

## Decentralization within the Centripetal Expression of State Power: Re-Guiding Cambodian Statutory Devolution

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### Abstract:

The present central-local relations in Cambodian local government system are of the 'integrated' or integrationist model (Kjelberg and Dente 1988) in which the division of central-local functions is blurred, making any real shift of power from the center to local governments impossible to be found. On the one hand, an overall view reveals that the present local governments, though holding devolved powers, are not provided enough resources to fulfill their responsibilities. On the other hand, the 'general powers' vested in them to deal with the welfare of the citizens are only nominal and are not encouraging enough to urge the judiciary to favor the local power for lack of a clear separation of functions. This integrated decentralization completely depends on the central government's commitment as to the extent of which it eventually intends to let local governments affect the well being of local residents. This article provides directions for some crucial steps to take both in the short and long run, without which Cambodian devolution can only be a lip-service and that re-centralization would remain the dominating term.

### Introduction

Both classical (i.e., J.S. Mill) and contemporary understandings of decentralization (i.e., B.C. Smith 1985, 1998) attach to it several ideal justifications such as political education, better provision of services, popular participation, accountability, and even, as Bryce (1921: 133) put it, a 'school of democracy'. However, it does not seem right to say that in a unitary State the central power is really weakened as the process of decentralization goes on the way. In reality, the State has wisely transformed itself from strictly holding its coercive power to take more subtle methods of conveying its will (Woodside, 1998). This holds true in terms of Cambodian decentralization, given the country's long history of central bureaucratic authority. After the UN-led elections in 1993, decentralization was not a priority (Devas 1996). The central government started to learn about decentralization since 1996 when it allowed some distant provinces to start with decentralized planning, financing, and management through 'Seila Program'<sup>1</sup> (Social Economic Improvement Local Agency) funded by both the Government and the donors group known as-NGOs included- Partnership for Local Governance or PLG. Seila/PLG have been active in providing trainings, monitoring, funding and coordinating projects. In 1997 and later revised in 1999 (Sub-decree, n.78, dated August 23, 1999), the 'Seila Task Force' chaired by the minister of economy and finance, was established as a governmental agency to help the Seila program reach its national scale. Even until 2000, however, there was "no local civil

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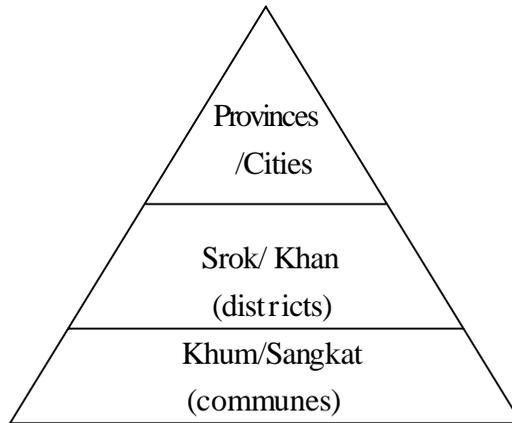
administration directly representing the people” (Kato *et al.*, 2000: 43). As Ayres (2001: 51) said, ‘it is difficult to determine from where the motivation came for the Cambodian government to pursue its policy of decentralization’. With the World Bank then reporting that more than one hundred States are being involved in the decentralization process, Cambodia, under pressure from aid agencies, had had to follow this international trend.

Theoretically, there is no a universal clear-cut definition of ‘decentralization’. Rather, the term denotes differing labels when put in different contexts. For example, Turner and Hulme (1997: 153) speak of six forms of decentralization, while Rondinelli *et al.*, kept extending their definition to incorporate the replacement of state agencies by private businesses and non-profit organizations, privatization, and economic liberalization (1986, 1989, 1990). The World Bank basically recognizes four types of decentralization: political, administrative, fiscal, and market decentralization ([http://www.ciesin.org/decentralization/English/General/Different\\_forms.html](http://www.ciesin.org/decentralization/English/General/Different_forms.html)). To simplify, the term embraces both devolution, which underlies most political decentralization, and deconcentration which is merely administrative. Smith (1985: 1) defines decentralization as “the delegation of power to lower levels in a territorial hierarchy, whether the hierarchy is one of governments within a state or offices within a large-scale organization”. It is this territorial-based definition that this article uses when referring to Cambodian political decentralization or devolution.

The term ‘decentralization’ has thus become a legal term when the Law on Khum/Sangkat Administration (LKSA)- promulgated in March 2001- uses it in its first article: “The present law regulates the administration of all Khum/Sangkat in the kingdom of Cambodia in accordance with the politics of decentralization”. The constitution (art. 145) provides for three administrative levels for both cities (4 cities) and provinces (20 provinces): cities are divided into *khans* (districts) which, in turn, are sub-divided into *sangkats*, and provinces into *sroks* (districts) and sroks into *khums* or communes (see the chart below). In an until-recently-former-communist State like Cambodia, it goes without saying that the Government would not rush to shift its power from the center to large sub-national units (districts and provinces). The current decentralization policy covers only the lowest and least powerful units: communes (Khum and Sangkat). Therefore, when ‘local government’ is spoken of in this paper, it *exclusively means the self-government of Khum and Sangkat governed by directly elected local councils (Khum/Sangkat councils)*. Khum/Sangkats have become democratic representative organs and are fundamentally different from their upper local administrations: districts and provinces/cities. These two levels of administration remain in the bloc of local administration governed by state agents—provinces and districts being governed by governors, and staffed with civil servants—appointed, paid by, and accountable to, the central government although efforts to bring the de-concentration system to these two levels are on the way (Seila/PLG Mid-Term Review 2003: 3).

Interestingly, the Constitution (art. 146) requires that all sub-national units be governed by organic ‘law’. So far there is no such law to govern cities, provinces and districts. There are instead two

Territorial Divisions Chart



Note: There are 20 provinces, 4 cities (Phnom Penh, Preah Sihanouk ville, Kep city, and Pailin city), 1510 Khums, and 111 Sangkats. Each province has its center also called 'city' which comprises a number of Sangkats. Each commune comprises a number of villages (*Phum*) which have persisted through out history as traditional units (not formally constitutionally recognized).

Source: Ministry of interior's order, No. 493, dated April 30, 2001.

ministerial orders of the ministry of interior, one dated Feb. 15<sup>th</sup> 1994 governing the provincial and city administrations and another of March 16<sup>th</sup> 2000 dealing with the districts. Strictly speaking, the minister of interior, by issuing these two orders, must have ignored the Constitutional command, rendering these two orders clearly illegal. Khum/Sangkats alone have been legalized following the adoption of the organic 'law' on Khum/Sangkat administration (LKSA).

Cambodia has chosen to apply devolution (or political decentralization) at the communal level covered by the LKSA, and administrative decentralization (or deconcentration) at district and provincial level to be covered by another law to come. This article limits itself to the study of the powers of Khum and Sangkat (also referred to as communes), that is, those of 'local government'. Chapter one reveals constraints in five particular areas: local elections, size and existence of local government, financial resources, partnership, and organs of local government. Chapter two deals with powers of local government and will find that the present legislation on decentralization remains a centripetal force of state power. Finally, the study will provide some crucial steps to take both in the short and long run.

## I. Overall View On the Present Local Government

### 1- LOCAL ELECTIONS AND A THREATENED MULTI-PARTISM

Local elections refer to the elections of the 'councils of Khum/Sangkat' as being held in early February 2002 with a huge turnout of 87% of electors.<sup>2</sup> The Law on Khum/Sangkat Council Election (LKSE) made it clear that all councilor-candidates must be registered in party lists (LKSE, art.98). Each Khum and Sangkat constitutes a constituency. Political parties prepare their lists with the number of

candidates equal to the number of seats; and voters will cast for the list as a whole. The top candidate of the list having received most votes becomes the mayor (LKSA, art.32) and the president of the council (LKSA, art.25). With the seats being allocated under the proportional system, the composition of Khum/Sangkat councils shall look multi-partist, having members from different parties.<sup>3</sup>

This multi-partism presents, however, both reward and threats. It is rewarding here in the sense that local councilors—belonging to the same party as the central officials—can expect an easy access to the central government and can hope to have the local interests they represent being nicely treated; but it poses a threat to non-partisans or minority groups who would find it difficult to have their requests satisfied. Given that Cambodian local elections are held just one year ahead of the general legislative elections (next elections scheduled for 2007 and 2008 respectively every 5 years), local elections actually serve as a fierce preliminary test pro or against the central government performance with the party in power craving to hold its oppressive dominance. With opposition parties seriously intimidated and vote buying widely applied and that political parties convey their thoughts to the public rather than hear the latter's demands, these electoral arrangements necessarily center local opinion more on the strength of the party than on local councilors' legitimacy, and thereby, pose a threat to public accountability: the local electorate would not cast local ballots with local issues in mind. Consequently, this multi-partism would only make the ruling parties stubborn. Interestingly, the results of the 'Impact Survey of Voter Knowledge and Awareness' (IS) in 2000 had showed that local residents did not fully support this party-list system.<sup>4</sup>

## 2- SIZE AND EXISTENCE OF LOCAL GOVERNMENT OR KHUM/SANGKAT

As of 2002, there are 1621 local governments and 11261 councilors.<sup>5</sup> The number of councilors ranges from 5 to 11 depending on the number of local residents (LKSA, art.12). With a small population density of only 64 per square kilometers (and about a quarter of the land of even under 20),<sup>6</sup> one can expect that local participation would look quite optimistic. However, being geographically small, local governments' voice would not be strong enough to lobby the center to adopt policies in their favor.

The existence of local government system looks rather fragile. Although Khum/Sangkat enjoy a Constitutional guarantee as territorial divisions—thus, the Parliament cannot abolish them without first amending the Constitution, a step yet pessimist—the decentralization system itself enjoys no Constitutional privilege and can be completely abolished at a stroke by a statute. While it was labeled as a 'revolution' in Cambodian administration,<sup>7</sup> the central government is fully free to reverse this development when it so chooses. Khum/Sangkats are left to the discretion of the Executive empowered to decide whether to create, modify their boundaries and even abolish them (LKSA, art.6). Moreover, the Minister of interior's discretion alone suffices when it comes to dissolving any khum/sangkat council for failing to comply with central rules or central policy (LKSA, art. 57 and 58).

There are no provisions for popular recall of local officials. It is regrettable that a non-directly elected official can dissolve directly elected bodies even without any plebiscite necessary. This raises confusion among local electorate in terms of democratic accountability: to who is their elected council really accountable? It has also been ignoring the popular will. Indeed, when asked whether they (people) shall have the right to recall any elected councilor, the response was definitely pro-democratic: 91% favored this popular mode of dismissal (IS, 2000: 53).

### 3- FINANCIAL RESOURCES

Human resources problem apart, financial resources are perhaps the most vital factor to local governments. The sub-decree dated Feb.25<sup>th</sup>, 2002 on Khum/Sangkat Fund determined the central grants for 2002 to amount to 20 billion riels (approximately only US\$ 5 million). The whole annual fiscal resources for 2003 came from the national budget allocation and the donors with 49.2 billion riels (approximately US\$12.3 million) divided among 1621 local governments.<sup>8</sup> The above sub-decree determined the amount of the central grants to local governments from the national recurrent revenues thus: not less than 2% for 2003 and not less than 2.5% for 2004. The law (LKSA, art.45), for its part, makes it clear that Khum/Sangkat have no power on politics of taxation, meaning that they cannot create taxes themselves but can only collect what would be allowed to by the central government, while local taxation power is allowed in countries nearby<sup>9</sup> since fiscal decentralization would not endanger the national macroeconomic stability (Tarigan 2003). The 'Report on the application of the decentralization year 2002 and perspectives toward 2003' reveals that their expected main incomes from taxes have not been collected due to the lack of relevant regulations allowing such operation, except a very limited income from civil registration fees (birth, marriage, death...) which of course are determined by the central government as a statutory function.<sup>10</sup> This fiscal disability has been affecting not only local development programs/plans but may already have intimidated some councilors. The above report shows that 149 councilors have quit office, likely because of insufficient remunerations from council's budget.

### 4- PARTNERSHIP

To proceed with decentralization policy, the 'National Committee for Support to Commune/Sangkat (NCSC)' was established in 2001 as an authoritative agency dealing with the decentralization matters. Composed of various ministers<sup>11</sup>, NCSC has four wide competences: as a coordinator for all agencies concerned, as a consultant when it comes to laws and regulations on decentralization, as a policy maker, and as an authority itself with power to make decisions and guidelines with binding force for Khum/Sangkat to follow. It also has the competence in determining the central-local relations.

To help NCSC, the 'Department of Local Administration (DoLA)' was established in May 2002 as a unit inside the Department General of Administration of the ministry of interior (Ministerial order,

dated may 7, 2002). DoLA serves as an assistant to the Department General of Administration and is the secretariat of NCSC. Each province is assisted by a 'Provincial Office of Local Administration (POLA)'. DoLA, POLA, and Seila/PLG provide channels for communication for all matters relating to decentralization.

Although these institutions (NCSC, DoLA, POLA and Seila-PLG) have proved quite efficient, they are all centrally created and are not obliged to consult with local governments. There has not been any commitment from the part of Khum/Sangkats themselves to set up communicative channels or associations to represent and protect their collective interests as a whole. The current partnership system mostly depends on the center.

## 5- ORGANS OF LOCAL GOVERNMENT

*Council.* As the representative organ of the inhabitants (LKSA, art.9), the council is elected for a 5 year-term (LKSA, art.11). It is composed of between 5 to 11 councilors depending on the demographical and geographical conditions of the area (LKSA, art12). The council can be dissolved at the discretion of the minister of interior in two cases, either because the intervention of the state in a case fails to get satisfied after six months' try (LKSA, art.57) or simply because the council is judged to have acted not in accordance with the central government policy (LKSA, art.58). Councilors shall individually lose their seat if they lose their ability as certified by a competent authority (for example by the hospital in case of insanity etc.) or lose their partisanship from their party or are expelled by the council for violating the internal rules of the council (LKSA, art.16). The council shall meet at least once a month (LKSA, art.21) with a quorum of more than half number of councilors (LKSA, art.22) paid by communal budget. The meeting is publicly open (LKSA, art.23) and decides over development projects, budget, local tax rates (the power to levy taxes belongs to the central government), internal regulations and local regulations, and other affairs to be specified by the minister of interior (LKSA, art.22).

*Mayor, deputy-mayors, clerk.* Mayor and deputy-mayors (first and second) are all councilors. The head of the list receiving most votes automatically becomes the mayor (LKSA, 32). The head of the list receiving second most votes becomes the first-deputy mayor; the head of the list receiving third most votes becomes the second-deputy mayor (LKSA, 33). If only one list has received all the votes, both mayor and deputy-mayors are chosen by their order in the list (LKSA, art.34). If only two lists have received the votes, both mayor and first deputy come from the first list receiving most votes, by their order in the list while the second deputy is chosen from the head of the second list (LKSA, art.35). On the other hand, the clerk is a central government officer nominated by the minister of interior and is subject to replacement upon the proposal of the mayor as decided by the council (LKSA, art.28). Mayor and clerk are centrally paid.

*Specialized committees.* Mayor has power to create (and logically to dissolve) committees<sup>12</sup> as

assisting and advisory bodies whose head can be picked up among councilors or residents of the place (LKSA, art. 27).

One big challenge stands clear: Cambodian local government has no staff. The central government created decentralization without decentralizing personnel. Most of Khum/Sangkats have no figures other than the councilors themselves. The fiscal constraint means that local government cannot afford to hire staff. In reality, the clerk, who is the only one technical staff provided by the central government to help Khum/Sangkat in daily matters, has yet to learn a lot.

## II. Powers of Local Government

### 1- CORPORATE STATUS

All Khum/Sangkat are corporations (LKSA, art. 2). With the legal personality, they can enforce rights within the permission of the law, entitled to them and are liable for the wrongdoing they may commit. This legal personhood helps us understand local government both in legal and political significances. As a legal entity, local governments' existence is distinct and independent from other institutions (parliament, government, judiciary) for they shall have their own rules, staff, assets and budget (LKSA, art.12, 27, 48, 73). As a political representative organ, local government shall decide over collective local interests and face the public accountability to the electorate through direct popular vote at regular intervals out of which local government still, though there may be changes in the composition of local council, remains. The corporate status ensures therefore a legal continuity for local government's works.

### 2- ECONOMIC CONSTRAINTS ON INCORPORATION

The extent to which the corporate status exists shows how capable local government is. This capacity implies that the government representing local people shall possess enough resources to have local interests satisfied.

All Khum/Sangkat are given status as juristic persons enjoying the right to initiate development plans (LKSA art. 60). It is noticeable that pressures to decentralize usually come from the need to reduce the burden of the state by making the provision of public services more responsive, quicker and closer to the users. Hence, local government designed to take these responsibilities must be provided with sufficient capacity. The present corporate status, however, would very likely prevent Khum/Sangkat from being efficient.

We shall identify the defects in Khum/Sangkat's incorporation. Theoretically speaking, creating a corporation means recognizing that a new *persona*<sup>3</sup> has been given birth, born with the rights (and can bear obligations) and the capacity to exercise them normally and eternally until judicially declared incapable because "once the status (of corporation) is given, the capacity is the principle and the incapacity (is) exception" (Linditch, 1997: 191). Public corporations, however, can only act within the

permission of the granting law. Khum/Sangkat in Cambodia are not fully given two fundamental rights: the right to own property and the right to make contracts.<sup>14</sup>

If it is true that the law has named Khum/Sangkat as corporations, the latter's right to own property (art.73) suffers from the control of the central power namely from the Ministry of Economy and Finance and Ministry of Interior (Art.83: The financial regime and asset management of a Khum/Sangkat shall be under the Ministry of Finance and Economy after having agreed on principles with the Ministry of interior). As to the property transferred by the state there is no sale or exchange of ownership or transfer of *usus* (use) possible without prior consent of the two ministries (art.81). Thus, it sees this right more theoretical than practically concrete, for, as Vedel and Dévolvé (1990: 390) put it, "Financial autonomy, which is not only the theoretical possibility of owning property and managing it but the practical practice for the decentralized organism to obtain and choose how to use resources, is a very important condition of concrete decentralization".

Restriction on the right to enter into financial contracts strengthens the economic dominance of the central government upon the subventions of which the decentralized power survives, which may, to some extent, undermine the democratic process (Foulkes, 1995: 24). Khum/Sangkat council is banned from borrowing money or engaging in any kind of financial obligation (art.80). Only the state can borrow money and then eventually transfers it to the Councils as subventions, and whether Khum/Sangkat can legally issue bonds is subject to legal debate for no single provision of the law expressly incorporates such a right. Moreover, Cambodia never had such practice before. Until the present time, resources available to local governments have been, as shown above, so much disappointing. In fact, Khum/Sangkat should have been entitled with the right to financial engagement within a specifically defined scope as specified by law.

Corporate status under the present system must endure strict limitations that make it incomplete, insufficient to make Khum/Sangkat capable to obtain resources without which there can be no free and reliable strength to deal with even purely local concerns.<sup>15</sup>

Localities may naturally tend to perform many works but usually the scarcity of their resources must make them dependent on the central grants. Therefore, Khum/Sangkat may prefer to do few works, but autonomously within their resources, than do a lot under the central interventions since the more the central authority intervenes, the less the local autonomy develops to full potential.<sup>16</sup>

### 3- LACK OF CENTRAL-LOCAL POWER SEPARATION AND ITS CONSEQUENCE ON FUNCTION-AUTONOMY DILEMMA

Any willing action is the result of exercising some kind of decision; and the decision-making capacity of a person to be motivated into action is his power exercised under that will. Power and "Will" are, thus, interconnected. This paper focuses on the concept of "Will" as it relates to the legitimate power usually acquired through popular elections.<sup>17</sup> Therefore, the exercise of such power

must emanate from, and be in, the popular “Will”. This is exactly how Cambodian local government, as the representative of local popular “Will”, has acquired its power. From this viewpoint, as long as the power of the local representative governments is based on the local popular “Will”, it becomes the exercise of the popular power, individually and partly residing within each citizen. On the other hand, because this “Will” is limited to what are local interests subordinate to the national ones as prescribed by law, it must be clearly defined. Of course, the local governments’ “Will” cannot infringe or damage the indivisible national sovereignty, but it can firmly be separated from it, starting from the very daily life.<sup>18</sup> The call for the separation of powers between levels of government—central and local—is often a solution to claims formulated by the local side in need of autonomy and the central side strongly committed to holding power.

Each person has different interests but once they have lived together in the same area and become accustomed to the use and benefit of the same things for quite long time, those previously individual interests seem to become harmonized as a set of interests shared by the community as a whole. This community Will is completed in, and since the community is just one among other hundreds, the Will of one community cannot prevail another’s. Thus, for example, in order to guarantee the sustainable and general peace of all communities, there is a call for national police forces. For matters beyond local interests, communities are submitted to a common rule laid down nationally, but for local matters, they should be submitted to themselves within the limits of the law. If done so, it is possible to separate the powers between national and local governments.

Now let us turn to the claim that this section makes in regards to the lack of this conceivable separation of powers. Local power depends on the demarcation line between central-local powers that—upon legislative policy<sup>19</sup>—has to be defined as clearly as possible so that the directly elected councils will not be abandoned to the unpredictable intrusions of the central authority. Therefore, it is important to search for the legislative “Will” defining the demarcation line of powers between the local and central governments, that is, whether or not the legislature has willingly institutionalized local regulatory power as is promised from the very beginning of the law.<sup>20</sup> The fundamental question is how clearly and concretely the sphere of competences vested in this local regulatory power is defined. To this question, we refer to the dual role the Parliament has vested in the decentralized authorities: as the “local representative organ” and the “state representative agent”.

As to the first role, Article 43 briefly cites some functions in the broadest language. It reads thus. Khum/Sangkat’s functions include:

- Maintaining security and public order
- Managing necessary public services and make them work well
- Encourage the improvement of contentment and welfare of the citizens
- Promoting social and economic development and upgrading the living standard of the citizens
- Protecting, preserving the environment, natural resources, culture and national heritages

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- Reconciling citizens' concept to seek for mutual understanding and tolerance
- Performing general affairs to respond to the citizens' needs.

Interestingly, this article treating the functions of the local power did not attract much of the lawmakers' attention.<sup>21</sup> Its language is so vast that it makes it difficult, if not impossible, to certify any real and concrete local power. The broad meaning of the text does not necessarily mean that local power is substantially large. Rather, it is more likely that such language could not put any substantial limit to the central intervention. A large power would be the most exposed to invasion from other powers. If it is true that "the commune's existence is coeval with that of citizens, their freedom is rare and fragile" (Tocqueville, reprint, 1961: 65) and once its power is exposed to invasion, localities are ready to obey. The broad language makes everything unclear, and therefore, easy to be invaded, and where there is invasion, there can be no separation possible. The local power is thus exposed to two main obstacles: first, the absence of its concretely clear definition encourages invasion from the central authority, that is, the absence of a guaranteed local autonomy; secondly, any (local) affair may be nationalized by later central legislation. In other words, there is not any clear central-local separation of powers.<sup>22</sup> The rules of central authority (cabinet and ministerial orders, etc.) do not stop where local power is supposed to be. From this viewpoint, local power does not seem to derive from the democratic acquisition through popular election (LKSA, Art.4), rather it is almost all derived from the central government's mercy whose role is always right there, impossible to be denied.<sup>23</sup> This role or supervision grows bigger when Article 47 (see the following section), improperly delegates the legislative power to the government.

On the other hand, as a state representative agent, delegations (statutory functions) command the most attention. Central interference can cover any matter. The method of delegation strongly reveals the central bureaucracy's concerns. Delegations go to the whole council (LKSA, Art.44). By delegating to the council as a whole, the ruling parties, in case of failure to win the mayor seat, can still keep influence on local government through their members elected to the Khum/Sangkat council. As the law goes, Khum/Sangkat must fully and wholeheartedly obey all national rules (Art.44).

It does not sound justified for the parliament not to stipulate local competences in concrete terms. A quick look at the two ministerial orders (of the ministry of interior), one dated Feb. 15<sup>th</sup> 1994 governing provinces and cities and another of March 16<sup>th</sup> 2000 dealing with districts, reveals that there are very detailed enumerations of functions, for instance, 32 functions for provinces and cities. The legislator leaves—under the art.47 as studied below—this very power to the central government to fix local competences in details. However, the cabinet order dated March 25<sup>th</sup> 2002 "on the decentralization of power, roles, and functions to Khum/Sangkat" made no significant progress regarding the sphere of local functions but simply repeated the same vague terms of the law (Art.43).

With the above reasoning, the legislature, unwilling to define the competences of the decentralized authority in concrete terms automatically enforceable by themselves, feels relaxed to impose upon

localities an absolute compliance with higher rules. Subsequently, Article 43 renders division of central-local functions blurred while Article 47 (see the following section) makes local government power dependent on central government's mercy. Within their economic constraints, local governments cannot perform functions as much as they want, while asking for central financial grants to do their job means exposing their independence to central disposal for grants never come without conditions and rules. As a result, there is always a difficult choice between functions and autonomy. Local government might enjoy some autonomy if they do not claim to do much, that is, they had better remain humble in order not to have their power invaded, for otherwise, any local crusade for more functions would face endless central interventions. Consequently, the dilemma between autonomy and function is at the surface of the issue. Within the lack of a clear separation of central-local powers, the more local governments want functions, the more they would have to accept central rules attached with grants, that is, to lose autonomy. This lack of separation of powers finds more explanation where the central government receives power to freely regulate the scope of the local affairs.

#### 4- IMPROPER DELEGATION OF THE LEGISLATIVE AUTHORITY AND ITS DANGER

It is very clear in the Supreme law [Constitution] that the legislative power, namely the power of the citizens to make laws to which they have declared their consent through their representatives,<sup>24</sup> is vested in the National Assembly (Constitution, Art.90) and the Senate (Art.99). The separation of the three powers—legislative, executive and judicial—is made a fundamental principle of constitutionalism (Art.51) in Cambodia. From this shall derive what is known as the non-delegation doctrine<sup>25</sup> based on which is to be banned any delegation of legislative power to the Executive whose regulatory power is not even maintained in the Constitution (Gaillard 1994: 111). However, the Cambodian parliament has voluntarily delegated its legislative power to govern local government through its famous art. 47 which reads “Role, functions and powers of the Khum/Sangkat administration ...may be determined in more details by sub-decrees (cabinet orders) following the proposal of the Minister of interior”, which could lead to injustice in some manner.<sup>26</sup> This article 47 puts no clear principle or standard to direct the delegated legislation. There is no central-local separation of functions, and now the law simply leaves to the Executive ‘the’ power to tell just what local functions are without putting any principle to guide or limit this power. Where is the limit to ‘in more details’ can be found? Surely nowhere. Thus the ground to challenge this delegation as unlawful is open although such was completely unfamiliar to the lawmakers.<sup>27</sup>

Such a delegation may put the separation of powers doctrine in peril as it extensively<sup>28</sup> transfers to the executive the lawmaking-power to set what the latter thinks fit. Cambodian legislators did not seem to have created local authority but simply have left it to the Executive to tell what it is while it is beyond a doubt that in a democratic government the power to list the authority of local

government, that is, to determine the demarcation line of power between levels of government, has to be legislative rather than executive or administrative for, as cited in Breyer and Stuart (1992: 38),

It is a principle not questioned that except where authorized by the constitution, as in respect to municipalities, the legislature cannot delegate legislative power, cannot confer on any body or person the power to determine what shall be the law. The legislature only must determine what it shall be...

The central government can behave as if it was the source of law since the delegating act (art.47) did not prescribe any requirements to be satisfied as to its use, which may run counter to the principle of a democratic government for, as shown in Davis and Pierce (1999: 26-7):

Legislative power is nondelegable [...]. What Congress does is to assign responsibility to the Executive; and when the Executive undertakes those assigned responsibilities it acts, not as the “delegate” of Congress, but as the agent of the People. At some point the responsibilities assigned can be so extensive and so unconstrained that Congress has in effect delegated its legislative power; but until that point of excess is reached, there exists not a “lawful” delegation, but no delegation at all.

This modern understanding has a meaningful place when viewed with the Cambodian context. It can be said that Cambodian Executive, or, precisely in this case, the Minister of Interior, holds, as argued during the legislative debate on the draft of LKSA, the ‘lawmaking power’.<sup>29</sup> This act of delegation (Art.47) does not seem to assure the minimum guarantee known as the “intelligible principle” which requires that the legislature lay down clear standards to which the empowered body is directed to conform (See, e.g., Stein *et al.*, 2002: 3-76), that is, to guide the Government to intervene in strict compliance with the legislature’s purpose.<sup>30</sup> The Cambodian cabinet is empowered with unchained and eventually unchallengeable<sup>31</sup> discretion to legislate, to create completely new regulations as the statutory language does not bear any single condition or set any substantive limitation regarding to the application of the delegated authority. In the absence of a clear direction for delegated legislation, Cambodian local government inevitably has to face the very possibility of unbridled central administrative discretion: “even if the language of the delegation is broad, Congress should articulate its policy goals in order to avoid unbridled administrative discretion” (Koch, 1997: 177).

The Cambodian parliament, having so delegated, must have improperly acted as it had denied its very competence. Such standardless delegation may have violated the constitutional doctrine of separation of powers, for, in Faure’s words (1997: 137), “the legislature wouldn’t grant so large power without ignoring its own competences” but Cambodian Constitutional council ignored this point when it accepted LKSA as a whole.<sup>32</sup> Of course, perhaps cases in the future may give the Constitutional council chances to think of the matter more seriously.

It is now important to immediately turn to the danger such breach can bring to the localities. As this article has found, where there is no central-local powers separation, any invasion becomes more of a reality. Local affairs cannot be properly protected, for the improper delegation has given to central government's invasion the very force of law. At least from early 1980s, Cambodian bureaucratic custom or tradition has always been the type of the centralization of power, and when a law is made to reflect a custom, its enforcement is usually calm and easy. As a result, the central government, which should have existed for general reasons, could still exist for any reason, and because it has deeply taken root in such a custom, its continuous presence, be it "dangerous" to the decentralization, remains calm and tranquil. The danger left by the present law can be explained more where localities are placed under a free disposal of the central power.

## 5- UNREVIEWABILITY OF CENTRAL DISCRETION AND ITS CONSEQUENCE

The danger that might be brought to local autonomy becomes more accurate since the protection of local competences seems to be absent when viewing the possibility to challenge the question of abuse of discretion by the central power. Undoubtedly, when the executive comes to legislate (Art.47) ("Role, functions and powers of the Khum/Sangkat administration ...may be determined in more details by sub-decrees (cabinet orders) following the proposal of the Minister of interior"), it comes with unlimited discretion. The judicial review on such discretion, as shown in Pierce (2002: 1251), appears to be precluded if the delegating statute leaves nothing to the court:

Whenever a statute gives a discretionary power to any person, to be exercised by him upon his own opinion of certain facts, it is a sound rule of construction that the statute constitutes him the sole and exclusive judge of the existence of those facts...

Article 47 provides neither standard nor limitation based on which the judge might actually evaluate whether or not the executive has acted beyond the delegated power, or whether there is abuse of discretion. Cambodian courts have no standard to apply in order to condemn an abuse: "...[T]hat unreviewable absolute discretion exists when the statute left the courts no law to apply" (See e.g. Koch, 1997: 308-21). The statutory language, though not expressly excluding judicial review, makes no meaningful standard so as to allow courts to intervene.

If the statute is written so that a court does not have a meaningful standard against which to judge the agency's decision, then judicial review is precluded (Koch, 1997: 334). The 'in more details' clause (art. 47) may be an asset for court to argue in favor of local government but since the power of local government is dictated in vagueness, the 'in more details' clause would not put a meaningful ban on central government's interferences.

Local power stops where there is a central rule regulating the same matter. In other words, the [local] discretionary power stops where there is regulation already [centrally] determined (Eisenmann,

1983: 295-6); local government finds itself imposed to follow the central will, somewhat more peculiar than its own, and this is the “obligation imposed by law” (LKSA, Art.54). Therefore, possibly very often, when local government decides to establish a measure, it does so because it is supposed to do so. Local power is attached by obligations, yet “the opposite of the discretionary power is exactly a power accompanied with obligations (Eisenmann, 1983: 293).”

The two sections above have explained how central government has received substantially large power to govern Khum/Sangkat. Undoubtedly, *ultra vires* principle against local government prevails when it comes to statutory functions’ matter (as a state agent) while the general competence clause, as shown below, would not help much.

## 6- CENTRAL-LOCAL RELATIONS: ULTRA VIRES PRINCIPLE

Cambodian local government is a mere statutory creature and has thus the enabling statute—LKSA—as its source of authority. However, as shown above, there is no clear division of central-local functions. Instead the law firmly puts Khum/Sangkat under the central power. Any powers of local government are not guaranteed by the Constitution and can be removed by the parliament when it thinks fit. The powers of local government can never go beyond what the statute permits: any act beyond its powers is unlawful or *ultra vires*. The article 5 of LKSA famously states that ‘the normative (decision-making) and executive powers are vested in Khum/Sangkat and must be exercised in compliance with the Constitution, statutes, decrees, sub-decrees, ministerial orders and all other relevant legal instruments’. Local acts cannot contradict these higher rules. The strict respect of vertical hierarchy still remains the rule in Cambodian public administration. Martin (1994: 7) appropriately observes that in Cambodia “respect for hierarchy is omnipresent”. Failure to conform to these central rules including international treaties and conventions recognized by the kingdom, shall render such failing act absolutely void (LKSA, art. 49). Moreover, the statute has excluded certain fields from the local jurisdiction. Thus, local government has no power regarding forestry, postal service and telecommunication, national defense, national security, monetary, external politics, politics of taxation, and other domains to be specified by law and relevant legal instruments (LKSA, art.45). Clearly then any local act in violation of statutory functions (delegated as a state agent) is void.

## 7- GENERAL COMPETENCE POWER: LOOSENING THE ULTRA VIRES PRINCIPLE?

Local government represents both the community and the state (LKSA, art.42). As the ‘representative agent of the state’ it assumes ‘statutory functions’ as specifically delegated and assigned to it by statutes and regulations through delegation (LKSA, art.44). *Ultra vires* is not hard to pronounce in case of a violation of the delegating act. It is of a principal-subordinate relationship or a top-down vertical control type. However, as the representative organ of the community (LKSA, art.9), local government is a multi-functional corporation holding the welfare power and assuming the

'general competences' in responding to local interests (LKSA, art.43). Khum/Sangkat's functions include:

- Maintaining security and public order
- Managing necessary public services and make them work well
- Encourage the improvement of contentment and welfare of the citizens
- Promoting social and economic development and upgrading the living standard of the citizens
- Protecting, preserving the environment, natural resources, culture and national heritages
- Reconciling citizens' concept to seek for mutual understanding and tolerance
- Performing general affairs to respond to the citizens' needs.

The wording of this article 43 seems to vest in local government a general power to act unless expressly prohibited by a central legislation. It is of the 'integrationist' model in which 'the division of central-local functions is blurred, because the delegation of central governmental functions to local governments is common and loosely defined' (Muramatsu 2001: 3). The wording shall provide an eternal basis for local legislation which should be presumed lawful until proved otherwise. However, when acting as an agent of the state, local government is not allowed to act beyond its statutory functions as detailed and specified by the enabling act. So far two functions have been delegated to local governments: civil registration and electorate registration. The law (LKSA) puts no limitation on statutory function, allowing a centripetal force to remain since any kind of service can be nationalized and thereby governed by national legislation. It will be to the court to decide whether local government—when performing a statutory function as a state agent—holds implied or incidental or consequential power discernable from the enabling act. However, under the *ultra vires* principle shown above, any general power of competence shall have implications for central government control: Khum/Sangkat cannot simply use their general power to override national legislation on the grounds that it thought the latter was inappropriate in local conditions. Indeed, local officials would still be reluctant to take measures even if authorized to do so due to an intense "hierarchical personal relations" (Mabbett and Chandler 1995: 259) with central officials. Also, any general power will be superseded by detailed or specific powers expressed by later central legislation.

### III. Re-guiding Cambodian Statutory Devolution

We can summarize what the article has found under three headings. Politically, there is neither Constitutional guarantee against arbitrary abolition of the devolution nor popular recall of local officials (while the contestability in local elections is very much threatened). Administratively, although local government is free to hire and fire employees, local regulatory power is weak and precarious. This article has proved that the Executive is given large powers to interfere into local affairs; affairs that it creates. The broadest language of Article 43 could not satisfy the idea of the separation of central-local powers and makes often a difficult choice between functions and autonomy. In addition,

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the improper delegation of legislative power has made the central agencies supervisors of the local organs. Any central rule is applied beyond local consent. Although local regulations need not be agreed in advance by the central authority to produce effect, they are no more than precarious for they could disappear under a later central rule. The present legislation was made in such a way that the central government still remains the provider of services in most areas. Although the powers of local government are broadly worded in general powers, those terms are far from being directly enforceable. The judiciary, having long been manipulated by the Executive (Kong Sam Onn 2001), would be ready to favor central power. Fiscally extremely poor means an extremely low level of services provision and investment. It cannot be said that local government has control over communal services. In reality, provinces and field agencies of the ministries still perform the role as service providers. Furthermore, it is believed that even primary education and medical care are not likely to be decentralized (Seila/PLG Mid-Term Review, 2003: 3).

It is clear that local government has an extremely little potential in improving the well being of local residents, mostly due to administrative and fiscal disability as well as a political culture of top-down government as illustrated by Seila/PLG Mid-term Review (2003: 11):

It may be noted that the old system of line command from the ministry of interior to the village still coexists with the new elected structures at commune level and that there is still insufficient understanding on the status and mandate of the new elected local government with its own law. This is illustrated by the fact that the commune chief and clerk are paid by the central government and seem more accountable to the district governor than to the commune council. The commune chief is required to attend weekly meetings with the district governor and the commune clerk reports on commune activities monthly, and sometimes weekly, to the central government.

The general powers clause is more of a mockery than a reality. Khum/Sangkats have neither appropriate fund nor qualified staff to perform their duties. In reality, they can mainly focus on local roads, water supply facilities and irrigation structures (Seila/PLG, *ibid* at 5). No approach or initiative from the central government in enacting the local revenues/tax act has been taken.

Within this centripetal expression of State power, Cambodian system of devolution needs concrete new guides. In administrative terms, some policy proposals can be made as follows:

- 1- Local administrative regulatory power should be termed concretely.
- 2- LKSA should be revised in such a way that the delegated legislation vested in the Executive is principled.
- 3- A clearer division of central-local functions shall be made.
- 4- Relationship between Khum/Sangkat and districts and provinces/cities must be clarified in the coming law.

5- Freedom to contract out own responsibilities.

6- Special attention must be made in terms of capacity building for both national and local staffs.

Fiscally viable and strong devolution requires the followings:

1- Future local tax law must specify clearly all types of local taxes to be levied.

2- Responsibility and control over communal services should be in local government's hand.

3- Local revenues should represent majority of expenditures.

4- Local government's right to financial engagement should be permitted within a scope to be specified by law.

5- Local government should have the right to borrowings.

6- Subventions from the center should be unconditional enough to guarantee local autonomy.

In the long run, it is desirable to think of the possibility to enhance political decentralization. This will be a time-consuming task for political decentralization often requires a constitutional protection of local government system against arbitrary abolition, a strong Parliament and an effective pressure groups tradition (World Bank, cited website), each of which is not yet the case in Cambodia today.

#### IV. CONCLUSION

After decades of being ravaged and exhausted by internal conflicts, Cambodian State machinery had had to centralize its bureaucratic power. The current system of devolution shows that this intention is still dominant. Although such cautious policy can be said to be wise in the sense that it would not threaten a wild shift of power from the center to localities, it cannot make local government live up to anticipated expectations at least in terms of service delivery. This worrying situation can only prompt consideration that it is from deconcentration to be applied at district and provincial levels that any real developmental returns could be found. Under the present system of devolution within the centripetal force, Khum/Sangkats would not be able to fulfill their justifications so much expound by both classical and contemporary theorists. This article presents its significance in that it has revealed some major mistakes the policy makers have made and has shed light on new guides for them to consider, not only for enhancing the current devolution but also for analyzing some pre-conditions for future deconcentration at district and provincial level. In other words, in a given political and bureaucratic environment like the case of Cambodia (administratively and financially very poor), a rush to devolution under the label of general power clause does not mean that local power is substantially large and workable. This finding is important for policy makers responsible for formulating a future workable deconcentration at district and provincial level. This study is, however, mainly limited to legal viewpoint and assumes that the central government would take initiatives (initiative from above) and that it needs to be strong enough "if it is to perform its integrative, coordinating, and monitoring role effectively" (Larbi 1998: 204), while the problem of local government is also related to political science particularly on how local officials can successfully lobby the central

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politicians to adopt regulations in favor of local government as well as on the role of pressure groups (initiative from below). The success of decentralization—either devolution or deconcentration—depends also on how much the behavior of the central leadership may gradually change in favor of it amid the long aged hierarchical central-local relationship.

### NOTES

- 1 The ‘Seila Program’ was launched by the UNDP Cambodia Reintegration and Rehabilitation (CARERE) in 1994 with focus on governance, participation, planning, financing and implementing local development in some distant provinces and, with its outstanding outputs, was adopted as an official program by the government in 1996 as an aid mobilization and coordination framework for support to the Royal government’s decentralization and deconcentration reforms. At the moment, Seila program is in its second five-year phase (2001-2005). See for example [www.worldbank.org/wbi/reducingpoverty/docs/newpdfs/case-summ-Cambodia-SeilaProgram.phf](http://www.worldbank.org/wbi/reducingpoverty/docs/newpdfs/case-summ-Cambodia-SeilaProgram.phf)
- 2 See the declaration (with binding force) of the National Election Committee, n. 03.242/02, dated March 5 2002.
- 3 Indeed, the elections in 2002 with the participation of eight political parties gave these results: 7703 councilors from the Cambodian People’s Party, 2211 from FUNCINPEC, 1346 from Sam Rainsy Party, and 1 from Democratic Party. See the declaration of the National Election Committee, n. 02.238/02 dated Feb.28 2002 and 03.244/02 dated March 5 2002.
- 4 Only 50% favored political party candidates and only 46% agreed that local elections be through prepared candidates lists. See William Collins et al, 2000. *Impact Survey of Voter Knowledge and Awareness*, pp.45-7 (Occasional paper, March 2000, published by Center for Advanced Study, Phnom Penh).
- 5 See the declaration of the National Election Committee, n. 03.245/02, dated March 7 2002.
- 6 See [www.nis.gov.kh/CENSUSES/Census1998/Brochure-Census98-English.PDF](http://www.nis.gov.kh/CENSUSES/Census1998/Brochure-Census98-English.PDF)
- 7 The minister of interior called the development “a revolution in the administration”. See The Record of the National Assembly’s debate, 9-12 January 2001, over the draft of the LKSA, p. 1294.
- 8 See the Final Report, National Workshop on Formulation of the 2003 Seila Program, held on 27-29 August 2002, p.21.
- 9 For example, the Barangays (grassroot units in the Philippines) enjoy taxing powers though the scope is quite limited. See Jose N. Nollado (1999), *The Local Government Code of 1991, Annotated*, pp. 204, 247, 442.
- 10 The sub-decree n.62 dated June 24, 2002 has fixed the registration and postal fees to be applied in Khum/Sangkat, for instance, a wedding form costs one hundred riels per page and a stamp of one thousand riels per form (1USD currently costs about four thousand riels).
- 11 The Decree, n.0501/175, dated May 18, 2001, art. 5, gives the composition of NCSC thus:
  - Minister of interior, chairperson
  - Minister of the cabinet, deputy-chairperson

- Minister of economy and finances, member
- Minister of rural development, member
- Minister of land management, urbanization, and construction, member
- Minister of planning, member
- Minister of women's affairs and former veterans, member
- Director General of the Department General of Administration of the ministry of interior, permanent member.

12 There is no limitation on the number of committees. For instance, in *Sangkat* Beoun Keng Kang 2 in Phnom Penh city, there is a 'committee for roads maintenance'.

13 When referring to the Cambodian local government as a corporation, we must be reminded that such corporation under the present system is no more than a fiction created by the lawmaker (the state) and can be legally abolished at anytime. Therefore, it has no right to exist. And for this reason, the state remains its master. Jean RIVERO made this presentation "...on the contrary, if they (corporations) purely are fictions, the state is their master", *Droit Administratif*, 1990, p. 50.

14 Because a corporation is "a collection of many individuals, united into one body [...] with the capacity of acting [...] particularly of taking and granting property, of contracting obligations, of suing and being sued" cited in BAILEY, *Cross On Principles Of Local Government Law*, 1997, p.8.

15 "In many developing countries, in order to reduce the government's budget deficit, the central government must be slimmed and local governments' dependence on central government must be reduced; to do this, central government must devolve powers to local governments and at the same time give them incentive to make greater efforts on their own to find the necessary resources", JICA, *Local Development and the Role of Government*, 1997, p.29.

16 Of course, not each and every central intervention tends to reduce the local autonomy. But survey on many countries has proved this trend: "In view of the influence of administrative control by the central government, the greater the scope and breadth of administrative controls, the fewer the powers of local legislatures. Certainly, the stronger the administrative controls, the more real decision making power shifts to the central government. [...] Under the circumstances, local legislatures, even if they enact local regulations and ordinances, cannot expect to have their own legislature exercise any real binding power", *Id.* at 46.

17 Article 4 (LKSA) reads: "The powers to direct and govern Khum/Sangkat are derived from the general, universal, free and fair, equal, direct and secret elections within the framework of each Khum/Sangkat".

18 Each person has, surely, more than one interest, each of which differs upon circumstances. For example, he/she does not, when casting vote for national parliament, feel the same when doing for his/her local council. When casting for the former, workers for example may think about the minimum wage to guarantee the living or about the equal treatment under the criminal law to make sure that they get the same justice with all others and so forth, while when casting for the latter, they would traditionally and immediately think about the local roads conditions, mediation for disputes, waste collection, and so forth, all of which are not

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necessary to share with all the rest of their countrymen. Thus, the local will can be perfectly separated from the national will. Indeed, the “Impact Survey of Voter Knowledge and Awareness” conducted in 2000 had identified three most important local needs to be responded to by the elected councils: improve infrastructure, care for the people, and lead (local) development.

19 Though it seems proper to say “central government’s policy” as the law on Khum/sangkat administration was drafted by the government and was adopted in its original wording without important changes. On the other hand, the reason why we refer to “legislative policy” is that the present Cambodian local government system is institutionalized by the legislation, not by the Constitution.

20 LKSA, art.5 declares the *normative and executive powers* that have to be given to the Khum/Sangkat.

21 This article 43 was referred to several times but none of those references was concerning the clear definition of local affairs in concrete service such fire fighting, waste disposal etc. See the record, *supra* note 7, at 1395-1424.

22 Japanese type for instance may give a satisfying central-local power frontier. For example, “waste collection and disposal is undertaken by municipalities”, Alan NORTON, *International Handbook Of Local And Regional Government*, 1994, p. 473.

23 *Supra* note 7, at 1317.

24 J.J.ROUSSEAU firmly set these principles: “[...] “Find a form of association which defends and protects with all common force the person and the goods of each associated, and by means of which, each one, uniting to all, yet obeys only himself, and remains as free as before”. [...] “Each of us puts in common his person and all his whole power under the supreme direction of the general will; and still we receive each member as an indivisible part of the whole”, J-J ROUSSEAU, *Contrat Social, Livre I, Chapitre.VI*.

25 This ‘non-delegation doctrine’ existed in the text of the Constitution before the amendments in 1999. The former Art.90 read: “The National Assembly is the sole body holding legislative power. This power shall not be transferred to any other organ or individual...”. However, in order to create the Senate in 1999—that is, another *organ* which will also hold the legislative power like the National Assembly—the amendments’ heroes couldn’t find a better solution but to omit the above underlined sentence though the idea remains the same as it was before. See the Record of the National Assembly, March 2, 1999, pp.58-67.

26 In case of borrowing for example, Khum/Sangkat shall apply to the central government which can enter into financial contract. As discussed above, there would be undoubtedly some kind of selective policy motivated by political or personal favoritism, source of injustice.

27 Parliamentary debate over the draft LKSA did not cover this doctrine. See the record, *supra* note 6.

28 Until amended.

29 *Supra* note 7, at 1405.

30 Yet, the legislative purpose itself is nothing more than the mere phrase “politics of decentralization” which is stated at the beginning of the law (Art.1) and not directly attached to the delegation granting provision (Art.47). Although the interpretation of the law shall be based, however, on its integrity, the legislator put no

more than two abstract principles: politics of decentralization (art.1) and 'local governance' (art. 3).

31 Eventually unchallengeable because the Constitutional Council has, on case-to-case basis, denied controlling the constitutionality of Cabinet orders. See Constitutional Council, Feb 4<sup>th</sup> 2000, decision n° 018/001/2000 and Oct 6<sup>th</sup> 2000, decision n°021/004/2000.

32 Constitutional Council, Feb 28<sup>th</sup> 2001, decision n° 041/003/2001.

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