level of government should be clarified when the organic law is enacted.

6.2.6 Commune Level of Government

The newly elected commune councils and the structures therein represent the current system at the commune level. At this time the structure is rather straightforward and uncomplicated, but it will develop over time as commune chiefs create various administrative committees,³⁷ agency functions are delegated to commune councils by the various line ministries, and additional staff are hired to carry out added responsibilities.

Currently the commune council is made up of five to 11 members, based on demographics and geography. The commune council is headed by a commune chief, who handles many of the day-to-day administrative tasks, such as preparation of the commune development plans, appointing administrative committees, advising the rest of the council on a variety of matters, and supervising the commune clerk. Commune councils may delegate specific duties to the chief, except for the following: adoption of commune budget plans, the imposition of rates for local fiscal taxes, non-fiscal taxes and various service charges, the voting to adopt internal rules and regulations and resolutions of the commune, the adoption of commune development plans and other matters determined by the MoI.

Beneath the commune chief are the first and second deputy chiefs, who act as assistants to the chief. The first deputy assists the commune chief on financial and economic matters, while the second deputy is responsible for assisting the chief on matters of administration, social affairs, public services and public orders.

As already mentioned, the current rules and regulations mandate that the commune chief establish a planning and budgeting committee, which is responsible for assisting the chief in creating and implementing the commune development plan, investment plan and annual budget. The planning and budgeting committee is chaired by the commune chief and includes as members three other councillors, two village authority representatives chosen by the commune council, two to four citizens from the commune chosen by the commune chief, and the commune clerk, who acts as secretary.

In addition to the planning and budgeting committee, the Sub-decree on Commune Financial Management System mandates the creation of a procurement committee. This committee is made up of the commune chief or his/her delegate as chairperson, two other councillors as members, the commune clerk as secretary and any other individuals invited by the chairperson as observers. The commune chief currently has authority to create additional committees and subcommittees based on recognised needs of the commune, but there currently are no guidelines on how exactly these should be set up.

In support of the commune council is a commune clerk appointed by the MoI. The commune clerk primarily acts as a secretary to the council and has no decision-making or disciplinary authority over it. The commune clerk is responsible for informing the commune councils on requirements under the law, and so acts in a way as in-house counsel. The clerk handles all incoming and outgoing correspondence, assuring that incoming is properly received and understood, and that outgoing correspondence and documents are properly formatted, accurate and legally correct.³⁸ Another aspect related to lines of communication is

³⁷ It is reasonably foreseeable that some committees may in the future be required by law in addition to the currently mandated planning and budgeting committee.

³⁸ Protocol is very important in Cambodia. DOLA is currently drafting detailed guidelines on the proper format of correspondence from commune councils to other entities such as district and provincial governors.

that the commune clerk can communicate directly with the MoI at the national level, including on issues of importance to the commune. Many have criticised the fact that the councils are locked into a system of line communication that overly respects hierarchy, such that the commune council can communicate with the national level only through the provincial governor's office. The commune clerks, with their ability to report directly to the MoI if requested to do so by the council, offer a means for getting around this.³⁹

In addition to the entities at the commune level that have already been mentioned, there is also mandated in the Sub-decree on Decentralisation of Power, Roles and Duties to Commune Councils that the commune council appoint one woman councillor to be in charge of women's and children's affairs. If there is no woman councillor, then a woman from the commune will be appointed as an assistant to the councillor in charge of women's and children's affairs.

Commune councils can work together and make joint agreements with other commune councils, though the *prakas* that outlines the roles and responsibilities of councils working together has yet to be promulgated. A policy study on this issue is currently being conducted by UNDP.

6.2.7 Village Level of Government

Since the constitution does not recognise the village as a level of government, village structures are merely an administrative arm of the commune. If villages in Cambodia were ever to be given actual executive and legislative authority such that they became autonomous units of government, as has been done with commune councils, the constitution would need to be amended.

The current body of rules and regulations authorises commune councils to appoint a village chief, who acts as the main conduit of information and communication between the council, including council committees, and the village. The village chief appoints a deputy village chief and a village assistant. According to Article 26 of the Sub-decree on Decentralisation of Powers, Roles and Duties to the Commune Councils, at least one of the three must be available to meet with villagers once a week in a designated meeting place.⁴⁰

At this time, the rules related to the procedures for selection of village chiefs, the taking of office, the changing of village chiefs and appointment of assistants to village chiefs, along with the rules related to the working procedure and duties of the village chiefs, have yet to be promulgated.

Another structure that exists in some, but not all, villages is the Village Development Committee (VDC). The VDCs tend to be project-based entities that function with varying degrees of effectiveness. This structure could be replaced by the rules mentioned above, so that commune councils can have effective administrative structures at the village level that fit well within their overall roles, duties and functions; this issue should be thoroughly examined by the government prior to implementation of said legislation.

7. Roles, Duties and Functions of Commune Councils

The LAMC and Sub-decree on Decentralisation of Roles, Duties and Functions to the Commune outline very broad and general duties of the commune councils. The LAMC defines their duties as follows:⁴¹

³⁹ See Article 5, *Prakas* on Delegation of Roles, Duties and Rights of the Commune Clerk.

⁴⁰ Since the relevant *prakas* has yet to be enacted, it cannot reasonably be expected that such a provision would be enforced.

⁴¹ Article 43 of the LAMC.

1. Maintain security and public order.
2. Arrange necessary public services and be responsible for the good functioning of these affairs.
3. Encourage the creation of contentment and well-being of the citizens.
4. Promote social and economic development and upgrade the living standards of the citizens.
5. Protect and conserve the environment, natural resources and national cultural heritage.
6. Encourage mutual understanding and tolerance among citizens.
7. Perform general affairs to meet the needs of citizens.

The roles, duties and functions sub-decree, which is supposed to add detail and definition to the above duties but does little to provide clarity, reiterates the language and adds the following:

1. Promote and facilitate the development of the commune by invoking assistance and mobilising capacities.
2. Promote and coordinate the process of democracy in the commune.

These very broad grants of authority, which are difficult for commune councils to comprehend, provide an umbrella under which detail can be added over time. As stated in Article 63 of the sub-decree, “A commune shall have authority to choose and implement any activities that are within the scope of these general functions and within the scope of available resources.”

In the meantime, specific functions that the commune councils do recognise and understand have been given to, or have been traditionally handled by, the commune. These include the preparation, adoption and implementation of the commune development and investment plans, civil and vital registration duties,⁴² voter registration,⁴³ informal land dispute resolution,⁴⁴ maintenance of records, provision of necessary information (notice) at the commune and village level, representation of community needs and mobilisation of community support.

The lack of key rules and regulations currently hinders the ability of commune councils to recognise the full extent of their potential roles, such as those related to the drafting of commune *deika*, and thereby controlling affairs within the commune boundary.⁴⁵ In addition, further capacity building will assist the communes in realising their full potential, but this will take time. Commune councillors are accustomed to taking direction from above in both cultural and politically historical terms, and change cannot be expected to take place overnight. As is commonly stated in Cambodia, “*muoy, muoy*” or “step by step,” which essentially means all things in due time. If too much is expected from commune councils in too short a time, the system of decentralisation could very well fail.

⁴² As outlined in the Sub-decree on Civil/Vital Registration. It should be noted that very few registrations have actually been made, and that commune chiefs feel that this function is beneath them. A solution would be to provide the necessary resources so that the commune councils could hire a staff person to handle this task.

⁴³ The National Election Commission has delegated to commune councils the task of updating voter lists, though no additional funding was allocated for this.

⁴⁴ The Cadastral Commission sub-decree states that representatives of commune authorities should be invited as ad hoc members of the district level commissions that are responsible for handling land disputes surrounding unregistered immovable property. It is unclear what this role will be in the future.

⁴⁵ In some areas communes are already drafting and implementing *deika*.

8. Commentary on Current Decentralisation Rules and Regulations

As previously mentioned, the body of rules and regulations enacted in relation to decentralisation is large and can be difficult to understand, especially for those who have no legal training. In addition, the drafting is not always precise and is generally not up to the standards of more developed countries.⁴⁶ This being said, it is important to note that for those who 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*. 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. There are some major issues that have been identified within the enacted rules and regulations, as will be discussed in section 8.2 below.

What should be guarded against are calls for wholesale redrafting of the body of rules and regulations already 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 would be any better; in fact, it could be worse.

There could be a need to amend the rules and regulations due to decisions on whether the NCSC's mandate will be extended or its roles and duties will be transferred to a permanent government institution. The passage of other laws could require amendments as well, such as passage of an organic law on provincial and district government. If the LAMC needs to be amended, which would require the lengthy legislative process outlined in section 5.1, then the effort should be made to streamline the related body of rules and regulations thereunder at the same time to ensure consistency and clarity, in addition to incorporating any lessons learned. Such a redrafting and enactment process would be likely in 2006, prior to the next commune elections in 2007.

8.1 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. 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 MLMUPC would state that the only entity that can interpret the meaning of the Land Law is the MLMUPC. Likewise, the MoI would argue that rules and regulations related to the commune councils should be interpreted by the MoI. This can get complicated, since the MEF will argue that interpretation of provisions related to commune finance is its 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 of the meaning and intent. Unfortunately, the judicial branch is quite weak, and there is no clear mechanism in Cambodia for administrative appeals where such questions of interpretation can be handled.⁴⁷

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

⁴⁶ The rules and regulations that have been passed are consistent with the quality of drafting usually found in Cambodia.

⁴⁷ Judicial reform as it relates to decentralisation is further explored in section 11 below.

written. Government bureaucrats are left to interpret and implement the law based on directives and support from their superiors.

8.2 Major Issues Identified

Several major issues can be identified within the current body of rules and regulations at this time.⁴⁸ Some of these are not currently affecting implementation, but could cause real problems in the future. Others, which normally would not be spotted during a review of the rules and regulations, are appearing during the implementation due to interpretations that no one involved in the drafting process could have foreseen.

The first noticeable issue relates to discipline or removal of commune councillors or entire councils. This is a situation that has not occurred, but it could be a problem in the future, especially if issues surrounding control of political power are at stake and where the councils end up becoming pawns in much larger national struggles.

Article 16 of the LAMC states that councillors may lose membership of the council if they lose their professional aptitude as certified by competent ministries or government institutions,⁴⁹ they contravene the internal rules and regulations of the commune council or the entire council is dissolved. Article 58 states that the Minister of Interior shall dissolve a commune council immediately if it conducts activities against the constitution or policies of the government. Article 84 states that commune councillors may be disciplined if they fail to comply with provisions of the LAMC, and if they fail to comply after being disciplined, the commune council may, upon an absolute majority vote in favour, remove said councillor. Chapter 4 of the Sub-decree on Decentralisation of Powers, Roles and Duties to Commune Councils, covering disciplinary action and dismissal of councillors, does little to clarify standards for dismissal or dissolution. Article 24 of the Governor *Prakas* establishes that the provincial governor has to report to the MoI when commune councils are failing to comply with the LAMC or are acting against the constitution or policies of the government, which could then lead to the minister deciding to dissolve the council.

The problem with these provisions is that the standards are not clear. What constitutes loss of professional aptitude? What would be considered an act against the constitution or policies of the government? In addition, there are no provisions for councillors or councils to challenge such decisions administratively or appeal such decisions to the courts. Nor are there any provisions whereby the citizens of the commune could challenge the decisions administratively or appeal to the courts.⁵⁰ It is not difficult to see how the dismissal and dissolution provisions could potentially be abused, though the likelihood of this ever happening is purely speculative.

There is also a problem with the rigid respect for hierarchy when it comes to lines of communication.⁵¹ Any communication from the commune councils to the MoI or other national entities has to go through the provincial governor's office. If the communication has to do with a complaint about the provincial governor's office, this could cause an obvious problem. Article 5 of the commune clerk *prakas* does state that the commune clerk may

⁴⁸ Problems related to structures created in support of decentralisation have already been covered in section 6 and will not be repeated here.

⁴⁹ There is no standard within the LAMC or subordinate rules and regulations for loss of professional aptitude.

⁵⁰ Article 39 of the constitution does state, "Khmer citizens shall have the right to denounce, make complaints or file claims against any breach of the law by state and social organs or by members of such organs committed during the course of their duties," with the settlement of complaints and claims being in the competence of the courts. Unfortunately, the law is so vague in these provisions that it would be difficult to make the case that the law was breached.

⁵¹ This is an oft-cited problem; it illustrates the point earlier made that different commentators can reach different conclusions when interpreting the law.

report directly to the Ministry of Interior on matters of concern to the commune or commune council if requested to do so by the council; this provision could provide the means of bypassing the requirements that all communications are to be channelled through the provincial governor's office. In addition, informal channels of communication always exist that could overcome any rigid protocols respecting government hierarchy.

A rather serious problem in the rules and regulations relating to commune finances is just now coming to light. Chapter 7 of the LAMC related to commune finances spells out very general provisions, with stipulations that the details are to be filled in by sub-decree. Article 3 of the Commune Fund Sub-decree states that any monies not transferred to communes in a given year shall be carried over to a subsequent year. Articles 22 and 23 of the Commune Financial Management System Sub-decree state that any unused development funds at the end of a fiscal year shall be placed by the provincial treasury into a reserve fund account, the monies of which can be used only to fund capital expenditures in subsequent years. The reason for the carry-over of capital expenditure or development funds is that the commune councils are working with three-year rolling investment plans, and therefore they need flexibility in spending capital funds that come from the national budget. Unfortunately, the MEF is not recognising the language in the sub-decrees which support this system, stating that the Organic Budget Law of 2000 states that any unused funds must be returned to the national treasury at the end of the fiscal year. This is a situation in which the bureaucrats within a ministry are interpreting the law in a manner that does not support the system of decentralisation. How can commune councils possibly draft and implement three-year rolling investment plans if funds for investment are available only for the year that they are transferred to the provincial treasury, especially considering the fact that planning, procurement and contract administration issues do not always fit within a yearly budget? There are two possible solutions to this problem: 1) the language in the LAMC on this point is made stronger, so the issue of language in a sub-decree vs. language in a law is taken care of; 2) true political commitment from the government to the decentralisation process leads to a different interpretation of the rules and regulations by the bureaucrats within the MEF.

This last issue shows that the real problems within the law that impact upon implementation may not be spotted right away and that only with time will they be discovered and need to be addressed.

8.3 Critical Rules and Regulations Currently Missing

Though there is a long list of rules and regulations that will need to be enacted in support of decentralisation,⁵² the following is an identification of the most important legal documents. Policy documents are included since they should be linked to the proper drafting of rules and regulations.

There are several major steps that have to take place in the development of the system of decentralisation. The first is the development of a clear policy document related to commune council governance that would be used to clarify the duties, roles and responsibilities of the various actors from the national down to the village level of government. This document could then be used to amend or redraft existing legislation and also used for interpretation purposes.⁵³ Inextricably linked to this policy document development is the development of a clear policy document for the drafting of the organic law. The structures, duties, roles and responsibilities that will be crafted for the provincial and district levels of government will impact upon the body of rules and regulations already put in place in support of the commune councils. This is why the two policy documents must be drafted in conjunction with one another. The organic law will need to be drafted in conjunction with the inevitable redrafting of the LAMC and the body of rules and regulations

⁵² See Annex B, which includes a list of rules and regulations yet to be passed.

⁵³ See section 4 on policy development.

that fall thereunder. This is a massive task that will take careful coordination among the various powers and stakeholders.

At this time the government is planning that a policy for the organic law will be drafted and adopted by the first half of 2005, with the actual law being drafted and enacted in 2006, before the next commune council elections.⁵⁴ There is currently no plan to draft a clear policy on what will be done with the current body of law related to the administration of the commune councils. It may make sense simply to combine the two policy documents, since the issues are so closely interrelated, and then draft a single organic law that incorporates the LAMC. Attention must be given to this issue.

There are other issues that need to be addressed when considering what critical rules and regulations are currently missing. One issue is the lack of a law on the determination of types, rates and procedures for the collection of revenues from fiscal taxes, non-fiscal taxes and service charges for commune councils.⁵⁵ By all accounts, the drafting of this law will not take place for some time (two to three years), so interim structures could be put in place. One of the major concerns related to this is the issue of fiscal harmonisation at all levels of government: what revenues do the communes, provinces and line ministries gather, as opposed to the national treasury? How are the various revenues shared, disbursed and properly accounted for? How decentralised is the decision-making authority with regards to the use of these funds?

An issue that can more easily be handled in the near term is the drafting of a *prakas* on the formalities and procedures for selection, taking office and changing of the village chiefs, appointment of assistants to village chiefs, and the working procedures and duties of the village chiefs. These rules and regulations can greatly enhance the ability of villagers to understand the role of the commune councils and have their concerns addressed at the commune level. In addition, these rules will clear up the legal ambiguity surrounding the Village Development Committees that exists in some areas.

Another important issue that must be addressed, and which will be explored in detail in section 10.1.1, is enactment of a sub-decree on administrative fees for commune councils carrying out delegated agency functions from the various line ministries, as required in Article 76 of the LAMC.

Other issues that can be addressed in the near term are the need for guidelines on commune councils hiring staff as needed, drafting of commune *deika*, creation of committees to assist in carrying out the commune council's duties, and the roles and responsibilities of multiple communes working together. These are all relatively straightforward legal documents that currently carry a high level of need within the realm of commune administration, and there is no reason why they should not be drafted and enacted within the next year.

8.4 Review of Rules and Regulations of the NCSC

According to Article 88 of the LAMC, it is the responsibility of the NCSC to check the consistency and cohesiveness of all legal documents issued by the government. Articles 4 and 7 of the NCSC royal decree clarify and expand the scope of work further by providing that the NCSC is to ensure inter-ministerial consultations to review common issues for achieving cooperative agreements and responsibilities of the various ministries as related to decentralisation, consider and share opinions on the body of existing rules and regulations for

⁵⁴ A task force has been created within the MoI for drafting the policy on the organic law and the law itself. Unfortunately, it appears that the Council for Administrative Reform is simultaneously drafting a policy on the organic law. There needs to be coordination between these two simultaneous efforts.

⁵⁵ Required under Article 74 of the Commune Administration Law.

amendment or adjustment so they are consistent with the government's policy on decentralisation, share opinions on draft rules and regulations that impact on the affairs of the commune councils, assist in determining the relationships between the government, provincial, district and commune levels of government and propose additional rules and regulations in compliance with the procedures in force.⁵⁶

The authority vested in the NCSC on legal matters is very broad, but the provisions do not outline in clear terms the procedures and obligations of related government institutions to follow NCSC directives. Article 12 of the NCSC royal decree states that the NCSC may invite ministers and directors of government institutions to its meetings for consultation and collaboration. This provision, along with others, makes the NCSC a leading strategic body for providing consultative and facilitation forums for arriving at agreements and consensus on legal issues, but mechanisms for resolving conflicts when they arise do not exist.

In addition to the NCSC royal decree, the Sub-decree on the Decentralisation of Power, Roles and Functions to the Commune Councils also speaks to the authority of the NCSC. Article 55 states, "A ministry or institution of the royal government that intends to delegate any power or responsibility ... to a commune council shall obtain prior authorisation from the NCSC." This function of the NCSC is not being fulfilled. In addition, the actual authority or ability of the NCSC to force changes in rules and regulations that are drafted or enacted is questionable.

The NCSC has simply not been fulfilling its role as it relates to the systematic review of rules and regulations related to decentralisation and the commune councils. This is due to the focus on other priority issues by the NCSC. There are also real concerns that the NCSC does not possess the capacity to carry out its comprehensive review function.

Ultimately the role of a permanent governmental entity that has a mandate to ensure consistency of rules and regulation will need to be created, most likely within the Ministry of Justice. Until that time, the NCSC should ensure that its mandated duties are met. Since the review of rules and regulations will continue to be a need beyond the current legislated mandate of the NCSC, provisions must be made either to extend the mandate of the NCSC or to place this responsibility with a more permanent entity. Whatever the outcome, it is likely that some provisions within the current rules and regulations will have to be amended in order to address the issue of the NCSC's continued existence or lack thereof.

9. Commune Boundary Re-Demarcation

The current commune boundaries are historical in nature and were recognised and put into place prior to passage of the LAMC. There is a problem in that some communes are simply too small to function properly as semi-autonomous governance units; thus it was recognised that commune boundaries would need to be re-demarcated. There are two relevant articles within the LAMC that speak to the issue of commune boundary re-demarcation. Article 6 states, "The establishment, disestablishment and change of commune boundaries and names shall be determined by sub-decree following the proposal of the minister of interior, in cases that do not affect the boundaries of the relevant provinces/municipalities. In cases that do affect the boundaries of the relevant provinces/municipalities, the establishment, disestablishment and change of commune/*sangkat* boundaries and names shall be determined by a royal decree following the proposal of the prime minister based on the proposal of the

⁵⁶ Article 73 of the Sub-decree on the Decentralisation of Powers, Roles and Duties to the Communes states, "During its mandate, the NCSC shall be responsible for coordination with ministries or institutions of the Royal Government of Cambodia to define and divide specific duties between central, provincial and district levels of administration and the commune." This provision and the language in the NCSC royal decree indicate that the NCSC has a role to play in deconcentration policy development.

minister of interior.” At this time there have been no boundary changes, so no sub-decrees or royal decrees on this matter have been necessary.

Article 8 of the LAMC states that in cases where “the establishment, disestablishment or change of the boundary of a commune causes a change in the number of elected commune councillors, such establishment, disestablishment or change of the boundary of that commune shall take effect at the election of commune/*sangkat* council for the next mandate.” The purpose of this provision is to ensure that there is no interference in existing mandates of elected commune councils.

One of the mandated duties of the NCSC is to “research and redefine commune boundaries...”⁵⁷ The Decision on Establishment of Subcommittees under the NCSC creates the Subcommittee on Urbanisation and Commune Boundaries. The duties of this multi-ministerial subcommittee include studying and reviewing the boundaries of all communes and giving comments on the adjustment of commune boundaries in order to create the possibility of effective and stable development planning.⁵⁸ This subcommittee has met only twice so far.

At this time the subcommittee has managed only to draft a three-page note on what process will be used to design studies and prepare criteria for the redistricting. No studies have actually been conducted and no criteria created, so in very practical terms nothing substantive has been done. There is agreement that the current mandate of the commune councils will not be interfered with, in compliance with the provisions in the LAMC, and that the ultimate goal is to have the redistricting of communes in place prior to the next election. This is a politically charged issue, so how it will proceed is difficult to determine; the current rules and regulations do not give any guidance.

10. Deconcentration

There is very little legal analysis of deconcentration that can be done at this time. There is no clear government policy guiding deconcentration at this point, and the single piece of legislation that will ultimately have the greatest impact on deconcentration, the organic law on provincial and district government, has yet to be drafted. That being said, some general comments can be made on the current situation and how legislation that has been, will or may be passed could have an impact on the existing body of rules and regulations related to decentralisation.

Deconcentration in Cambodia can be broken down into two components: deconcentration within the various line ministries, including the delegation of agency functions from the ministry to the commune, and deconcentration from the central/national level of government to provincial and district levels of government.

10.1 Line Ministry Deconcentration

Since there is no clear policy or law guiding deconcentration within the line ministries at this time, deconcentration within the separate ministries is wholly dependent on the commitment of those controlling the ministries. The various ministries can be characterised as being quite insular and separate from one another, with very little cooperation and coordination between them due to efforts to maintain power and control over financial resources. Capacity within the line ministries in the sub-national level offices (provincial and district) is generally quite low. Delegation to these lower levels tends to be related to the performance of tasks and duties as directed and controlled from the national level, without assumption of any decision-making authority over them or control over related budgets; this is admittedly a very weak form of deconcentration.

⁵⁷ NCSC royal decree, Article 4, point 7.

⁵⁸ Decision on NCSC Subcommittees, Article 4.

One legal issue that will create problems over time as deconcentration evolves within the line ministries is that there are often instances of jurisdictional overlap between the ministries. These overlaps can have impacts at the national, provincial, district and ultimately commune levels of government, creating uncertainty and inefficiency within the realm of service delivery and local planning. One clear example of this jurisdictional overlap can be seen in the sub-decrees that outline the organisation and functions of the ministries of Water Resources and Meteorology (MOWRAM) and Industry, Mines and Energy (MIME).

Article 3 of the MIME sub-decree states that its duties and obligations include research on the distribution networks of hydropower and estimates of its potential in order to develop electrical power production projects, and the preparation and implementation of sanitary water distribution systems in municipalities and urban areas. Article 3 of the MOWRAM sub-decree states that its obligations and duties include the preparation of plans for the exploitation, development and conservation of water resources to serve the national economy and living standards in rural and urban areas. In addition, Article 11 states that the Department of Water Resources Management and Conservation within MOWRAM is responsible for preparing and carrying out strategic plans in order to serve multi-purpose development, including hydropower, flood control and irrigation, except that the projects serving hydropower production should have first priority. MIME and MOWRAM have overlapping jurisdiction over potable water supply and hydropower production issues. This has already become a problem in the municipality of Sihanoukville, where the Kbal Chhay watershed project is having difficulties in determining which ministry is responsible for issues surrounding the development of a water reservoir and treatment system that will provide the municipality with potable water supplies in the future.

Over time these jurisdictional overlaps of the various line ministries will need to be addressed. The government has shown that it has the ability to deal with these overlaps legislatively when the opportunity arises. The recently passed Forestry Law removed a jurisdictional overlap between the Ministry of Agriculture, Forestry and Fisheries (MAFF) and MIME. Article 107 of the Forestry Law states, “All sawmills, forest products and by-product processing facilities that have been established and operate under *prakas* of MIME shall be transferred to the jurisdiction of MAFF.” These overlaps could also potentially be cleared up within the Council of Ministers through amendments to the various ministerial roles and functions sub-decrees.

Coordination, cooperation and control between line ministerial departments at the provincial and district levels could potentially be effectively handled by the provincial governor and his office, though it would require a clear delegation of authority that is binding and respected by the various line ministries; this issue will be more fully explored in Section 10.2 on provincial and district deconcentration.

Another serious issue that must be recognised and addressed is the delegation of agency functions from the various line ministries to the commune councils. Major concerns are appropriate funding to the councils for carrying out the functions, the capacity of councils to carry out the delegated functions and proper integration of the rules and regulations granting the functions with existing rules and regulations.

10.1.1 Granting of Agency Functions to Commune Councils

The LAMC directly addresses the granting of agency functions by the state or line ministries to commune councils. Article 42 of the LAMC states that the commune has “the role of an agent representing the state under the appointment or delegation of power by the state authority.” Article 44 further clarifies this issue by stating that the state authority, or line ministry, “may delegate powers to the commune, together with increasing its capacity and providing it the means, materials and funds for implementation.” What is important to note in these provisions is the fact that delegations of authority, if they are actually made, must be

accompanied by the necessary capacity building and budget allocation to carry out the delegation properly. Furthermore, Article 55 of the Sub-decree on Decentralisation of Powers, Roles and Duties to Commune Councils states, “A ministry or an institution of the government that intends to delegate any power or responsibility ... to a commune council shall obtain prior authorisation from the NCSC.”

Article 76 of the LAMC addresses the issue of budget allocations for carrying out agency functions by stating that the communes are entitled to fees for carrying out agency functions that are supplementary to the normal revenues of the commune from the national budget. It is the responsibility of the government or relevant ministry to provide for the appropriate fees for performing the agency function, and if the function is permanently delegated to the commune, then the government shall ensure that long-term financial resources are available to support the delegation to the commune. The detailed rules relating to the provision of these fees to the communes are to be implemented by sub-decree, though this has yet to be drafted.

So far there has been little delegating of agency functions to the commune councils. The prime exception to this is the enactment of the Social Land Concession Sub-decree, which includes a major delegation of agency function from the MLMUPC to the commune councils, and which also illustrates some of the problems within the current system.⁵⁹ This sub-decree sets up a system of local social land concession programmes in which the commune council is responsible for initiating the process, creating the social land concession plan, implementing the plan and reviewing the plan annually. In preparation of the plan, the council must identify available land to be utilised and describe exactly how it will be used, what infrastructure will be necessary or is already available to implement the plan properly, identify the target recipients of land under the plan (the application and selection process for land recipients is completed by the commune council before submitting the plan for approval to the provincial/municipal land use allocation committee), detail the procedures used in identifying the target land recipients, outline the plans and conditions for the allocation and occupation of the land, conduct an environmental and social impact assessment, and fulfil any other requirements determined by a National Social Land Concession Committee.⁶⁰

Without going into too much detail, it is clear that this is a very complicated process, which will require significant resources of time, money and capacity. There are also potential issues with regard to how the planning and approval process in the Social Land Concession Sub-decree links to the commune development planning process. The sub-decree does not speak to the issues of agency fees or capacity building, and the NCSC has not reviewed this sub-decree to see if it is compatible with existing rules and regulations.⁶¹

If multiple line ministries began to grant substantial agency functions to the commune councils, there could be serious breakdowns in the system due to lack of capacity, lack of funds and poor integration or conflict with existing rules and regulations. The NCSC and MoI need to review these delegations carefully, and the sub-decree on agency fees needs to be implemented.

⁵⁹ The sub-decree essentially sets up a mechanism whereby the government may gratuitously grant “state private land” to eligible heads of poor families that, depending on circumstances, are in need of the land for residential or family farming purposes. The social land concessions initially carry only a grant of use and occupancy, though this may convert to a right of ownership with title if defined criteria within the programme are followed by recipients for five years.

⁶⁰ Article 9, Social Land Concession Sub-decree.

⁶¹ See section 8.4 on review of rules and regulations by the NCSC.

10.2 Provincial and District Deconcentration

As previously mentioned, the organic law on provincial and district levels of government has yet to be drafted. In the absence of this important piece of legislation, temporary structures have been created to support concepts of deconcentration and decentralisation such as the Governor *Prakas* and the PRDC *Prakas*.

Other than the two legislative documents just mentioned, the legal framework that controls activities at the provincial and district level is somewhat limited and out of date. The key rules and regulations currently in existence include the *Prakas* on the Roles, Responsibilities and Organisational Structure of the Provincial and Municipal Administrations, enacted in 1994, and the 1998 Law on Provincial/Municipal Finances and Property (Provincial Budget Law).

At this point in time there is some confusion within the policy bodies as to who is in charge of drafting the government policy on deconcentration and the organic law. The CAR seems to feel that this is its responsibility, but at the same time the MoI has established a task force for creating a policy document that is currently consulting with the provinces and plans to have a policy document in place in 2004, drafting of the organic law completed in 2005 and enactment of the law in 2006, before the next commune elections in early 2007.

At this time there is much discussion within the government about the role of the provincial government in deconcentration and horizontal coordination of the line ministries. Though it is likely that some form of multi-ministerial coordinating body headed by the governor will be created, similar to the current PRDC ExCom, how much actual control and decision-making authority will be granted to the governor cannot be predicted at this point. Final decisions on this will depend on the political will and commitment to deconcentration of the government. What is clear is that the passage of the organic law will impact upon the existing rules and regulations related to decentralisation, and there need to be careful consideration and coordination of this process.

The organic law will have to be drafted in conjunction with the repeal, amendment and passage of other rules and regulations. For example, the organic law will have to take into account financial structures at the provincial and district levels, so the 1998 Provincial Budget Law will need to be reworked, and the law on types, rates and procedures for the collection of fiscal taxes, non-fiscal taxes and service charges for commune councils will have to be drafted in such a way that it does not conflict with these other pieces of legislation. The current Governor *Prakas* in support of the communes will need to be integrated into the organic law, as will the PRDC *Prakas*.⁶² In addition, the LAMC and the rules and regulations thereunder will have to be amended to reflect changes in government structures at the provincial and district levels as a result of the enactment of the organic law, but these amendments must be done simultaneously with the drafting and enactment of the organic law.

If the organic law is to be drafted in 2005 and sent to the National Assembly for passage in 2006, then the other rules and regulations must be amended at the same time, so that a cohesive body of rules and regulations are in place for implementation at the beginning of the next mandate of the commune councils in 2007. This means that there will be a large amount of work ahead for the Council of Ministers (reviewing and adopting laws or amendments to laws prior to their submission to the National Assembly, plus reviewing and adopting new sub-decrees and amending existing sub-decrees), the National Assembly, and the various line ministries involved.⁶³ If this process of drafting and amending is not properly coordinated and carried out, there could be some major problems of legislative conflict and

⁶² Both of these *prakas* would cease to exist once the organic law is enacted.

⁶³ Refer to section 5.1, which gives an overview of the lengthy processes involved in enactment of laws and sub-decrees.

incompatibility, leading to confusion and difficulties in implementation during the next mandate. The seriousness of this issue and the amount of effort that will need to go into this process cannot be emphasised enough.

11. Judicial Reform as it Relates to Decentralisation

The judicial branch of government is seen as the weakest of the three in Cambodia. The capacity of the court system is very low; there is very little trust among the population that the courts can properly address their concerns; the separation of powers between the judicial branch and the executive is lacking; the level of corruption in the judicial system is reported as being high, etc. The government has committed to strengthening the judicial branch, and has made an important first step by adopting a Legal and Judicial Reform Policy in 2003. The policy outlines seven broad strategic objectives:

1. improved protection of personal rights and freedoms;
2. modernisation of the legislative framework;
3. better access to legal and judicial information;
4. enhanced quality of legal processes and related services;
5. strengthening of judicial services, i.e. the judicial power and prosecutorial services;
6. introduction of alternative dispute resolution methods;
7. strengthening of legal and judicial institutions to fulfil their mandates.

There are three areas of judicial reform that can have the greatest impact on decentralisation: providing access to legal information, providing clear means for commune councils and citizens within communes to appeal administrative decisions, and the creation of a proper mechanism whereby rules and regulations are reviewed to ensure consistency and avoid conflict.

At this time there is a real need to improve access to what various rules and regulations actually say. Government officials at the provincial, district and commune levels are often unaware of the content of the rules and regulations that affect their roles, rights and responsibilities. This is also certainly true of the ordinary citizenry. Capacity building in the area of law should be an ongoing priority in the near, medium and long term, as the legal system in Cambodia will constantly change and develop in the years to come.

A clear system should be in place in which commune councils can appeal administrative decisions by other government entities that affect them. This system should include both an administrative appeals procedure within the government structures and a judicial appeals procedure if their concerns are not met within the administrative structures. This is a government-wide system that needs to be created and will require serious commitments of time, energy and political will.

Permanent legislative review mechanisms need to be created. At this time the NCSC has the mandate to review all rules and regulations that impact upon the roles and functions of commune councils, but this mandate is not being met, and the NCSC is not a permanent body. In addition, there is a real question whether the NCSC even has the capacity to carry out technical legal review functions. Permanent entities within the government that possess the capacity to carry out this function will ultimately need to be created, probably within the Ministry of Justice.

12. Land Use/Natural Resources Management and Decentralisation

The current structure of decentralisation does support the concept that commune councils will play a role in land use and natural resources and environmental management (NREM), though in many instances theirs will be limited to a facilitation role, while actual decision-making

authority will rest with the line ministries that have the jurisdictional competence within specific areas. Current pilot projects that are focussed on mainstreaming land use/natural resources management into the commune development process are currently being implemented and developed by the SEILA programme. The following is a basic overview of what is currently in place that supports such efforts.

12.1 LAMC and Related Rules and Regulations

The LAMC and related rules and regulations create a clear and indisputable opportunity for commune council involvement in participatory land use/NREM activities; the commune development planning process is the cornerstone of this opportunity. The rules and regulations for creating, implementing, evaluating (through the preparation of annual reports) and subsequently modifying development plans create a clear structure that, if properly implemented, will produce truly dynamic and useful participatory land use/NREM planning activities at the commune and village level. The fact that these rules and regulations contain very strong provisions related to the active involvement of commune residents, civil society and interested stakeholders throughout the commune development planning process supports this conclusion.

In addition to the above, commune councils have been granted legislative authority that can be used to pass rules related to land use/NREM planning activities. The communes also have been granted a number of financing mechanisms for development activities, such as the commune fund, which ensures that money will be available for implementation activities; unfortunately many of the funding mechanisms still need to be properly developed, such as the law on types, rates and procedures for the collection of fiscal taxes, non-fiscal taxes and service charges for commune councils, before their full potential for financing land use/NREM planning activities can be realised.⁶⁴

12.2 Land Law and Related Rules and Regulation

The Land Law and subsequently passed legislation create additional opportunities for commune council involvement in participatory land use/NREM planning by clarifying issues related to state public and state private property, the designation of communal property that is managed and ultimately owned by indigenous communities, economic and social land concessions, procedures for creation of cadastral maps and land registers and land dispute resolution. While all of these issues can be worked into the commune development planning process, certain areas mandate direct involvement of commune councils.

Commune councils have a direct role to play in land conflict resolution procedures, creation of cadastral maps and land registries (both systematic and sporadic) and social land concessions. The provisions for social land concession planning are of critical importance; commune councils initiate the process at the local level, and it mirrors the commune development planning process, therefore creating the opportunity to integrate the two. It is hoped that the rules and regulations related to economic land concessions (industrial agricultural exploitation) will create a similar role, thereby further enhancing the ability of commune councils to be actively involved in land use/NREM planning.

12.3 Rules and Regulations Related to Natural Resources and Environment

Unfortunately, existing and draft legislation directly related to natural resources and the environment, such as the new Forestry Law, make little mention of the commune councils' role. These rules and regulations, however, offer real opportunities and guidance for the commune councils in land use/NREM planning activities. In addition, the Sub-decree on

⁶⁴ This would include both the law on fiscal taxes, non-fiscal taxes and service charges for commune councils, and a sub-decree on administrative fees for commune councils.

Decentralisation of Powers, Roles and Duties to Commune Councils allows a commune to choose to undertake any activity that falls outside its jurisdiction if there is special authorisation from a ministry or institution of the state, such as the MAFF or the Ministry of Environment, based on the mediation of the MoI and review by the NCSC. There are also opportunities for creating clear roles and duties for commune councils in this area through rules and regulations that have yet to be passed.

12.4 Gaps in Existing Rules and Regulations

There are currently gaps in the legislative landscape that impact upon a commune council's ability to be fully involved in land use/NREM planning. For example, rules and regulations related to the administration and management of state land, economic land concessions, lands of indigenous communities and community forestry still need to be developed. This is not to say that meaningful and effective land use/NREM activities cannot take place in the meantime.

12.5 Overall Creation of Governmental Structures

One of the positive aspects of the rules and regulations that have been drafted and passed over the past three years is that they create clear government structures, duties and procedures that are consistent nationwide. The roles of entities such as village chiefs, commune chiefs, commune councils, commune clerks, district and provincial governors, cadastral commissions, departments of local administration, provincial departments of planning, provincial rural development committees with local administration units and technical support staff underneath them, provincial land use allocation committees, district working groups etc. have been outlined in the law. This structure assists commune councils involved in land use/NREM planning, and the government as a whole, in the identification of needs and concerns, the sharing of ideas, the contribution of and access to technical assistance, the resolution of conflicts, and the effective monitoring and evaluation of programmes. This ultimately leads to continuous improvements to government systems and the further development of effective rules and regulations. The current legal structure supports commune councils' involvement in participatory land use/NREM planning, and if properly implemented, this system will only improve over time.

13. Fiscal Management Issues in Relation to Decentralisation

The biggest issue with regards to law harmonisation and fiscal management in relation to decentralisation has to do with the overall financial management system in the country. The law on the types, rates and procedures for the collection of fiscal taxes, non-fiscal taxes and service charges for commune councils cannot be developed in a vacuum and will have to be drafted in conjunction with deconcentrated revenue collection systems at the provincial and district level to avoid over-taxation or double taxation of the citizenry. In addition, the overall system of revenues collection and sharing needs to be carefully linked with revenue collection and efficient disbursement by the national treasury.

14. Capacity Building in Support of Decentralisation

The capacity of commune councils to carry out their new mandates is clearly an issue, with current reports showing that the capacity is generally quite low. The capacity within the commune councils and those government entities supporting commune councils must be continuously upgraded for the foreseeable future. This capacity building must cover a broad variety of subject matters (law, finance, accounting, contracting, governance, public participation, development planning etc.). While current capacity-building support primarily comes from the SEILA programme and related support structures, there is also support from the ADB Commune Council Development Project and initiatives from various NGOs and civil society.

From a legislative standpoint, mechanisms for ensuring that any delegated agency functions include necessary capacity building must be properly used over time. In addition, permanent government structures that will support communes and guarantee continuous improvement in capacity over the long run will need to be incorporated into the organic law on provincial and district governance, replacing temporary structures that have been implemented through the SEILA initiatives, such as the various management units under the PRDC ExCom.

15. Conclusions and Recommendations

Based on the above review, several primary findings and recommendations can be made:

1. Much credit should be given to the government for enacting such a large number of rules and regulations in support of decentralisation in such a short time.
2. There was no policy document in place when the primary legislation was drafted, so there was no clear guidance available for the drafting of the legislation. Essentially, the LAMC became the policy document. This, in addition to the short time frame involved, has led to a rather complex and poorly linked body of rules and regulations that contains significant amounts of overlap and lack of clarity due to poor drafting. The body of rules and regulations are, however, consistent with the quality commonly found in Cambodia and can be implemented.
3. Although there are problems within the body of rules and regulations, these do not seem to be having any major impacts on implementation in the field due to the use of *prakas* for that implementation. Over time as problems arise, they will need to be addressed.
4. The current pace of decentralisation appears to be moving in accordance with the desire of the government and, according to many commentators, at a speed that is appropriate to the cultural and capacity context of Cambodia.
5. Prior to the next mandate, clear policies that will guide the drafting of new rules and regulations, along with amending existing rules and regulations, need to be drafted for both decentralisation as it relates to commune councils and deconcentration as it relates to provincial and district levels of government (organic law). The drafting of these policies must be done in conjunction with one another since decentralisation and deconcentration are inextricably linked.
6. In terms of current legislative gaps, the most obvious is the lack of an organic law for provincial and district levels of government. In addition, the primary pieces that need to be put in place in the near to medium term include: rules and regulations on the determination of types, rates and procedures for the collection of fiscal taxes, non-fiscal taxes and service charges for commune councils (this must be done in the context of the harmonisation 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 village chiefs, appointment of assistants to village chiefs and the working procedures and duties of village chiefs; guidelines on commune councils hiring staff as needed; drafting of commune *deika*; creation of committees to assist in carrying out commune councils' duties; and the roles and responsibilities of multiple communes working together.
7. The issue of extending the mandate of the NCSC needs to be addressed within the policy on decentralisation. If it is extended, then the LAMC and related rules and regulations will need to be amended accordingly.
8. There needs to be a comprehensive, systematic review of the financial/budgetary system if commune councils are to start generating actual tax revenue instead of

just fees, as is envisioned in the LAMC. There needs to be a clear system in terms of what revenue is gathered by the national treasury, the province and the commune in order to avoid over-taxation or double taxation.

9. Nothing has really been done on commune boundary redistricting, though the goal is to have this issue addressed before the next commune elections in 2007.
10. Drafting of the organic law will inevitably impact upon the existing rules and regulations related to decentralisation. In light of this fact, and other issues that will affect the current rules and regulations, a comprehensive, systematic redrafting of the LAMC and the sub-decrees and *prakas* thereunder may be required. If so, this must be carefully handled, with a clear policy document in place to guide the drafting. If the goal is to have the organic law passed before the next commune elections (the government is stating that this is the goal), then the LAMC redrafting must also be completed before the next commune elections. The two issues are inextricably linked and must be addressed at the same time. This will require coordination and cooperation between the main policy bodies involved (NCSC, CAR, MoI and SEILA), along with strong political commitment by the government.
11. The organic law should address the issue of horizontal coordination of deconcentration amongst the line ministries at the provincial and district levels.
12. The NCSC has not had time to review legislation that impacts on the commune councils, such as the recently passed Social Land Concession Sub-decree. The problem is that agency functions are being delegated without the necessary mechanisms in place to ensure that the required resources (capacity and fiscal) are included.
13. Commune councils have an important role to play in land use and natural resource management issues, even though at the moment they may not have any direct decision-making authority on issues within certain areas, such as the forestry sector.

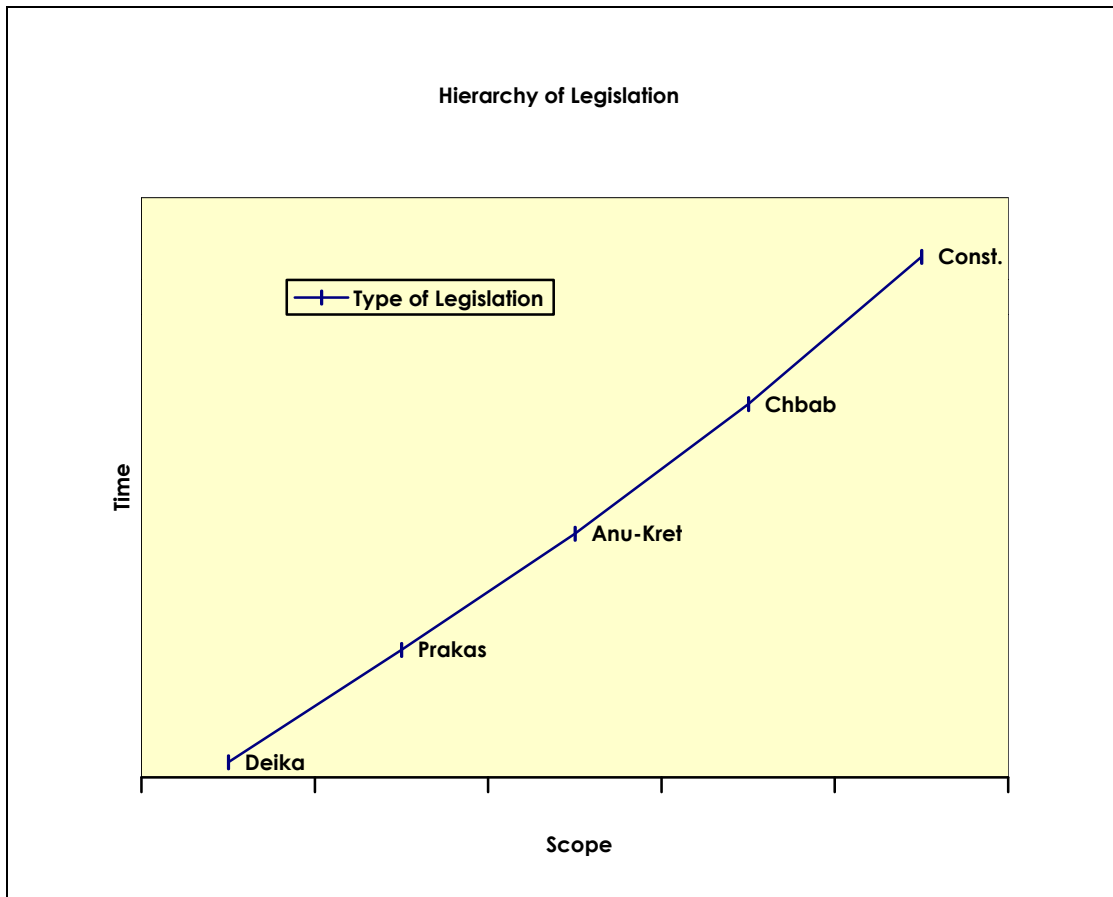
References

- (2003) *Problems and Concerns of Commune Councillors: Results from the DOLA Letter Box at Commune Seminar*
- Ayers, D. (2001), *Review of Literature on Decentralisation* (Phnom Penh, CCSP)
- Blunt, P. (2003), *Contextual Analysis for Strategic Management of Capacity Building for Decentralisation and Deconcentration in the Kingdom of Cambodia* (Phnom Penh, ADB Commune Council Development Project)
- CAR (2003), *Draft Discussion Paper on Deconcentration Policies and Strategies*
- Council of Minister, *Sub-decree on Community Forestry Management* (Phnom Penh: Council of Minister)
- Council of Minister, *Sub-decree on Forest Concession Management* (Phnom Penh: Council of Minister)
- Council of Minister, *Sub-decree on Organisation and Functioning of Ministry of Interior* (Phnom Penh: Council of Minister)
- Council of Minister, *Sub-decree on Organisation and Functioning of Ministry of Environment* (Phnom Penh: Council of Minister)
- Council of Minister, *Sub-decree on Organisation and Functioning of Ministry of Land Management, Urban Planning and Construction* (Phnom Penh: Council of Minister)
- Council of Minister, *Sub-decree on Organisation and Functioning of Ministry of Agriculture, Forestry and Fisheries* (Phnom Penh: Council of Minister)
- Council of Minister, *Sub-decree on Organisation and Functioning of Ministry of Industry, Mines and Energy* (Phnom Penh: Council of Minister)
- Council of Minister, *Sub-decree on Organisation and Functioning of Ministry of Water Resources and Meteorology* (Phnom Penh: Council of Minister)
- Council of Minister, *Sub-decree on Organisation and Functioning of Ministry of Economy and Finance* (Phnom Penh: Council of Minister)
- Council of Minister, *Sub-decree on Organisation and Functioning of Ministry of Rural Development* (Phnom Penh: Council of Minister)
- Council of Minister, *Sub-decree on Organisation and Functioning of Ministry of Planning* (Phnom Penh: Council of Minister)
- Council of Minister, *Sub-decree on Organisation and Functioning of Cadastral Commission* (Phnom Penh: Council of Minister)
- Council of Minister, *Sub-decree on SEILA Task Force* (Phnom Penh: Council of Minister)
- Council of Minister, *Sub-decree on Social Land Concessions* (Phnom Penh: Council of Minister)
- Council of Minister, *Sub-decree on the Creation of the Council for Administrative Reform* (Phnom Penh: Council of Minister)
- Evans, H. (2003), *Report on Deconcentration*

- Flam, S. (2003), *Draft Legal Review and Analysis of the Body of Decentralization Law* (Phnom Penh, GTZ)
- Kingdom of Cambodia, *Constitution of the Kingdom of Cambodia, revised 1999* (Phnom Penh: Kingdom of Cambodia)
- Kingdom of Cambodia, *Law on Environmental Protection and Natural Resources Management* (Phnom Penh: Kingdom of Cambodia)
- Kingdom of Cambodia, *Law on Financial Regime and Property of Municipalities and Provinces* (Phnom Penh: Kingdom of Cambodia)
- Kingdom of Cambodia, *Law on Forestry* (Phnom Penh: Kingdom of Cambodia)
- Kingdom of Cambodia, *Law on Land* (Phnom Penh: Kingdom of Cambodia)
- Kingdom of Cambodia, *Law on the Organisation and Functioning of the Council of Ministers* (Phnom Penh: Kingdom of Cambodia)
- Royal Government of Cambodia, *Cambodian Millennium Development Goals* (Phnom Penh: RGC)
- Royal Government of Cambodia, *Governance Action Plan* (Phnom Penh: RGC)
- Royal Government of Cambodia, *National Forestry Policy* (Phnom Penh: RGC)
- Royal Government of Cambodia, *National Poverty Reduction Strategy* (Phnom Penh: RGC)
- Royal Government of Cambodia, *Policy on Judicial and Legal Reform* (Phnom Penh: RGC)
- Royal Government of Cambodia, *Policy Paper on Social Land Concessions* (Phnom Penh: RGC)
- Royal Government of Cambodia, *Prakas on Organisation and Functioning of Forestry Administration* (Phnom Penh: RGC)
- Royal Government of Cambodia, *Prakas on Structures, Roles and Responsibilities of the PRDC* (Phnom Penh: RGC)
- Royal Government of Cambodia, *Prakas on the Roles, Responsibilities and Organisational Structure of the Provincial and Municipal Administrations* (Phnom Penh: RGC)
- Royal Government of Cambodia, *Second Five Year Socio-Economic Development Plan* (Phnom Penh: RGC)
- Siphana, S. (2001), *Compendium of Cambodian Laws* (Phnom Penh)
- Smoke, P. (2003), *Report on Fiscal Decentralisation and Deconcentration*
- Tolvanen, J. P. (2003), “Report of Legal Registration Advisors Mission”
- Wehrmann, B. and Rathmony, S. (2002), *Recommendations for Decentralisation of Land Management and Land Administration: The Future Role of Commune Councils, Strategy Paper and Action Plan* (Phnom Penh, GTZ)

Annex A

Scope vs. Time Chart



Annex B

List of Rules and Regulations⁶⁵

1. Rules and Regulations Passed in Support of Decentralisation Reform

- Law on the Election of Commune/*Sangkat* Councils, dated 18 January 2001
- Law on the Administration and Management of Communes/*Sangkats*, dated 12 January 2001
- Royal Decree on the Establishment of NCSC, dated 18 May 2001
- Sub-decree on the Establishment of DOLA, dated 3 July 2001
- Sub-decree on Amending Article 8 and Article 59 of Sub-decree on Civil Registration, dated 24 June 2002
- Sub-decree on Determination of Wages for Commune/*Sangkat* Councillors, dated 24 June 2002
- Sub-decree on Civil Registration Fees and Fiscal Stamp Fees, dated 24 June 2002
- Sub-decree on Establishment of Commune/*Sangkat* Fund, dated 25 February 2002
- Sub-decree on Decentralisation of Powers, Roles and Duties to Commune/*Sangkat* Councils, dated 25 March 2002
- Sub-decree on Commune/*Sangkat* Financial Management System, dated 2 April 2002
- Sub-decree on Determining the Number of Commune Councillors in Cambodia, dated 30 April 2001
- *Prakas* on the Establishment of an Accounting System for the Commune Fund, dated 10 April 2002
- *Prakas* on the supplementary account in state account design, dated April 10, 2002
- *Prakas* on the Roles, Duties and Rights of Commune/*Sangkat* Clerks, dated 19 December 2001
- *Prakas* on Delegation of Powers to Provincial/Municipal Governors to Manage the First Commune/*Sangkat* Council Meetings, dated 18 February 2002
- *Prakas* on Delegation of Powers to Provincial/Municipal Governors in Support of Commune/*Sangkat* Councils, dated 18 April 2002
- *Prakas* on Roles, Duties and Structures of DOLA, dated 7 May 2002
- *Prakas* on Form and Contents of Commune Fund, dated 25 April 2002
- Inter-ministerial *Prakas* on Amending Article 29 of Inter-ministerial *Prakas* on Commune/*Sangkat* Development Planning, dated 26 August 2002

⁶⁵ The following lists were compiled by Leon Bernard Suy and Long Panhavuth.

- Inter-ministerial *Prakas* on Utilisation of Guidelines on Commune/*Sangkat* Development Planning Process for Five Years (2003-2007) and Commune/*Sangkat* Rolling Investment Programme for Three Years (2003-2005), dated 7 February 2002
- Inter-ministerial *Prakas* on Commune/*Sangkat* Development Planning, dated 7 February 2002
- First Work Plan of NCSC for Implementing Decentralisation, dated 20 September 2001
- Decision on the Establishment of Sub-committees under NCSC, dated 28 September 2001
- Decision on Amending the Guideline on Preparing Internal Rules of Commune/*Sangkat* Councils and Example of Commune/*Sangkat* Internal Rules, dated 21 February 2002
- Decision on Basic Education, Training and Capacity Building to Support Commune/*Sangkat* Councils in a Decentralised Way, dated 29 April, 2002
- Decision on Working Procedures of the NCSC, dated 20 September 2001
- Decision on the Establishment of Support Systems for Commune/*Sangkat* Development Planning in Seven Provinces/Municipalities (Phnom Penh, Sihanoukville, Kep, Kandal, Koh Kong, Stung Treng, and Ratanakiri), dated August 26, 2002
- Guideline on Fulfilment of Conditions to Receive the Commune/*Sangkat* Fund to Be Transferred in the Third Stage in 2002, dated 18 September, 2002
- Guideline on the Conduct of the First Meeting to Declare the Validity of Commune/*Sangkat* Councils and the Names of the Chairperson of Commune/*Sangkat* Councils, Commune/*Sangkat* Chiefs and Commune/*Sangkat* Deputy Chiefs and the Start of Functioning after the First Meeting; and Annex with Example of Commune/*Sangkat* Council Internal Rules , dated February 18, 2002
- Guideline on Preparing Internal Rules of Commune/*Sangkat* Councils, dated 21 February 2002
- Guideline on Formalities and Procedures for Replacement of Commune/*Sangkat* Councillors, dated 29 April 2002
- Guideline on Functioning and Strategy in Education on the Commune/*Sangkat* Planning Process and financial System Management, dated 29 April 2002
- Guideline on Managing and Utilising Brochure “Is there anything you would like to know about decentralisation and commune/*sangkat* councils in Cambodia?”, dated 6 May 2002
- Guideline on the Usage of Commune Profile and Preparation for Year 2003, dated 29 July 2002
- Guideline on Implementing the Decision of NCSC on Establishment of Support Systems for Commune/*Sangkat* Development Planning in Seven Provinces/Municipalities, dated 5 September 2002
- Guideline on the Preparation and Implementation of the Commune Fund, dated 29 April 2002
- Notification on the Allowance to Village Chiefs, Commune Clerks and Provincial Planning Departments, dated 25 July 2002

- Notification on Salary Withdrawal of Commune Councils, dated 12 July 2002
- Notification on Appointment of Commune Accountants, dated 27 June 2002
- Notification on Provision of the Commune Investment Fund Categorised as Commune “A” and its Determination of the Fund, dated 21 June 2002.

2. Rules and Regulations Yet to be Passed in Support of Decentralisation Reform as Mandated by the LAMC

- Instruction on formalities and procedures for selection of village chiefs, taking office, the changing of village chiefs and appointment of assistants to village chiefs (Article 30)
- Instruction on working procedures and duties of village chiefs (Article 31)
- Instruction on the formalities and procedures to enable the communes/*sangkats* to prepare commune *deika* (Article 50)
- Law on the determination of types, rates and procedures for the collection of fiscal taxes, non-fiscal taxes and service charges (Article 74).
- Sub-decree on the organisation of fees to communes for their performance of agency functions (Article 76)
- Sub-decree on the allotment of annual resources to the commune/*Sangkat* through the Commune Fund (Article 78)
- Sub-decree on the management process, rules for the uses and procedures of withdrawing money from the Commune Fund for expenses (Article 78).
- Sub-decree on the procedures for management and use of commune assets (Article 81).

CDRI Working Papers

- 1) Kannan, K.P. (November 1995), *Construction of a Consumer Price Index for Cambodia: A Review of Current Practices and Suggestions for Improvement* (Working Paper No. 1) \$5.00
- 2) McAndrew, John P. (January 1996), *Aid Infusions, Aid Illusions: Bilateral and Multilateral Emergency and Development Assistance in Cambodia, 1992–1995* (Working Paper No. 2) \$5.00
- 3) Kannan, K.P. (January 1997), *Economic Reform, Structural Adjustment and Development in Cambodia* (Working Paper No. 3) \$5.00
- 4) Chim Charya, Srun Pithou, So Sovannarith, John McAndrew, Nguon Sokunthea, Pon Dorina & Robin Biddulph (June 1998), *Learning from Rural Development Programmes in Cambodia* (Working Paper No. 4) \$7.50
- 5) Kato, Toshiyasu, Chan Sophal & Long Vou Piseth (September 1998), *Regional Economic Integration for Sustainable Development in Cambodia* (Working Paper No. 5) \$6.00
- 6) Murshid, K.A.S. (December 1998), *Food Security in an Asian Transitional Economy: The Cambodian Experience* (Working Paper No. 6) \$9.00
- 7) McAndrew, John P. (December 1998), *Interdependence in Household Livelihood Strategies in Two Cambodian Villages* (Working Paper No. 7) \$9.00
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Law Harmonisation in Relation to the Decentralisation Process in Cambodia

Decentralisation and deconcentration are part of the Royal Government of Cambodia's reforms to promote democracy, improve development opportunities, reduce poverty and ensure sustainable development.

The RGC is undertaking decentralisation reforms to devolve power to semi-autonomous (Commune Councils are described here as semi-autonomous due to the fact that there is substantial control from the governmental hierarchy that lies above them.) elected governments at the Commune and *Sangkat* (urban commune) level, and to move towards enhanced roles for provinces and municipalities as deconcentrated entities of the centre. In March of 2001 the RGC embarked on a bold experiment in decentralisation of government, with the enactment of the Law on Administration and Management of the Communes and *Sangkats*, and the Commune Election Law, followed by elections of Commune Councils in February of 2002. A range of functions, spending authorities, and resources have been devolved to local governments and the provincial governors have been given responsibilities of support to and supervision of Commune/*Sangkat* Councils. In support of this effort, a large body of rules and regulations has been passed in a relatively short period of time. How these rules and regulations fit together with each other and already existing legislation, plus how the ongoing government efforts towards decentralisation fit within these structures, are the focus of this report. Several primary observations can be made as a result of analysing the current situation in Cambodia.

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