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Letter from the Editor

This issue of *The International Journal of Not-for-Profit Law* features a special section on Public Benefit Commissions, which decide whether a particular NGO is entitled to tax relief or other benefits. We open with an overview by **David Moore**, followed by studies of the varying commission structures and experiences in England and Wales, by **Richard Fries**; Moldova, by **Ilya Trombitsky**; and Armenia, by **Tatshat Stepanyan**.

Leading off our other articles, **Susan Rose-Ackerman** examines Poland and Hungary's nascent civil society organizations and the obstacles they face, particularly in seeking to influence public policy. Next, **J. Peter Pham** assesses civil society's role in bringing order to long-troubled Liberia, which recently inaugurated the first woman elected to head an African nation. **Alfitri** explains *zakat*, the Muslim obligation to contribute particular amounts to particular beneficiaries, and Indonesia's 1999 law regulating its collection by private parties. **James McGann** and **Mary Johnstone** argue that NGOs now confront a worldwide credibility crisis, but not an irremediable one. Using data from an informal survey, **Charles B. Maclean** and **Jim Moore** show how natural disasters diverted major resources from smaller American nonprofits in 2005, and propose five steps to reduce the impact of future disasters. In *Understanding Organizational Sustainability Through African Proverbs*, finally, reviewer **Emeka Iheme** finds a good deal of wise counsel, but also the blind reverence for ancient teachings that too often impedes African progress.

We gratefully acknowledge the assistance of the U.S. Agency for International Development, the *Brown Journal of World Affairs*, HTML masters Kareem Elbayar and Erin Means, *IJNL* volunteer Asad Kudiya, and, especially, our deeply knowledgeable and generous authors.

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SPECIAL SECTION: PUBLIC BENEFIT COMMISSIONS

The Public Benefit Commission: A Comparative Overview

David Moore*

Fundamental to an active civil society is the right to pursue any legal purpose, including both mutual benefit and public benefit interests. The legal framework for non-governmental, not-for-profit organizations (NGOs) typically permits organizations to be created in different forms and to pursue a broad range of legitimate goals.

Most countries, however, identify a subset of NGOs as deserving a range of state benefits, based on their purposes and activities. By providing benefits, the state seeks to encourage certain activities, usually related to the common good or public benefit. NGOs pursuing such purposes and activities may be given various labels, including "tax-exempt organizations" or "charities" or "public benefit organizations." Further, although some countries may not explicitly define such status in the law, they nonetheless link state benefits to certain purposes and activities. Here we use the term "public benefit" to refer to this special status – however described in the national context – and the term "public benefit organization," or PBO, to refer to organizations legally recognized as having this status.

Who decides which organizations qualify for public benefit status? What, if any, discretion is allowed in making this decision? These questions have critical implications for the regulation of public benefit organizations and the entire nonprofit sector. The decision-maker has the authority to grant public benefit status, often the authority to revoke public benefit status, and in some countries the authority to supervise and support the work of public benefit organizations. By granting public benefit status, the decision-maker lays the foundation for distinct regulatory treatment – treatment that entails both benefits (usually tax exemptions) and obligations (more stringent accountability requirements).

There is no single right answer to the question of who should make the public benefit determination. Instead, countries have adopted a variety of approaches. In some countries, this authority is vested in the tax authorities. In other countries, the judiciary or a governmental entity, such as the Ministry of Justice, confers public benefit status. Still others empower independent commissions to decide the question. What makes sense in a given country depends on local circumstances.

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One innovative approach is the public benefit or charity commission. Although very few countries have adopted the commission model, it is a source of ongoing interest to countries around the world that are drafting, amending, and refining laws and regulations to govern public benefit organizations or charities. The longest-running and most famous example of the independent commission is the Charity Commission of England and Wales. In Moldova, the 1996 enactment of the Law on Associations established a Certification Commission responsible for recognizing qualified organizations as PBOs. For a third variation on the public benefit commission we turn to Armenia, where a governmental commission qualifies projects – not organizations – as public benefit.

Poland and Latvia offer examples of a different kind of public benefit commission. Poland's 2003 Law on Public Benefit Activities establishes a Council for Public Benefit Activities. The Council is not the decision-maker, but rather "an opinion, advising and supporting body" for the Ministry of Social Security, the responsible decision-maker. Similarly, the 2004 Latvian Law on Public Benefit Organizations contemplates the creation of a Public Benefit Commission; the Latvian Commission, like its Polish counterpart, acts as an advisory body for the Ministry of Finance, which is the decision-making body.

The following articles provide overviews of the three decision-making commissions in Europe and the neighboring areas of the former Soviet Union: England & Wales, Moldova, and Armenia.[1]

The overviews highlight the similarities and differences between the three nations' approaches, including the following:

The Role and Purpose of the Commission

- The Charity Commission (CC) of England & Wales registers organizations as charities; for organizations meeting the legal test for charitable status, registration is both a right and a legal requirement.
- The Certification Commission of Moldova qualifies organizations as public benefit organizations, based on the voluntary application of organizations.
- The Armenian Government Commission qualifies programs, not organizations, as charitable, meaning that a single organization must apply to the Commission multiple times for multiple programs.

The Measure of Independence of the Commission

- The CC of England & Wales offers the best-known example of an independent commission. The Commission is an "autonomous" government department established under statute, currently the Charities Act 1993. The CC is a non-ministerial governmental department. As such, the CC exercises its powers and responsibilities independent of governmental control and direction.

[1] Also note that Scotland enacted the Charities and Trustees Investment Act in July 2005 (to be effective in 2006), which creates the Scottish Charity Regulator (OSCR). Looking beyond Europe, the New Zealand Charities Commission was established by the Charities Act (2005) (www.charities.govt.nz).

- The Certification Commission of Moldova is a nine-member commission, whose members are selected by the President, Parliament, and Government. One-third of the Commissioners must be representatives of public associations. The mixed nature of the Commission aims to ensure some measure of independence from the government and political process.
- The Armenian Governmental Commission is not designed as an independent commission, but is instead fully controlled by the Armenian Government, with Commission members appointed by the Prime Minister.

The Accountability of the Commission

- The CC of England & Wales is accountable to the courts, and, solely with regard to its efficient use of public resources, to the Home Secretary and government. The draft Charities Bill contains a proposal to establish a Charity Tribunal, which would hear appeals of substantive decisions of the CC.
- The Moldovan Commission has a less developed system of accountability; indeed, there is no external reporting obligation.
- The Armenian Commission, as a governmental commission, is accountable directly to the government.

SPECIAL SECTION: PUBLIC BENEFIT COMMISSIONS

Charity Commission for England and Wales

Richard Fries*

1. Overview

1.1 The Charity Commission for England and Wales (CC) is commonly described as the regulator of charities. It is an "autonomous" government department established under statute, currently the Charities Act 1993 (which is being substantially amended by a Charities Bill now being considered by Parliament). This simple description begs a number of questions: What is the rationale for regulating charity? What is charity in law? What is the nature of the independence that the Commission, as a government department, can exercise? This article will address these questions in describing the composition and functions of the Commission.

1.2 It will be noted that the Charity Commission's responsibilities are confined to England and Wales, one of the three diverse legal jurisdictions which make up the United Kingdom. Scotland and Northern Ireland have different legal and administrative regimes, though, as with the Internal Revenue Service (IRS) in the United States, fiscal provisions, now administered by the newly amalgamated HM Revenue and Customs department (HMRC), impose a degree of uniformity throughout the United Kingdom. The arrangements for the rest of the UK are described briefly in an appendix to this article.

1.3 Charity is a key concept in British not-for-profit law. It is a complex subject, but in essence a charity in English law is a public benefit organization (PBO). With certain exceptions, charities must register with the Charity Commission and comply with its accountability requirements. The Commission's day-to-day role is to support and supervise charities, ensuring compliance with the accountability requirements, promoting good practice and discouraging bad practice, and investigating and remedying mismanagement and abuse. It has a range of powers both to modernize charities' legal structures and to intervene following mismanagement and abuse.

1.4 There are some 190,000 charities on the Charity Commission's Register of Charities. (The Register can be found on the Commission's web site, www.charitycommission.gov.uk.) They include public bodies, such as the British Council and the Arts Council; nationally and internationally known organizations, such as the National Trust and the British Red Cross; foundations, of which the Wellcome Trust is the largest; and specialist bodies, such as Arthritis Care and Samaritans. Although some charities are large, professionally staffed organizations (which control most of the charitable sector's resources – 3% of charities account for 78% of charitable income!), in numerical terms most charities (well over 100,000) are small local bodies, some ancient,

* Richard Fries was Chief Charity Commissioner from 1992 to 1999. He is a visiting fellow at the Centre for Civil Society at the London School of Economics and a member of the Advisory Board of the International Center for Not-for-Profit Law.

such as parish trusts, and others new, such as recently established community organizations. In essence, the CC's role is to determine what voluntary bodies meet the legal requirements for charitable status, with the benefits and reputation it brings; to ensure that they comply with the legal and administrative requirements for holding that status; and to use its powers to help charities to operate effectively and with integrity. Given the large number of registered charities, it must use its powers selectively. (The new Charities Bill will require it to use its powers "proportionately.")

2. Origins of the Charity Commission

2.1 The Charity Commission was established in 1853. It thus has a continuous existence of more than 150 years (though in a form recognizable today it "only" dates back to 1960). The concept of Charity Commissioners, however, dates back more than 400 years and links with the development of charity in English law.

2.2 Charity is a branch of common law. That is to say, it is determined on the basis of a legal tradition developed by the courts and not by reference to statutory law. (The present Charities Bill, although it provides a statutory framework for the determination of charitable status, reinforces rather than reforms the common law approach.) Charities are non-governmental, non-profit-distributing bodies whose purposes are wholly charitable. Charitable purposes are ones accepted under the common law tradition as purposes serving the public benefit. (The public benefit requirement is strengthened by the new Charities Bill). The common law of charitable purposes has been developed from the Preamble to the Charitable Uses Act 1601, and was codified in the Pemsel judgment of 1891. It is preserved in a modernized form in the present Charities Bill. The essential point is that a key responsibility of the CC is to determine what constitutes charitable, or public benefit, purposes in the modern world.

2.3 The 1601 Act referred to above sought to ensure that charitable resources were devoted to their proper purposes in the public interest. Under that framework, as developed over the centuries by Parliament and the courts, Charity Commissioners were from time to time established to investigate the use of charitable resources. Where there was abuse or obsolescence, action in the Chancery Court was required to remedy or modernize a charity. This process had become so cripplingly expensive, time consuming, and inflexible by the 19th century that reformers, eager to use charitable resources to meet the new needs of Industrial Revolution society, created the Charity Commission as a permanent body to assume, economically and efficiently, the responsibilities previously held by the Chancery Court. The development of the Charity Commission over the last 150 years has been based on that concept, and much of its responsibility continues to be to operate on behalf of the courts.

2.4 The Charity Commission became an administrative as well as a quasi-judicial body as a result of the reforms of the Charities Act 1960 (the basic provisions of which were absorbed into the 1993 Act and indeed remain the basis for the current Bill). In order to improve public information and accountability of charities, the 1960 Act established the Register of Charities and began the process of converting the CC into a regulatory body, with powers of investigation and remedy. The CC, as it is being

developed under the new Bill, reflects a modernization process begun in the 1980s. At that time, questions were raised about whether to retain the CC on grounds of both efficiency and cost. The rationale for requiring charities to be subjected to a regulatory body was questioned, as indeed was the viability of charity as a legal basis for public benefit organizations in the modern world. A review process in government and the charitable sector concluded that for reasons of public support and legal flexibility, the law on charity should be put on a modern footing rather than being replaced, and that the CC should accordingly be developed into a modern regulator.

2.5 The mission the CC now sets itself is to promote the public's trust and confidence in charity and charities, as "the independent regulator for charitable activity." The basis for this is that an organization's status as a charity attracts tangible and intangible benefits and commands public confidence. A body registered as a charity automatically receives a range of fiscal benefits, notably tax enhancement for donations; qualifies to apply for grants from foundations and other bodies; and gains greater respect from the giving public.

2.6 The concept of charity regulation, as developed through the reforms of recent years, is designed, as the CC's mission statement highlights, to ensure that public confidence in charities is maintained and that they merit the privileges that their status entails. The nature of charity regulation is a sensitive issue – and has therefore to be applied sensitively. The essence of charitable status is that charities are independent. In English law, the notion of "non-governmental" is underpinned by the law on trusteeship. The board of a charity consists of its trustees, who have absolute responsibility for its activities in fulfillment of its charitable purposes. Regulation has to respect this independence.

2.7 The CC's regulatory powers are thus essentially based on compliance with the legal requirements of charity. As discussed below, the CC's mission reflects the wider public expectations of the effectiveness as well as the integrity of charities. The role of the CC as regulator in encouraging effectiveness is a sensitive issue, which is at the heart of the nature and development of the CC under the new Bill.

3. Legal Basis for the Charity Commission

3.1 Although the Charities Bill has not yet become law, its essential outlines for the CC are clear, having been discussed at length and in detail during a process that started in 2001, with the establishment of a government review of charity and not-for-profit law and regulation. This article therefore describes the legal basis for the CC as set out in the Bill.

3.2 The Bill establishes the CC as a body corporate with the status of a non-ministerial government department (NMD) with objectives, general functions, and duties set out in the Bill. As an NMD, the CC exercises its powers and responsibilities independent of governmental control and direction. (This is the basis for describing it as an autonomous government department). This status has been subject to criticism during the review process, on the general basis that the CC should exercise its powers on behalf of the public interest at large and not for the government, and, more specifically, that the

CC must be able to act against government if, for example, government seeks to interfere with the independence of charities and their right to criticize government actions and policies. Government spokesmen have assured Parliament that it will respect the independence of the CC and as a concession have added a provision to the Bill stating that "in the exercise of its functions, the CC shall not be subject to the direction or control of any minister or government department."

3.3 The Bill sets out detailed provisions described below for the establishment and form of the Commission, for its resourcing out of public funds and for its staffing, at levels agreed with the Home Office, the government department (Ministry of the Interior) to which it relates, and the Treasury (Finance Ministry).

4. Composition of the Commission

4.1 Under the Bill, responsibility for the CC is given to a board consisting of a chair and four to eight members. They are appointed by the Home Secretary (a senior government minister), subject to the general requirements for the integrity of public appointments overseen by the Commissioner for Public Appointments (an independent public office). Two of the members of the CC must be qualified lawyers and one from Wales (appointed following consultation with the Welsh National Assembly). The Home Secretary is required to ensure that CC board members have knowledge and experience of charity law, charity accounts and financing, and the operation and regulation of charities of different sizes and descriptions. Beyond these specifications, there are no particular requirements for the appointment of CC members. Thus, the members of the CC may be expected to be drawn from a variety of backgrounds relevant to the charitable sector. (Under present law, there are only five Charity Commissioners, including two lawyers, one businessman, and two from the charitable sector.)

4.2 CC members, like present Commissioners, will be part-time, remunerated on a pro rata basis. Unlike Commissioners, they will not have the status of civil servants. As part-time "non-executive" members of the CC's board, they are free to pursue outside interests, but, though there are no formal specifications, general principles of conflict of interest apply – for example, in relation to positions and interests with particular charities. Members may be removed from office by the Home Secretary, but only on grounds of incapacity or misbehavior (undefined) and only after consultation with the Commission.

4.3 The Bill specifies that the CC should have a chief executive. The appointment of other staff is left to the CC, but their terms and conditions of service require government approval (through the Minister for the Civil Service). CC staff, unlike CC members, are, as now, civil servants – i.e., part of the government service. Nonetheless, staff may be drawn from a variety of backgrounds, including the charitable sector, and may be appointed on a short-term basis rather than being part of the permanent government service. The CC currently has more than 500 staff, including about 30 professional lawyers and accountants. It is based in four offices in different parts of England and Wales.

4.4 The Bill empowers the CC to organize its business as it deems best, including by delegating business to committees. It must, however, hold an annual public meeting,

publish a report on its performance and activities annually, and present the report to Parliament. In practice, the CC has begun to hold regular board meetings open to the public. The CC is reorganizing its business pursuant to a new strategy it is developing under the provisions of the Bill. Under a Chief Executive (with previous experience as finance director of large charities), the CC will be divided into three broad directorates: Legal and Charity Services, Policy and Effectiveness, and Charity Information and Corporate Services. Each directorate in turn consists of a number of divisions, including Compliance and Support within the Legal and Charity Services Directorate and Charity Effectiveness within the Policy and Effectiveness Directorate. The CC is aiming to concentrate the different functions in its different offices in a single "reception center" in the Liverpool office, to provide a single point of initial contact for all charities.

5. Strategy and Objectives of the Charity Commission

5.1 The Bill defines the CC's objectives as follows:

- Increasing public trust and confidence in charities;
- Promoting public understanding of the public benefit requirement of charity;
- Promoting compliance with the legal requirements for the control and management of charities;
- Promoting the effective use of charitable resources; and
- Enhancing the accountability of charities.

The functions and duties that the Bill gives the CC, discussed below, are designed to enable the CC to meet these objectives.

5.2 The CC's objectives amount to maintaining and enhancing the relevance of and public confidence in the concept of charity as the legal basis for public benefit voluntary organizations; and maintaining public confidence in the integrity and effectiveness of charities by supervising their compliance with legal accountability requirements, preventing and remedying mismanagement and abuse, and advising them on legal, governance, and management practices.

5.3 The strategy the CC is developing to give effect to these objectives is expressed, under the public trust and confidence mission quoted above, in four strands:

- Enabling charities to maximize their impact;
- Ensuring compliance with legal obligations;
- Encouraging innovation and effectiveness; and
- Championing the work of the charitable sector.

6. Functions and Powers of the Charity Commission

6.1 The Bill gives the CC six general functions:

(1) Determining whether an organization is a charity;

(2) Encouraging better administration;

(3) Identifying, investigating, and remedying misconduct or mismanagement;

(4) Issuing public collection certificates for public fundraising;

(5) Collecting and disseminating information;

(6) Advising the government on charity matters.

Registration/Qualification

6.2 Registration is the basis for the CC's role. It involves determining whether a body has a charitable purpose (as defined in the Bill), meets its public benefit requirements, and heeds the independence and non-profit distribution requirements of the law. Subject to appeal, as will be discussed below, the CC's determination is binding, including on the tax authorities (with the tax benefits that follow). While the technicalities of this process can be ignored for present purposes, two features must be emphasized. Registration is a legal requirement. If a voluntary body meets the legal tests for charitable status, it must apply for registration in order to enjoy the legal benefits of that status. But registration is also a *right*. If the legal requirements are met, the CC must register the body: it does not apply a discretionary policy or other test, although the complex tests required by the Bill will involve considerable and sometimes difficult exercises of judgment, such as whether an organization's purpose is charitable and provides a public benefit. What the CC is *not* empowered to do is to make any judgment, on its own behalf or for the government, as to whether there is a need for a new body to pursue its intended purpose (provided it is charitable and for the public benefit), or whether the body will be effective in pursuing its objectives in the way it proposes (provided they come within the set of purposes).

6.3 Present law provides no definition or even clear set of criteria for determining public benefit. The essence of common law is reliance on a body of decisions developed by the courts over centuries, supplemented by the Charity Commission in recent years. The reforms of the Charities Bill preserve the common law basis for determining public benefit but, though not providing a statutory definition of public benefit, set a clear framework under which the Commission will exercise its responsibility for deciding what purposes serve the public benefit and therefore entitle a voluntary organization to register as a charity.

6.4 Under the common law, a charity is an organization with a purpose that is charitable serving the public benefit. The list of purposes set out in the Preamble to the Charitable Uses Act of 1601 is customarily taken as the basis from which the modern notion of charity has derived. It has greatly developed over the 400 years since, especially by a court judgment in 1891 that divided charity into four "heads": poverty, education, religion, and other purposes beneficial to the community. The first three were presumed to serve the public benefit, while organizations with purposes falling under the fourth head had to demonstrate specifically that they do serve the public benefit.

6.5 The Bill sets out 11 "charitable purposes," covering the main aspects of the public interest, together with a 12th purpose equivalent to the old fourth head covering other aspects, including new ones that may arise in the future.[1] In a key change, the Bill eliminates any presumption that a given body serves the public benefit simply because it pursues a given objective – for example, seeking to relieve poverty. Rather, every charity, at the point of registration and under ongoing monitoring, will have to demonstrate that it serves the public benefit. While the Bill does not seek to define what constitutes the public benefit, generally or for each category, it requires the Commission to publish guidelines on the approach it will adopt. These will reflect existing law: to be accepted as a charity, in essence, the purpose of a body must bring benefits, which may be tangible or intangible, direct or indirect, to the public at large or a sufficient section of the public.

6.6 It is not possible here to discuss the concept of public benefit in detail, but political purposes and activities deserve mention. Traditionally, the courts have held that purposes cannot qualify as charitable if they are "political," meaning (in charity law) directed at securing or opposing changes in the law or government policy (in England or elsewhere); such purposes are deemed a matter for Parliament (i.e., part of the political process) and therefore lie outside the proper jurisdiction of the courts. This is not as restrictive as it sounds, however, based on the way in which the Charity Commission has interpreted the law in recent years. For example, although the courts refused charitable status to Amnesty International in 1982 on the ground that its purposes were "political," the Commission has now accepted the promotion of human rights as a charitable purpose on the basis that the Human Rights Act, and the European Convention on Human Rights to which the Act gives effect, are part of the English law. The promotion of human rights is also explicitly included in the list of charitable purposes in the Charities Bill.

6.7 Political activities by charities used to be regarded with suspicion, but since the reforms of the 1990s, it has been accepted that charities have the right to campaign in

[1] At this writing, the draft Bill contains a framework listing the main charitable purposes as follows:

- Prevention or relief of poverty;
- Advancement of education;
- Advancement of religion;
- Advancement of health or savings of lives;
- Advancement of citizenship or community development;
- Advancement of arts, culture, heritage, or science;
- Advancement of amateur sport;
- Advancement of human rights, conflict resolution or reconciliation or the promotion of religious or racial harmony or equality and diversity;
- Advancement of environmental protection or improvement;
- The relief of those in need by reason of youth, age, ill health, disability, financial hardship, or other disadvantage;
- Advancement of animal welfare; and
- Other currently charitable purposes together with new purposes analogous to or within the spirit of purposes accepted now or in the future as charitable.

pursuance of their objectives, provided that doing so contributes to the realization of their charitable purposes. For example, a charity concerned with helping needy groups such as the homeless or the disabled can legitimately campaign about relevant laws and government policies. The reform process of which the Charities Bill is part has reinforced this liberal approach.

Supervision

6.8 Under regulations made under the Charities Act, amplified by detailed recommended practices drawn up the CC, charities are required to draw up an annual report of activities and accounts in standard form proportionate to the scale of their activities. Larger charities (currently those with a turnover of £10,000 or more) are required to submit these to the CC. CC supervision is based on securing compliance with the reporting requirements and on following up on any issues of concern that may emerge. The CC has powers to require provision of information, but its supervisory activities generally rely on cooperation. It conducts structured visits to charities to examine governance and management arrangements. Charity law is based on the principle of unremunerated voluntary trusteeship, but there are no specific legal requirements for governance and management. The CC relies on general principles and experience in developing rules of good practice, which are set out in publications such as "The Hallmarks of a Well Run Charity," accessible on the CC's website. Strictly speaking, such rules are purely advisory unless a charity fails to comply with legal requirements, such as through mismanagement (itself a concept not defined by law) or through acting outside the powers conferred by its constitution. Nevertheless, the CC advice has considerable authority.

Support and Guidance

6.9 Much of the CC's activities consist of giving support and guidance to charities, both generally, through guidance material (such as that published on its website), and specifically, in response to queries from charities or as a result of its own supervisory activities. Advice and guidance cover legal issues, such as the role and responsibilities of trustees and issues relating to good governance and management. The CC has legal powers to amend charities' constitutions to enable them to function more effectively.

Investigation

6.10 The CC has substantial powers of investigation under the Charities Act (1993, strengthened in the Bill). There are two parts to these powers: the power to set up an investigation (a formal inquiry), for which no statutory requirements have to be met in terms of suspected mismanagement (though in practice the CC first assesses whether grounds exist to suspect serious issues justifying investigation and possible corrective intervention); and powers to intervene, to protect the charity and its resources, and to put right any failures. The CC's powers of intervention and remedy include suspending and removing trustees and appointing new trustees, suspending a charity's bank account to prevent loss while an investigation is underway, appointing a receiver and manager to fulfill some or all of the functions of a charity's trustees, and ordering trustees to make restitution for resources misused. The aim of CC investigation and intervention is remedial, to enable a charity to function effectively. While winding up a charity is not

one of the outcomes to which investigation is directed, this may be the result if a charity is not viable. In such a case, any resources remaining will be transferred to a viable charity with a comparable purpose.

Limits on the Powers of the Commission

6.11 The CC is specifically prohibited from intervening in the administration of a charity. Its role is essentially to support and supervise the functioning of the trustees in fulfilling their governance responsibilities.

6.12 Public confidence in charities depends on their impact as much as on their integrity. The CC, however, is neither empowered nor competent to advise on or regulate the substantive activities of charities – how they may best fulfill their charitable purposes. As part of the increased focus of charity law on public benefit, the CC's reporting and supervisory requirements concentrate more on requiring charities themselves to demonstrate how their activities achieve public benefit. For larger charities, the CC has introduced a standard information return as a vehicle for impact reporting.

7. Accountability of the Charity Commission

7.1 The fundamental accountability of the CC is to the courts. The precise relationship has developed under successive legislation, from the CC as a quasi-judicial body acting on behalf of, and subject to, the courts to the CC as a regulatory NMD acting in its own right – a complex shift but one that can largely be ignored here. It is, however, important to note that charity law continues to involve trust law, an equally technical branch of common law. Consequently, the courts continue to play a substantive role in charity regulation through their responsibility for the ultimate enforcement of trusts. The CC's use of its powers, further, is subject to judicial appeal and, in some instances, to substantive reconsideration, not just review, by the courts.

7.2 A notable addition to the framework of accountability in the Charities Bill – its greatest novelty, some have suggested – is the proposal to establish a Charity Tribunal (CT). Again, the provisions are complex (and their examination by Parliament not yet complete), but in essence, substantive decisions of the CC, from registration or its refusal to post-investigation remedial intervention, will be subject to appeal to the CT. Appeals on issues of law in turn may be made from the CT to the courts.

7.3 As a government department financed out of public funds, the CC is accountable to the Home Secretary and the Treasury for its efficiency in using its resources. As with all bodies receiving public funds – whether part of government or not – the CC comes within the purview of the House of Commons' Public Accounts Committee (PAC); its review agency, the National Audit Office (NAO); and more generally Parliament as a whole. While the general accountability to Parliament is more theoretical than practical, the periodic reviews carried out by the NAO and PAC are important; they have been very influential in the way the CC has developed in recent years. Similarly, as a government department, the CC is subject to review for allegations of maladministration by the Parliamentary Commissioner for Administration (the PCA - the Ombudsman). Reviews of particular complaints undertaken by the PCA require CC response, and the CC has established its own independent, internal complaints review. Both of these, however, are confined to administrative process.

8. Conclusion

8.1 The concept of charity and the Charity Commission have a long history. This has led some to ask whether charity is an adequate legal basis for voluntary organizations seeking to serve the public interest in the modern world. The review process that has led to the reforms of the Charities Bill, however, has overwhelmingly endorsed the view that public confidence in and support for the general notion of charity makes it desirable to modernize the law rather than replace it. The intention behind the Bill is therefore to create a more intelligible framework for charity or public benefit that is appropriate to the needs of the modern world while retaining the flexibility of the common law. So far as the Charity Commission is concerned, the Bill likewise seeks to give it a modern statutory basis that enables it to act as a modern regulator promoting effective charitable activity. The emphasis is on maintaining an active engagement with the charitable sector, encouraging good practice and seeking to prevent bad practice, rather than relying on corrective intervention or sanctions once things have gone wrong. The Bill is not expected to come into operation until later in 2006, so it is of course too soon to say how the new legal and regulatory framework will work; but the wide support for the reforms, in the sector and in Parliament, gives ground for optimism.

Appendix – Scotland and Northern Ireland

(1) As noted in this article, Scotland and Northern Ireland are separate jurisdictions with their own laws and parliaments (though the Northern Ireland parliament is currently suspended). Until recently, neither had arrangements comparable to the CC and its register. Charities in Scotland and Northern Ireland do benefit from fiscal relief on the same basis as those in England and Wales, and the courts have determined that the law of England applies solely to determine whether a Scottish or Northern Irish voluntary organization qualifies for tax relief as a charity. It is applied, on a UK-wide basis, by HMRC, with tax matters, as is common in federal constitutions, reserved to the national level.

(2) Recently the Scottish Parliament has passed its own legislation creating a Scottish equivalent of the Charity Commission, known as the Office of the Scottish Charity Regulator (OSCR), which is developing a Scottish Register of Charities and applying Scottish law in determining charitable status. How the link between English and Scottish charity law and UK tax provisions will work out remains to be seen.

(3) Similar developments, including the creation of its own Charity Commission, have recently been proposed by the government in Northern Ireland.

SPECIAL SECTION: PUBLIC BENEFIT COMMISSIONS

Moldovan Certification Commission

Ilya Trombitsky*

1. Overview

1.1 Consciously modeled on the Charity Commission of England and Wales, the Certification Commission in Moldova is the sole example of a public benefit commission in continental Europe. It is responsible for certifying not-for-profit organizations – including both associations and foundations – as "public benefit" organizations. Conceived as an independent decision-making entity, it has met with mixed results. On the one hand, the creation of the Certification Commission demonstrated the willingness of Moldovan authorities to modernize their relations with the "third sector" by delegating a portion of regulatory responsibility to a partially independent body. The Commission's measure of independence, made possible through its mix of state and NGO representatives, is its greatest strength. On the other hand, the reform process did not go far enough to create a fully coherent public benefit system; in particular, the legal system does not provide appropriate benefits and preferences for public benefit organizations.

1.2 Non-governmental, not-for-profit organizations (NGOs) in Moldova can assume three forms: associations, foundations, and institutes. The governing legislation includes the Law on Associations (1996), the Law on Foundations (1999), and the Civil Code (2002). There are about 4,500 NGOs in Moldova, of which approximately 3,500 are registered at the national level. All NGOs at the local level and most of the national and international NGOs are registered as associations, with institutions and foundations less common, as shown below. Generally, the Moldovan legal framework is supportive of not-for-profit forms and does not restrict the ability to establish and manage an NGO independently.

Registration of National and International NGOs in Moldova (2000-2004)

NGO Form	2000	2001	2002	2003	2004
Association	320	340	329	324	285
Institution	24	13	36	26	24
Foundation	28	45	36	27	16

1.3 The Law on Charity and Sponsorship (1995) establishes a kind of "charity organization." There is no connection, however, between the "charity organization" and

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the certification procedure of the Commission. The Law on Charity and Sponsorship provides that charity organizations can be established in the form of an association, foundation, institution, or other form. In practice, the Ministry of Justice largely ignores this Law and instead recommends that NGOs register in accordance with the Laws on Associations and on Foundations.

2. Origins of the Commission

2.1 Like nearly all of the former Soviet republics, Moldova underwent tremendous change in the 1990s as the not-for-profit sector emerged and became an active part of society. Initially, however, NGOs suffered from a poor public image. The receipt of foreign funding and the nature of not-for-profits as non-taxpayers were much misunderstood and led to great distrust of the sector. The lack of clear financial management rules, further, led to several well-known cases of money laundering within the not-for-profit sector. In addition, politicians were discovered to have used humanitarian aid for their own campaigns for public office. Aggravating the problem was the lack of a sound legal framework governing NGOs; the organizations were regulated only by government decree (1992).

2.2 With the adoption of a new Constitution in 1994 came the obligation to improve the regulation of NGOs. Local NGOs in Moldova, working with select Members of Parliament, led efforts to draft a Law on Associations, based in part on comparative international experience. The result of the cooperative effort was the enactment of a new Law on Associations (1996).

2.3 To improve the public image and accountability of NGOs, the Law envisioned a separate "public benefit" status for NGOs pursuing certain public benefit purposes. The primary authors of the law (Valerii Lebedev, PhD in Law, and Ilya Trombitsky, MP) were particularly concerned with identifying a suitably professional decision-making authority for public benefit certification, ensuring that the decision-maker was sufficiently independent from political influence, and allowing for NGOs to participate in the decision-making body. Recognizing that few civil servants in Moldova are familiar with the NGO sector and that courts lack the capacity, the drafters looked to the Charity Commission of England and Wales. Based on this model, the law drafters proposed the establishment of a Certification Commission under the Ministry of Justice as an independent body to certify "public benefit" associations.

3. Legal Basis for the Commission

3.1 Moldovan legislation establishes the Commission and details the certification procedures for public benefit organizations in Chapter V (Article 35) of the Law on Associations. Public benefit status was thus initially limited to associations and public institutions.[1] The authority of the Commission was subsequently expanded to include the certification of foundations under the Law on Foundations (1999). Article 19 of the Law on Foundations states that "(1) For the purpose of receiving partial or full exemptions

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[1] The Law on Associations covers both associations and institutions. Article 8 defines the public institution as "a union of citizens that does not have a fixed membership, whose objective is to perform certain services, fulfillment of works in the interest of its participants and in order to achieve the Charter goals."

from specified taxes, dues and other payments for the benefit of the State as well as privileges provided in conformity with this Law and other legislation, foundations – in order to confirm the public benefit character of their activities – shall have the right to the certification according to Articles 34-37 of the Law on Associations." Thus, all legal forms of NGOs are eligible to seek public benefit status.

3.2 As mentioned above, the 1995 Law on Charity and Sponsorship established a kind of "charity organization," in no way connected with the certification process of the Commission. The Law provides that a charity organization can be established as an association, foundation, institution, or other form. In practice, however, the Ministry of Justice makes little effort to apply this Law.

4. Composition of Commission

4.1 The Commission consists of nine members, of whom three are appointed by the President, three by Parliament, and three by the Government. To guarantee NGO participation in the Commission, the Law requires that one of each group of three should represent a public association and not be a civil servant. The law does not provide additional criteria for Commission members or further guidance on selecting the NGO representatives.

4.2 Each body (President, Parliament, and Government) uses its own well-established legal procedure to nominate Commissioners. The President issues a decree, while the Parliament and the Government adopt Regulations. Each of these three public bodies independently determines on what basis to appoint Commissioners; the only common limitation is that at least one of each three nominees must be a public association representative and not a civil servant.

4.3 In practice, the President usually nominates either his own councilors or other presidential staff members; the Government appoints representatives from the Ministry of Justice and Ministry of Finance; and the Parliament usually names MPs, though MPs are often too busy to attend Commission meetings, and their mandate as Commissioners extends beyond their mandate as MPs.

4.4 Commission members are not paid or otherwise financially supported, including reimbursement for expenses incurred as a result of their service on the Commission.

4.5 Conflict of interest in the Certification Commission is not addressed in the law. It is common Commission practice, however, that an NGO representative cannot evaluate or vote on an issue concerning the NGO to which he or she belongs. The mixed composition of the Commission did much to guarantee its independent decision-making until 2001, at which time the Communist Party gained control of all three branches of government; since that time, the composition of the Commission has been less diverse.

4.6 Serving the Commission are a Chair and Secretary, each elected by simple majority through an open or secret ballot at the first session of the newly appointed Commission. The Chair convenes and leads meetings, coordinates Commission activity, and represents the Commission to third parties. Meetings are valid where there is a quorum of two-thirds of all Commissioners (six Commissioners); decisions are adopted by simple majority of those present. The Ministry of Justice provides the necessary

equipment and premises for the Commission meetings. Commission sessions are open to the public and organized as necessary.

5. Strategy and Objectives of the Commission

5.1 The main objective of the Certification Commission is to review and evaluate NGO applications for public benefit status. During nine years of existence, the Commission has reviewed approximately 500 certification applications. There are currently about 250 NGOs recognized as public benefit organizations (PBOs) (i.e., about 5% of the entire NGO sector in Moldova). Interestingly, a significant number of NGOs certified as PBOs between 1997 and 2002 did not reapply with the Commission to renew their status.

6. Functions and Powers of the Commission

6.1 The Commission is empowered to engage in the following activities:

- To certify NGOs as public benefit organizations;
- To issue the official State Certificate recognizing public benefit status, or to decline the application for such a Certificate;
- To maintain the Register of Public Benefit Organizations;
- To receive and examine petitions from natural persons and legal entities related to the competence of the Commission.

6.2 The Commission's scope of work is based on provisions of the Law on Associations (1996) (Articles 34-37) and its activity is governed by Regulations approved by the Minister of Justice (Order of the Minister of Justice Nr. 276, October 3, 1997).

Registration/Certification

6.3 To apply to the Certification Commission, the NGO voluntarily submits a written, signed request. In support of its request, the applicant must also submit (1) a completed application form, (2) copies of its Certificate of Registration as an NGO, (3) information on its activities, (4) a certificate from the Tax Inspectorate reflecting no tax violations, (5) its own declaration of nonparticipation in any electoral campaign in favor of or against any candidate for public office, and (6) a copy of the decision of the NGO's governing body on the appointment of a representative to present the application to the Commission.

6.4 To conduct application reviews, the Commission normally meets on a monthly basis – or as determined by the Chair. One of the Commission members (depending on professional interests and knowledge) is primarily responsible for each application. He or she examines the documentation presented to the Commission, visits the applicant if necessary, and then presents the case to the Commission. The presence of an authorized representative of the applicant is obligatory during the Commission meeting. Representatives of ministries related to the applicant's areas of activity might also be invited to attend.

6.5 Under the Law on Associations (Article 2), an organization is certified as a PBO if it engages in one of several spheres of public benefit activity:

1) Protection of human rights;

2) Promotion of education, training, skills development, knowledge dissemination;

3) Health care;

4) Social care;

5) Promotion of culture;

6) Support of art;

7) Promotion of amateur sports;

8) Provision of relief from natural disasters;

9) Protection of the environment; and

10) Other public benefit activities.

6.6 The list of public benefit activities provided by the law is open-ended. Other activities may be recognized as public benefit at the discretion of the Certification Commission. An organization will be recognized as a PBO if it is engaged predominantly in one or more of the listed or recognized activities. This does not prevent the organization from carrying out other activities, including entrepreneurial activities. Although a PBO is free to engage in public advocacy on issues of public interest, it must not use any assets to support or oppose any candidate for public office or to finance any political party (Article 52 of the Tax Code (1997)).

6.7 Moldovan legislation does not clearly address those organizations whose members are the primary beneficiaries of the organization's activities, such as organizations of disabled and other vulnerable groups. The Commission will normally extend public benefit certification to membership organizations whose activities relate to state social protection or to purposes listed in the Tax Code.

6.8 The Commission makes its decision by simple majority of those present; in case of a tie, the vote of the Chair is decisive. Where an application is successful, the Commission must issue an official State Certificate, signed by the Chair and sealed with a Ministerial stamp. The Commission typically makes a decision within a month of receiving the application and issues a Certificate within three days of the review meeting. Minutes are prepared within three days of the meeting and signed by the Chair and Secretary.

Supervision

6.9 The Commission maintains a Register of Public Benefit Organizations, which is supposed to be made available to the public (although not yet accessible via the Internet).

6.10 The Commission does not have any ongoing supervisory role over PBOs. Where necessary during the application process, the responsible Commissioner can visit the applicant to verify the data presented. But it is not clear from the Law or from the Ministerial Order that the Commission has the authority to suspend the public benefit status of an NGO that violates the law.

7. Accountability of the Commission

7.1 The Commission is conceived of as an independent body, and it has no external reporting obligation. The actual independence of Commission decision-making, however, is questionable. All nine Commissioners are appointed by the State (President, Parliament, and Government) and can be expected to reflect an official point of view. The requirement that three of the nine Commissioners represent public associations is critical to ensuring that the voices of civil society are heard. Even so, two-thirds of the Commissioners have proved in practice to be State officials, and the three NGO representatives are selected by State officials.

7.2 In accordance with the Law and Ministerial Order, an NGO has the right to a judicial appeal of any adverse Commission decision, such as the rejection of its application for certification. To date, interestingly, no such appeal has ever been filed.

8. Conclusion

8.1 In following the model of the Charity Commission of England and Wales, the Moldovan Certification Commission was designed as an independent – or partially independent – decision-making body on questions of public benefit status. It remains the only such body in Europe or the transitioning states of the former Soviet Union.[2] For that reason alone, it merits study.

8.2 As we have seen, however, the true independence of the Certification Commission has been frustrated by several problems. Government agencies have demonstrated an indifference and lack of understanding toward the role of the Commission. The President, Parliament, and Government, as nominating bodies, have selected Commission representatives without sufficient thought and vision. To date, the Commission has not prepared any detailed procedural regulations or launched a website. Even the register of public benefit organizations is not yet accessible to the public in practical terms. Perhaps most important, lawmakers have not amended the legal framework to provide sufficient privileges and incentives for public benefit organizations. Public benefit status, fundamentally, is an issue of fiscal regulation. Without corresponding state benefits, public benefit status is largely an empty concept.

[2] The Armenian Governmental Commission, as an overtly government body that certifies projects rather than organizations, falls into its own unique category.

SPECIAL SECTION: PUBLIC BENEFIT COMMISSIONS

Armenian Governmental Commission Regulating Charitable Programs

Tatshat Stepanyan*

1. Overview

1.1 The Commission Regulating Charitable Programs in Armenia takes a unique approach to "public benefit" or "charitable" status. According to Armenian legislation, the Commission qualifies projects rather than organizations as "charitable." The receipt of tax benefits is the primary incentive for an organization to seek charitable status for a project, but the organization is entitled to tax benefits only within the framework of the qualified project.

1.2 Only noncommercial organizations have the right to apply to the Commission for qualifying their programs as charitable. Article 51 of the Civil Code defines the types of noncommercial organizations: "Legal persons that are noncommercial organizations may be created in the form of societal amalgamations, funds, unions of legal persons, and also in other forms provided by a statute." Thus, noncommercial organizations – including societal amalgamations (i.e., public organizations), foundations, and noncommercial unions of legal persons – alone can qualify their programs as charitable and receive corresponding tax benefits.[1] Commercial organizations are free to carry out charitable activities, but without tax benefits.

1.3 Adding complication, the Law on Charities defines "charitable organizations" as "those noncommercial organizations that carry out charitable assistance stipulated by this law." Yet the Law does not provide for registration, certification, or any other formal recognition of the charitable status of an organization. Nor are charitable organizations automatically entitled to tax benefits according to the Law. Instead, charitable organizations must seek to qualify specific programs as charitable, and, indeed, seek multiple qualifications for multiple programs.

2. Origins of the Commission

2.1 The Armenian Governmental Commission Regulating Charitable Programs dates back 14 years. The original Commission was created on December 31, 1991, by a decree of the Government of the Republic of Armenia (RA).

2.2 In 1991, newly independent Armenia suffered from harsh socioeconomic conditions during the slow transition from a planned Soviet-style economy to a market-based economy. The situation was especially severe due to the tragic earthquake in 1988,

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[1] There are approximately 3,000 noncommercial organizations currently registered in Armenia. There is no official information, however, regarding the number of qualified charitable programs.

which, according to official statistics, killed 25,000 people (more than 100,000, according to unofficial sources) and devastated a number of cities, towns, and villages. Following the earthquake, significant streams of humanitarian aid flowed into Armenia, and numerous charitable and humanitarian international organizations began to operate actively in the country. At the same time, many local humanitarian organizations became registered to help cooperate with international organizations in distributing foreign assistance.

2.3 With the increased volume of humanitarian assistance, the Armenian government grew concerned over the perceived duplication of projects, the concentration of humanitarian aid programs in the same locations, and fraud and abuse. To help ensure that humanitarian aid was effectively managed, the Armenian government created the RA Governmental Central Commission on Humanitarian Aid. The Commission was established to monitor the receipt and distribution of all humanitarian assistance entering Armenia, to determine the order of distribution of the humanitarian assistance, and to coordinate with humanitarian assistance providers.

2.4 Since then, new laws and regulations have changed the name, rights, activities, and obligations of the Commission numerous times. Currently, the Commission is officially known as the Armenian Governmental Commission Regulating Charitable Programs (“Commission”).

3. Legal Basis for the Commission

3.1 The activities of the Commission are regulated by a number of RA legal acts, including the Law on Charity, the Law on State Duties, and Customs and Tax legislation, as well as Governmental Decree #66 of 2003 on Charitable Programs, which approved the Bylaws of the Commission.[2] As indicated by its official name, the Commission is attached to the RA Government and receives its financing from the RA State Budget. Indeed, there is no legislative intent for the Commission to be independent from government. Rather, the Commission is meant to present and coordinate the interests of various RA state bodies, as well as the implementers of and participants in charitable programs.

4. Composition of the Commission

4.1 The law gives the Prime Minister authority to determine the composition of the Commission, including the number of members. Only the Head of the Department of the Staff of the RA Government on Credit and Humanitarian Assistance Programs has a reserved spot on the Commission, as the President.

4.2 There are no qualifying requirements for the other Commission members. Governmental Decree #66 of 2003 on Charitable Programs simply provides that “members of the Commission can be representatives of RA State bodies, other organizations, as well as representatives of foreign organizations that are involved in charitable programs, and persons involved in charity.” Thus, the Prime Minister can

[2] It is remarkable that decisions similar to Governmental Decree #66 of 2003 on Charitable Programs have been adopted on numerous occasions, all of them temporary. This leaves the impression that the Government is struggling to establish a system and creates uncertainty in the minds of those implementing charitable programs in Armenia.

choose from a broad range of candidates. The criteria for selecting members, however, are unclear. For instance, it is not indicated how representatives of noncommercial organizations are to be chosen. Given that more than 3,000 noncommercial organizations are officially registered in Armenia, the difficulty of selecting a few representatives without any guidance is considerable.

4.3 Under practice in recent years, the Commission is composed of representatives of state bodies (the majority), noncommercial organizations (public organizations and foundations), and religious organizations. Both the qualitative and quantitative composition of the Commission fully depends on the subjective opinion of the Prime Minister. The current Commission has 27 members, of which 19 represent state bodies, five represent public organizations and foundations, and three represent religious organizations.

4.4 Commission members fulfill their obligations without salary or compensation.[3] The law does not provide any safeguards against conflicts of interest. Indeed, Commission members are often appointed from organizations that implement charitable programs and enjoy corresponding tax and customs benefits, making them interested parties. As a rule, however, noncommercial organizations constitute less than a third of the Commission, and therefore do not play a decisive role.[4]

4.5 Officers of the Commission include the President, Deputy President, and Secretary. The rights and responsibilities of these officers are detailed in the Bylaws of the RA Governmental Commission Regulating Charitable Programs.[5] The President of the Commission manages and directs the activities of the Commission, oversees Commission meetings, signs Commission decisions, prepares reports, handles the Commission's media relations and publicity, and represents the Commission. The Deputy President carries out the assignments of the President regarding organizational activities of the Commission, stands in for the President in his absence, coordinates the activities of the working groups of the Commission, receives and examines information regarding charitable programs, and maintains the registry of charitable programs. The Secretary of the Commission prepares materials for Commission meetings, communicates with Commission members, signs decisions adopted by the Commission and protocols of Commission sessions, carries out administrative work, and, in the absence of both the President and the Deputy President, conducts meetings of the Commission. The Commission may create working groups to address specific issues, which operate according to the timetable and manner approved by the Commission. The Commission may also engage workers and specialists of RA State bodies in its activities; indeed,

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[3] It would be more appropriate if Commission members at least received reimbursement for the expenses they incur in connection with the Commission's activities, such as transportation costs and communications expenses.

[4] Nothing would prevent a Prime Minister from appointing representatives of noncommercial organizations as the majority of the Commission.

[5] The President and Secretary of the Commission are also appointed by the Prime Minister's decree. Despite the fact that the Head of the Department of Credit and Humanitarian Assistance Programs is necessarily also the President of the Commission, he or she must be officially appointed by the Prime Minister.

nonmembers may participate in Commission sessions as experts at the invitation of the Commission President or by decision of the Commission.

4.6 Meetings of the Commission are initiated when necessary, but at least once a month. Commission meetings are valid if at least two-thirds of the members are present. Decisions are made by a simple majority of votes of the members present during the session, or by a simple majority of all the members when the discussion is held in absentia. In case of a tie in voting, the vote of the Commission President is decisive.[6] Upon demand of the President, the Deputy President, Secretary, or any other member of the Commission, his or her objection or abstention regarding an adopted decision should be reflected in the protocol of the session. Both the President and Secretary must sign decisions of the Commission.

5. Strategy and Objectives of the Commission

5.1 The overarching goal of the RA Governmental Commission is to coordinate charitable programs in Armenia and to oversee the activities of charitable organizations. (See the RA Law on Charity, Articles 18-19).

5.2 As defined in its Bylaws, the Commission is tasked with carrying out the following specific functions:

a) Qualifying programs as charitable;

b) Revoking or suspending the charitable qualification of a program;

c) Determining the scope of goods and services immediately connected with and necessary for the implementation of the charitable program;

d) Maintaining the registry of charitable programs and a record of charitable assistance carried out by volunteers;

e) Monitoring the implementation of charitable programs by receiving information on their course and conclusion;

f) Extending the time period during which monetary and in-kind gifts and donations may be used to carry out the charitable program;

g) Studying the practice of implementation of charitable programs and taking measures to increase their efficiency, including by recommending inspections or other necessary measures to relevant public entities;

h) Maintaining the registry of charitable goods entering Armenia; and

i) Ensuring appropriate publicity of charitable programs.

6. Functions and Powers of the Commission

Registration /Qualification

6.1 The most basic function of the Commission is the qualification of programs as charitable. Only those programs implemented by Armenian noncommercial organizations

[6] For example, if the votes of 28 commission members (including the President) are split equally, it is the decision supported by the President that will pass.

or religious organizations, individuals, foreign states, or international organizations can qualify as charitable. Charitable status is not available to, among others, any program that includes the provision of monetary or other support to political parties or commercial organizations (with the exception of public health organizations).[7]

6.2 In order for a program to qualify as charitable, an eligible organization must submit an application – with corresponding materials attached – to the Commission. The decision to apply is purely voluntary.[8] Upon receipt of the application, the Commission has 30 days to review it. The review is conducted in the presence of the applicant, who must be informed of the session at least two days in advance. The absence of a properly notified applicant does not prevent the hearing of the application; it may, however, serve as the basis for postponing it. The review of the application may also be postponed where additional examinations are needed for decision. Review of the application may not, however, be postponed beyond 30 days. The Commission must notify the applicant of its decision within five working days. The rejection of an application or the postponement of discussion must be recorded in the meeting minutes with a corresponding explanation, and the relevant excerpt from the meeting minutes must be sent to the applicant.

6.3 In practice, unfortunately, the Commission does not routinely heed these legally defined time limits. More troubling, however, is the fact that the RA legislation does not provide clear and objective criteria for qualifying a program as charitable. As a result, inevitably, the Commission exercises subjective discretion. Because the application process can be lengthy (despite the strict limits in the law) and unpredictable (given the lack of criteria), applicants are typically those organizations implementing large programs.

<u>*Supervision*</u>

6.4 The Commission oversees the activities of organizations undertaking qualified charitable activities based on reports and information received. The RA Law on Charities (Article 18) requires charitable organizations to prepare and submit an annual activity report to the Commission. The report must contain information regarding the following:

1) The use of property and spending of resources;
2) The organization's financial activity and compliance with the law;
3) The governing supreme body;
4) The contents of the charitable program;
5) The results of the organization's activities;
6) Any violations revealed during inspections and measures taken to eliminate them.

6.5 In addition, the Commission may receive information on the implementation of a charitable program through other means, including a written report on the results of a

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[7] RA Governmental Decree #66 of 2003 on Charitable Programs.

[8] The main incentives to seek charitable qualification of programs include (1) prestige (that is, the award of honorable titles); (2) benefits on taxes, duties, and obligatory payments; and (3) the receipt of material and technical assistance from the RA Government or corresponding Community Council.

program or a report from a person appointed to assess the results (if either of these is envisaged by the program application or imposed as a condition by the Commission in granting charitable status), or a survey of the program's beneficiaries.

6.6 The Commission has no authority to inspect organizations directly. Its authority is limited to petitioning authorized bodies – such as tax bodies and the state inspectorate of labor – to conduct an inspection. The Commission also has the right to request information and analytical materials from state bodies, local government agencies, and organizations.

Support and Guidance

6.7 The Commission does not carry out any consultative or direct assistance to organizations implementing charitable programs.

Investigation

6.8 If an organization undertaking a charitable project violates RA legislation, the Commission may send it a written warning. The Commission may suspend or revoke the qualification of the project if the organization receives more than one written warning within a year or commits serious violations of law in implementing the program. Suspension or revocation terminates the organization's tax benefits. Where the organization has provided false information about its activities, the state benefits it has received (that is, taxes and other obligatory dues that have not been paid) can be subject to confiscation under RA legislation.[9] The charitable organization can appeal all of these actions in court.

Limits on the Powers of the Commission

6.9 The Commission has no authority to directly influence an organization. It has the authority only to suspend or revoke a project's charitable qualification, and only upon sufficient grounds. Suspension or revocation, as noted above, will terminate tax and other benefits, in some cases retroactively.

6.10 The Republic of Armenia protects the legal rights of participants (organizations and individuals) in charitable projects. State officials and other persons hindering these rights are subject to legal liability in the manner stipulated by law.[10]

6.10 Article 6 of the RA Law on Charity expressly provides as follows: "It is prohibited to put restrictions on the choice of goals and means of implementation of charity." An organization is thus free to choose the goals and implementation methods of its charitable programs. Furthermore, it can appeal any adverse decision of the Commission to the courts.

7. Accountability of the Commission

7.1 The Commission is accountable to the RA Government. According to the RA Governmental Decree #66 on Charitable Programs, the Commission report to the

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[9] Article 19 of the RA Law on Charities.

[10] Article 17 of the RA Law on Charities.

government on the implementation of charitable programs during the previous year by April 15 of each year.[11]

7.2 Organizations can appeal adverse Commission decisions to court. An organizations can also present complaints and appeals regarding the Commission to the President of the Commission and to the RA Government, which must review the complaints or appeals in the stipulated manner and respond within one month.

7.3 Overall, though, the selection of Commission members by the RA Prime Minister and the legal requirement that the position of Commission President be filled by the Department of the Staff of the RA Government on Credits and Humanitarian Assistance Programs both serve to underscore the close connection between the RA Government and the Commission.

8. Conclusion

8.1 Undeniably, there are serious problems with the concept and implementation of the Governmental Commission Regulating Charitable Programs in Armenia. As a governmental body, the Commission lacks independence from the government. With its members selected by the Prime Minister and without the guidance of objective criteria, the Commission lacks independence from the political process. With the purpose of providing government oversight over charitable programs, the very concept of a cross-sectoral Commission must come into question.

8.2 To improve the functioning of the Commission, it would be desirable to do the following:

- Reconceive the purpose of the Commission as qualifying organizations, rather than individual programs, as charitable;
- Improve the process of selecting Commission members by defining the composition of the Commission, especially the ratio of representatives from the civil sector and government, along with the manner of selection of those representatives;
- Set forth clear criteria for qualifying programs as charitable, as opposed to the vague and general statements in the current legislation; and
- Ensure that the Law holds government accountable and that the government takes action within mandatory timeframes, perhaps by providing for default qualification where the government fails to act promptly.

[11] Point 4 of the RA Governmental Decree #66 of 2003 on Charitable Programs.

ARTICLE

From Elections to Democracy in Central Europe: Public Participation and the Role of Civil Society

Susan Rose-Ackerman*

Democracy means more than elections, political party organizations, and the protection of individual rights. It also means that day-to-day policymaking is accountable to the public. Some claim that the only requirement for popular sovereignty is free and fair elections. But that is unrealistic. The chain from periodic elections to the details of public policy is very attenuated. Rather, as policy is made in the government and the bureaucracy, it is crucial that those making the decisions learn from individuals, firms, and other organizations what is at stake. The elected officials, their top-level appointees, and the higher civil service should make the ultimate decisions, but they need ongoing input from outside formal government structures.

Here is where the post-socialist transition process in Europe has lagged. These countries cannot attain full democracy unless the policy-making process becomes more accountable to citizens through transparent procedures that seek to incorporate public input. Of necessity, statutes are frequently vague and unclear and leave many difficult policy issues to the implementation stage. Given this, citizens and organized groups should be involved in that stage, with the government retaining the authority to issue general rules consistent with its statutory mandates.

Institutional design in emerging democracies involves a tricky balancing act. How can public bodies be responsive to the concerns of citizens and yet remain insulated from improper influence? How can they perform both as competent experts and as democratically responsible policy makers? I confront these questions in my book, *From Elections to Democracy: Building Accountable Government in Hungary and Poland* (Cambridge University Press, 2005). This article summarizes the main conclusions of my research. Hungary and Poland both have made the transition to electoral democracy but with relatively weak policy-making accountability. This aspect of state building has two parts. On the one hand, transitional democracies need to create accountable governments that can competently handle the tasks of the regulatory welfare state. On the other, they also need to confront the weaknesses of civil society as a source of advocacy and oversight.

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I first outline the policy-making process in Hungary and Poland. Next I discuss the strengths and weaknesses of civil society organizations. The article concludes with a discussion of the benefits and risks of participatory processes, drawing on the rulemaking experience of the United States. Clearly, U.S. law and practice cannot be transferred uncritically. Nevertheless, fundamental features of U. S. administrative law – notice, openness to a wide range of opinions and expertise, transparent and well-justified decisions, and external oversight – seem basic principles that could guide public policy-making processes in all democratic governments.

Public Participation in Poland and Hungary

Policy making needs to incorporate public and interest group concerns without giving up the benefits of delegation to expert government ministries. This balance between public input and bureaucratic competence has been imperfectly achieved in Poland and Hungary. I summarize the situation in each country.

Poland

- Under the Polish Constitution, the only route for public input at the national level is through the election of representatives to the Sejm (Parliament).
- Ministry regulations can be issued without giving notice, holding a public hearing, or providing reasons. Final regulations must, however, be published.
- Statutes and rules can be referred to the Constitutional Tribunal for a ruling on their constitutionality. A referral can only be made by a limited number of bodies; individuals only have access if they can argue that their rights have been violated.
- Although consultations do occur in practice, the law does not generally require that drafts be sent out for comments from political parties, associations, citizens' groups, or experts.
- The Constitution gives citizens the right to obtain information from the state, and in 2001 the Sejm adopted an Act on Access to Public Information. However, its impact remains unclear, and the Act deals only with access to information, not access to process.
- "Tripartite processes" involving labor, management, and government exist. However, only about 20 percent of workers belong to a union, and that share is falling. Elsewhere, permanent institutions of stakeholders comment on draft normative acts and on petitions to improve regulations.
- The Constitution limits formal regulations and thus pushes public entities to use informal methods. As a result, some statutes are difficult to implement effectively because binding rules cannot be issued, and others may be administered through informal acts and case-by-case adjudications.

Hungary

- The Constitution authorizes the issuance of government decrees so long as they do not conflict with statutes. The Constitutional Court held, in a case involving the regulation of abortion, that it is unconstitutional to regulate a fundamental right through an executive decree.

- Hungary has a Law on Normative Acts that permits "citizens—directly or through their representative bodies—to participate in the preparation and creation of legal regulations [i.e., normative acts] affecting their daily life." Prior to promulgating a decree, "jurisdictional bodies, social organizations and interest representative organs have to be involved in the preparation of draft legal regulations which either affect the interests represented and protected by them or their social relations." Unfortunately, the Act is mainly hortatory, but it does at least express an ideal of broad participation.
- A number of Hungarian laws require advisory councils. These are permanent bodies with shifting individual memberships that review government proposals and sometimes initiate studies on their own. The ministry or the government must consult with the council but is not subject to penalties for failing to do so. Government decision-makers are under no obligation to consult more broadly or to consider whether particular interests are inadequately represented on the councils.
- The Constitution includes a right for citizens to learn about and disseminate information of public interest. A 1992 act codified this right, and the Environmental Protection Act also contains a freedom of information provision. Both acts permit access to anyone; one need not show a personal or legal interest in obtaining the information. Civil society groups have tried to use requests for information to increase their influence. However, information is not always easily available and may depend upon personal connections.
- There is no legal requirement to publish proposed rules and statutes.
- The government elected in 2002 has made a few moves in the direction of openness led by the Ministry of Justice. The Ministry of Social, Health and Family Welfare has begun a process of broader consultation. It posts drafts on its website and sends them to a mailing list of about 600.

Conclusions

In spite of some salient differences, the Polish and Hungarian governments face similar challenges in developing more accountable policymaking procedures. The difficulties they face fall into four categories: public knowledge, open processes, government justifications, and judicial review.

The governments do not routinely publicize draft regulations and statutes under consideration. Even when plans and drafts are made public, few laws require open-ended hearings or information gathering from the public. Instead, consultation is limited to pre-set advisory groups or a select group of insiders. Neither country requires written justifications for normative acts (regulations), and such justifications are seldom prepared.

The judiciary has not required much in the way of open and participatory policymaking inside government. In Hungary, access to the Constitutional Court is very broad, but challenges to the administrative rulemaking process are seldom successful. In Poland, access to the Constitutional Tribunal is more limited, but the Tribunal recently struck down the administration of a law for violating the Constitution. Poland has an

administrative court system, but it deals with the administration of the law in individual cases and is unlikely to face a case where the procedures used to promulgate a general legal norm are at issue. In both countries, furthermore, the delays, costs, and the small chance of winning keep lawsuits by NGOs to a minimum.

Thus, the basic process of establishing legal norms and decrees inside the government risks being either an insular exercise carried out by ministers and their top assistants or a limited cooperative process that involves a few outsiders who either serve on advisory committees or who are associated with groups that enjoy special access to the government. These procedures may function well in particular cases, but they make it difficult for those who feel excluded from the process to do anything about it. Such individuals have no right to demand to be heard or to insist that the government defend its polices, short of a claim of unconstitutionality. The constitutional framework is not sufficient to manage the policymaking processes of either of these newly democratic states.

The Role of Private Groups

The Central European countries distinguish three types of organizations, other than political parties, that play a role in policymaking and implementation processes. These are “jurisdictional” organizations, “interest” groups, and “civil” organizations.

- Jurisdictional organizations or “self-governments” are mostly local and regional governments, but the category also includes other groups, such as university students and sometimes government agencies that will be affected by the policy in question.
- The term “interest groups” often refers simply to labor unions and employers’ associations that participate in the official consultation processes, which are sometimes referred to as “social dialogue.” However, it also can include other organized groups of economic interests. Professional “chambers” for such groups as lawyers and doctors and the Academy of Sciences mix these two categories. These organizations have been created by statute to regulate their respective professions. In general, they must be consulted if a draft law or regulation concerns their members.
- Civil organizations are nonprofit or civil society groups representing interests that are poorly institutionalized and cannot call on membership fees to cover their budgetary needs. The groups have policy goals that will affect a broad range of the population beyond their members. Examples are groups that focus on the environment, poverty, and human rights. Groups concerned with women, the disabled, the old, and disadvantaged minorities seek economic and social benefits for the groups they represent, but they also have broader goals and attract members who will not benefit personally.

The role of nonprofits as advocates and gadflies is in its infancy in Central Europe, as it is in other emerging democracies. My recent book includes case studies of two contrasting areas where private and quasi-private organizations are relatively well-established – environmental protection advocacy in Hungary and student groups in Poland.

Environmental Advocacy Organizations in Hungary

Environmental activism in Hungary began at the end of the Socialist period, with small cores of activists able to mobilize large numbers of people to protest particular issues. These mobilizations continued into the democratic transition, but newer groups focus their efforts more on affecting policy using technical and policy arguments. Even the most active groups, however, depend on the energy of a few committed people, have scant funds, and rely on grants that may be canceled after a few years. Relations with public officials are sometimes rocky, but the groups' access to the media and public sympathy for their efforts have helped keep them in operation and given them some influence. These nonprofits face three interlocked difficulties. These are problems of (1) financial and human capacity, (2) credibility, and (3) effective access to the policymaking process.

- Funding: Advocacy groups receive a large proportion of their funds from government and foreign grants. As foreign foundation support is phased out, these groups will become even more dependent on government support unless they aggressively begin to seek domestic private donations or develop eco-businesses to generate revenue. This may limit their role as advocates and gadflies.
- In seeking credibility, the groups follow two broad strategies. Some develop grassroots support and educate people about environmental problems. Access to the media is key and has been used creatively by several groups. Other groups gain credibility through providing expert opinions to public officials. Of course, expertise can help mobilize ordinary people as well, and a group's expert opinions may be taken more seriously if it can point to media and public support.
- Access to key government officials is a function of legal and political practice and of the attitude of those in key government positions. Because it is relatively weak, the Environmental Ministry has sometimes welcomed the publicity for environmental issues that NGOs can generate. Other ministries are less receptive. If access to government is denied or if the decision is opposed to the group's interests, one remedy is to go to the courts either to force greater openness or to challenge decisions after they are made. This is not often a fruitful approach if government laws and norms are at stake, but in the environmental area, legal challenges are sometimes worthwhile, especially to enforce the freedom of information requirements and to challenge individual projects. However, broad legal challenges to government rulemaking processes are seldom possible.

Student Groups in Poland

Student and youth organizations in Poland present a complementary case. The sector includes both jurisdictional organizations, in the form of university self-governments, and civil organization. Some existing groups have also considered becoming interest groups, analogous to labor unions and professional chambers.

One group represents the reincarnation of the official student organization under communism. A second important group was formed in the 1980s to act as a counterweight to the official group and protest regime policies. Other groups are oriented toward professional development, often in alliance with the corresponding professional

chambers. These associations interact with the official student self-governments, whose university-level leaders are elected and who claim to speak for the entire student community. The National Students' Parliament includes representatives from the university parliaments. Several student groups are trying to create an alternative nationwide roundtable. These groups face issues of funding and of finding a credible and effective role to play.

- Funding tensions are similar to those facing the Hungarian environmental organizations. Government provides programmatic funds, and the self-governments distribute public scholarship funds and run dormitories and cafeterias under agreement with the universities. The self-governments are deeply entwined with the state and university administration, a fact that may blunt their ability to act as independent voices. The groups with political party allegiances obtain government financial support, at least when their supporters are in power. All groups rely on donations from private firms and foundations and on the sale of services.
- Student leaders struggle with the issues of how to reinvent their organizations, further their own careers, and interact with other types of organizations. This case is a particularly good example of the tendency of the state in Central Europe to gravitate toward formal, official bodies as the exclusive route for group influence. It illustrates the weaknesses of that strategy when the official organization lacks democratic legitimacy and becomes a source of conflict.

Thus, in a different country and in a very different policy area, we see some of the same puzzles and problems that face Hungarian environmental groups. How much should groups cooperate with official bodies? What are the costs and advantages of close affiliation or identification with particular political parties? How can funding levels be maintained without compromising independence? How should leaders balance the need for expertise against claims of broad popular support? If a group's leaders have privileged inside access to policymakers and politicians, will they be a strong voice for more open and inclusive procedures? In both cases, the administrative process inside government encourages the development of a few "official" voices. In contrast, a process that is more open-ended would encourage the development of groups outside the existing hierarchies and generally excluded from formal advisory councils. This would put a greater burden on the government bureaucracy to manage public participation in government policy making, but on the positive side, it would avoid solidifying closed loops of consultation between government and certain privileged groups.

Developing Accountable Rulemaking Processes

The weakness of the policymaking process in Central Europe suggests a search for alternative models. One place to start is the United States administrative process. In the United States, legally binding rules (government norms or decrees with the force of law) are generally promulgated under the notice and comment rulemaking process required by the Administrative Procedure Act (APA). The APA, passed in 1946, sets out the essentials of a publicly accountable process. I focus on "notice and comment rulemaking," where an agency gathers information free of the strictures of a judicialized process. This process requires that the preparation of rules with the force of law be

announced in the Federal Register and include a hearing open to "interested persons." Final rules must be accompanied by a "concise general statement of their basis and purpose." Rules can be reviewed in court for conformity with APA procedures, as well as conformity with the authorizing statute and the Constitution. A rule can be struck down for being "arbitrary and capricious" or in some cases for being "unsupported by substantial evidence."

There are many practical problems with the American rulemaking process, but in principle, it represents one approach to the problem of balancing expertise and bureaucratic rationality against popular concerns for openness and accountability. Critics argue that the most important problems with participation in rulemaking are delay, bias, irrelevance, displacement to other methods, and curbs on agency implementation. Case studies provide examples of all of these problems, but most appear largely to be the result of ill-designed and biased procedures, not of participation per se. In the positive cases, officials draft proposed rules in light of the forthcoming public participation processes. Even if they consult with a biased selection of interest groups before the public hearing process, officials must consider how their proposals will be greeted by the public and the media when they are publicly posted in the Federal Register and later, when they are subject to judicial review. Agency officials, knowing that their proposed rule will face public and interest group scrutiny, try to anticipate objections ex ante.

Open procedures cost time and money, so emerging democracies will need to make some compromises to avoid gridlock and to assure that processes are not just for show. The practical implementation of more open participatory procedures requires a realistic understanding of the tradeoffs involved. To improve policymaking accountability of the national government, a two-pronged strategy is needed – efforts, first, to support the creation and consolidation of independent nongovernmental organizations, and, second, to create a more open and accountable policymaking process inside government.

The first prong is to strengthen groups that operate independently of political parties and concentrate on a small set of policy issues – be they feminist causes, indigenous rights, environmental harms, working conditions, student concerns, or burdensome business regulation. Advocacy groups exist in most emerging democracies but they are often small, poorly funded, and lack professional staff. Furthermore, even organizations with ample funding may not be effective advocates if much of their funding comes from the state and if they administer government programs. The registration of nonprofit advocacy groups should be a simple and inexpensive process that concentrates on avoiding the fraudulent use of the nonprofit form for personal financial gain. In addition, governments may need to provide assistance to poorly organized and funded interests to help level the playing field in the administrative process. However, if governments subsidize nonprofit advocacy groups, support needs to be provided in a way that does not undermine the groups' independence.

The second prong of a reform agenda includes the public posting of draft rules, making open-ended requests for comments, and giving reasons for decisions. The executive is ultimately responsible for the legal norms that it issues, but it must be willing to hear alternative viewpoints and to explain why it has selected a particular policy. Interested persons should be able to go to court to challenge executive decrees and

normative acts that have legal force on the grounds that the process was not sufficiently open and inclusive or that the rule is inconsistent with the authorizing statute or the constitution. The executive should be open to comments from a broad range of interests and individuals. Managing these processes will require some creativity on the part of agencies, although new information technology makes broad participation feasible even in middle-income countries. Drafts can be posted on the internet, comments can be accepted by email, and agencies can facilitate public participation by developing web sites that are informative and easy to negotiate. Nevertheless, one cost of increased participation must be accepted – the time needed both to allow the outsiders to review drafts and to permit public officials to incorporate this feedback into the final rule.

Judicial review needs to support reforms inside the executive. Even if new statutes specify grounds for review, this might not be an effective form of oversight unless the courts are reorganized and judges retrained. To avoid interference by judges in the operation of bureaucracies, statutes need to specify the grounds for review, and these should be limited to procedural violations and clear inconsistencies between rules and statutes or the constitution.

Some claim that the focus should be on strengthening political parties, not overcoming the problems listed above. However, political parties are not a good substitute for independent civil society organizations. Too strong a move in transition countries to incorporate independent groups under political party labels could produce a system of rotating elected cartels that govern for limited periods without considering the interests of those who are currently associated with opposition parties or who are poorly represented by parliamentary blocs.

The problems of democratic consolidation in transitional countries are the problems of countries that have democratic structures, secure borders, no large-scale organized violence, and a functioning private sector. They are not different in kind from those facing democracies with much longer histories. The scale of the difficulties is larger for some issues, and the existing institutions in the public and the private sectors are fragile and untested, but none of these issues suggests an imminent breakdown of the state. This observation means that a new democracy can learn from experiences elsewhere. Its politicians and policymakers can engage in a productive dialogue with those in wealthier, more established democracies as they seeks ways to create more accountable government institutions that can garner popular support.

ARTICLE

Reinventing Liberia: Civil Society, Governance, and a Nation's Post-War Recovery

J. Peter Pham*

On January 16, 2006, Ellen Johnson-Sirleaf was inaugurated as the 24th president of Liberia, the West African country originally established as a homeland for freed slaves and other African-Americans "repatriated" from the United States.[1] Johnson-Sirleaf's installation, coming after national elections in October 2005 and a presidential run-off in November in which she won 59.4 percent of the vote against soccer superstar George Manneh "Oppong" Weah, is historically significant for a number of reasons.[2] The election was arguably the freest, fairest, and most democratic poll since the nation's independence in 1847. As the first woman elected head of state in Africa, Johnson-Sirleaf represents a remarkable breakthrough in what historically has been a predominantly patriarchal society where women have largely been relegated to the periphery of political life (the new president campaigned explicitly on her gender, and many of her supporters sported T-shirts that proclaimed "All the men have failed Liberia; let's try a woman this time"). The generally smooth transition back to constitutional government also fulfilled one of the key objectives of the August 2003 Comprehensive Peace Agreement (CPA),[3] which ended the country's second civil war in a decade and began post-war transition and peace-building processes in which both the United Nations and the United States government were heavily invested.

While these are by no means insignificant achievements, it would be dangerous to overestimate their importance in the context of the violent conflicts which have wracked Liberia for nearly three decades and which ignited a regional conflagration that consumed – and, in some parts, continues to plague – its neighbors Sierra Leone, Guinea, and Côte

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[1] This essay is a follow-up to a more extensive study published previously in this journal: J. Peter Pham, *A Nation Long Forlorn: Liberia's Journey from Civil War toward Civil Society*, 6 INT'L J. NOT-FOR-PROFIT L. (2004), *available at* http://www.icnl.org/JOURNAL/vol6iss4/ar_pham.htm.

[2] *See* Jeremy I. Levitt & J. Peter Pham, Editorial, *Liberia Must Confront Its Past If It Wants a Brighter Future*, BALT. SUN, Dec. 8, 2005, at 23A.

[3] Comprehensive Peace Agreement Between the Government of Liberia and the Liberians United for Reconciliation and Democracy (LURD) and the Movement for Democracy in Liberia (MODEL) and Political Parties, Aug. 18, 2003, *available at* http://www.usip.org/library/pa/liberia/liberia_08182003_toc.html.

d'Ivoire.[4] In 2003 the Bush administration, egged on by pundits demanding that it "do something" on the eve of the President's first trip to Africa,[5] contemplated leading an international "humanitarian intervention" in the Liberian civil war, and went so far as to deploy three warships offshore with 2,300 Marines. I dashed off an essay for an online foreign policy journal that turned out to be one of the few pieces published that summer that argued against anything more than a very limited mission.[6]

My opposition to a more forceful engagement had nothing to do with doubts about the American military juggernaut (though stretched by the Iraqi situation, the U.S. armed forces would have hardly been challenged by the ragged forces in Liberia) or with any lack of sympathy for the Liberian people (I had just returned from a two-year tour there, during which I formed many lasting bonds). Rather, my skepticism stemmed from a sense that many advocates of intervention suffered from what the late Israeli statesman Abba Eban described as the "tendency to imagine the past and to describe the future"[7] – in the present case, they invented an idyllic Liberian past, demonized the present, and imagined a future paradise to be brought into being easily enough by American arms and a round of balloting. Reality, of course, is much more complex, and I doubted whether, despite the best of intentions, the would-be interventionists had either the vision or the commitment to undertake transformative change of the failed state that Liberia had become. More likely than not, elections of some sort would be organized and, under the cover of the "success" of holding the polls, the international community would retreat, leaving the situation no better (if not worse) for the effort and the root causes of the conflict unaddressed – thus perpetuating the historical cycle of conflict and violence.

Nearly three years later, my intuition has, regrettably, proved to be correct. Despite much-ballyhooed initiatives such as the U.S. administration's general agenda to promote democratization abroad, as well as very specific prescriptions such as those in the 450-page tome released last year by British Prime Minister Tony Blair's Commission for Africa,[8] international policy with respect to failed states – and not only in Africa – remains very much attached to what could be called an "election fetish," the notion that electing a national government is the end point of state-building. According to this view, an election "cures" the crisis that provoked the intervention, absolves the ethical obligations of the outside forces, and dispatches the nation happily along the peaceful

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[4] *See* J. Peter Pham, *Lazarus Rising: Civil Society and Sierra Leone's Return from the Grave*, 7 INT'L J. NOT-FOR-PROFIT L. (2004), *available at* http://www.icnl.org/JOURNAL/vol7iss1/ar_pham.htm; J. Peter Pham, *Democracy By Force? Lessons from the Restoration of the State in Sierra Leone*, 6 WHITEHEAD J. DIPL. & INT'L REL. 129 (2005); *see also* J. PETER PHAM, CHILD SOLDIERS, ADULT INTERESTS: THE GLOBAL DIMENSIONS OF THE SIERRA LEONEAN TRAGEDY (Nova Science Publishers, 2005) (on the conflict in Sierra Leone).

[5] *See generally* Editorial, *Liberia Denied*, WASH. POST, July 22, 2003, at A16; Editorial, *The U.S. Role in Liberia*, CHI. TRIB., July 23, 2003, at 20; and Editorial, *America's Role in Liberia*, N.Y. TIMES, July 24, 2003, at A18.

[6] *See* J. Peter Pham, *A Realistic Commitment: Balancing National Interests and American Ideals in Liberia*, IN THE NAT'L INT.: WKLY. ANALYSIS & COMMENT. ON FOREIGN POL'Y, July 16, 2003, available at http://www.inthenationalinterest.com/Articles/Vol2Issue28/Vol2Issue28Pham.html.

[7] ABBA EBAN, DIPLOMACY FOR THE NEXT CENTURY 11 (1998).

[8] OUR COMMON INTEREST: REPORT OF THE COMMISSION FOR AFRICA (2005).

pathways of development toward a future of prosperity. This notion, already tried with less-than-convincing results across Liberia's western border by the just-wrapped-up United Nations Mission in Sierra Leone (UNAMSIL),[9] typifies the international community's mindset.

In my view, by contrast, electoral processes alone do little to address the governance issues that are the essential foundation for sustainable peace and development. Recently, I have had the immense satisfaction of finding concurrence with my contrarian views from no less a figure than Amos Sawyer who, in addition to being one of the founding fathers of modern Liberian civil society and perhaps the preeminent political scientist produced by his country,[10] served as Liberia's internationally recognized head of state from 1990 to 1994, as president of the Interim Government of National Unity during the first civil war. Now living in the United States, where he is associate director and research scholar at Indiana University's Workshop on Political Theory and Policy Analysis, Sawyer has turned his attention to whether a stable political order can be established in Liberia after years of collapsed governance, unimaginable violence, and complex humanitarian crises. His answer, which comes in a recently published volume, *Beyond Plunder: Toward Democratic Governance in Liberia*,[11] is a qualified yes: the task is feasible, but only in the context of constitutional arrangements and societal institutions that represent a clear break from those of the country's past.

After reviewing the background of the Liberian civil war, this article will, taking Sawyer's work as a point of departure, examine the responses of the international community and civil society through the just-concluded transition and highlight some of the governance issues that the newly inaugurated Liberian government must address to avoid a relapse into conflict. While the discussion will be limited to Liberia, the lessons gleaned from the West African country are applicable to nation-building exercises in other places, not the least of which is the Greater Middle East.

FROM "MODEL" TO FAILED STATE

Liberia's 1847 Declaration of Independence proudly proclaimed Africa's first black-ruled republic to be "the happy home of thousands who were once the doomed victims of oppression," a place that "if left unmolested to go on her natural and spontaneous growth, if her movements be left free from the paralyzing intrigues of jealous ambition and unscrupulous avarice, ... will throw open wider and yet wider a door for thousands who are now looking with an anxious eye for some land of rest." Despite the lofty ambitions of the freed slaves and other transplanted African-Americans, what was inaugurated was something other than the exemplary democratic polity romanticized by the popular media on this side of the Atlantic. Rather, over the course of the next century and a half, relations between the "Americo-Liberian" settlers and their descendants – who never accounted for more than roughly 5 percent of the total

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[9] *See generally* J. PETER PHAM, CHILD SOLDIERS, ADULT INTERESTS: THE GLOBAL DIMENSIONS OF THE SIERRA LEONEAN TRAGEDY (Nova Science, 2005).

[10] *See* J. PETER PHAM, LIBERIA: PORTRAIT OF A FAILED STATE 74-104 (Reed Press 2004).

[11] AMOS SAWYER, BEYOND PLUNDER: TOWARDS DEMOCRATIC GOVERNANCE IN LIBERIA (Lynne Rienner, 2005).

population – and the native peoples of the region were characterized by a peculiar version of the colonial *mission civilisatrice* that continues to haunt Liberian public life.

Members of indigenous African communities, for example, were denied the right to vote altogether until 1946, when it was extended to the select few of their number who owned a home, paid taxes on it, and were otherwise deemed "civilized" by arbitrary criteria established by government officials. The country's legal system, codified only in the 1950s with the aid of legal scholars from Cornell University, vested neither indigenous ethnic communities nor individual members of such groups with title to the lands that they had occupied from time immemorial. Rather, indigenous communities were granted the use of what was declared public land. The law went on to stipulate that "when a tribe shall become sufficiently advanced in civilization," it was entitled to "petition the government for a division of tribal land into family holding."[12] As the dean of Liberian studies, J. Gus Liebenow, once observed, the Americo-Liberians' "views of Africa and Africans were essentially those of nineteenth-century whites in the United States. The bonds of culture were stronger than the bonds of race, and the settlers clung tenaciously to the subtle differences that set them apart from the tribal 'savages' in their midst."[13]

This effectively colonial state of affairs persisted until April 12, 1980, when a quasi-literate master sergeant, Samuel Kanyon Doe, an ethnic Krahn, and his band of seventeen low-ranking soldiers launched a coup that killed the last Americo-Liberian president, William Tolbert Jr., and overthrew the settler oligarchy. Despite his increasingly violent and oppressive rule. Doe, like his Americo-Liberian predecessors, benefited from America's Cold War calculus that, more often than not, turned a blind eye to the abuses of despots so long as they proved willing to accommodate U.S. interests. In Liberia, those interests included a large diplomatic and intelligence communications relay station comprising two 500-acre antenna fields, a 1,600-acre Voice of America relay station, a U.S. Coast Guard maritime navigational tracking station (one of only six in the world at the time), and unlimited access for American military flights to the Robertsfield Airport.[14] U.S. economic and military assistance to Doe – famously saluted during a state visit to the White House by President Ronald Reagan as "Chairman Moe" – amounted to over $500 million between 1981 and 1985.

The fall of the Americo-Liberian ruling class had been greeted with hope, but it soon evaporated with Doe's imposition of an even more repressive Krahn-based military oligarchy. As Jeremy Levitt of Florida International University has observed:

> Doe's native regime … failed to progressively reconfigure let alone overhaul Liberia's sociopolitical order. It rather widened preexisting fissures and sent the country spiraling downward into an abyss of darkness from which it has yet to recover. The outcome of Doe's rule may signal

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[12] LIBERIAN CODE OF LAWS ch. 11, §§ 60-61 (Cornell University Press, 1957).

[13] J. GUS LIEBENOW, LIBERIA: THE QUEST FOR A DEMOCRACY 15 (Indiana University Press, 1987).

[14] *See generally* HERMAN J. COHEN, INTERVENING IN AFRICA: SUPERPOWER PEACEMAKING IN A TROUBLED CONTINENT 126-162 (St. Martin's Press, 2000) (on U.S.-Liberian relations during Doe's presidency by author who served as senior advisor on Africa to President Ronald Reagan [1987-1989] and assistant secretary of state for African affairs under President George H.W. Bush [1989-1993]).

> the extent to which authoritarianism, corruption, ethnic divisions, and elitism have been entrenched into the Liberian body politic and wider cultural fabric. Hence it may be asserted that while the 1980 coup brought about the (short-lived) ethnic transformation of Liberia's body politic, it did nothing to reconstruct its constitution of order or fundamentally enhance the quality of life of the Liberian masses. In this sense, the Doe episode demonstrates that majority rule, whether it be settler or native Liberian, is not synonymous with democratization.[15]

The end of the Cold War altered America's strategic calculations: during Reagan's second term, U.S. aid to Liberia plummeted from $53.6 million in 1986 to $19.5 million in 1989. Except for some $10 million in emergency food and other humanitarian assistance, no aid was appropriated in the first budget submitted by the George H.W. Bush administration. Then on Christmas Eve 1989, rural Nimba County was invaded by a handful of insurgents led by Charles Taylor, the U.S.-educated son of an Americo-Liberian father and a Gola mother, who had been trained in Libya after breaking out of a federal prison in Boston (he had been held on an extradition request from Liberia for having allegedly embezzled from the government agency he had run earlier). Within the year, until they were halted by a military intervention by the Economic Community of West African States (ECOWAS), Taylor and his allies had gained military control over nearly 90 percent of Liberia's national territory and had captured and killed the hapless Doe.

While the deployment of the regional military intervention force, dubbed ECOMOG ("ECOWAS Monitoring Group"), in August 1990 prevented Taylor's takeover of the capital, Monrovia, the unintended consequence was to prolong the conflict. Denied the prize that was almost within his grasp, Taylor doggedly engaged the would-be peacekeepers as well as an ever-proliferating host of other armed factions for seven long years, during which the fighting engulfed all or parts of neighboring Sierra Leone, Guinea, and Côte d'Ivoire. In Liberia, the death toll has been estimated to be as high as 250,000, out of a pre-war population of just over three million. Ironically, the end result was the same as if there had been no intervention at all: in an internationally monitored election on July 19, 1997, Taylor triumphed over his opponents, winning 75.3 percent of the vote. Ellen Johnson-Sirleaf, a Harvard-trained economist, ran a distant second with 9.5 percent, while a trio of veteran civil society activists – Cletus Wortorson, Gabriel Baccus Mathews, and Togba Nah Tipoteh – trailed with humiliating 2.5, 2.5, and 1.6 percent, respectively. The election was judged "free and fair" though flawed by the international community – including observers from the U.N., the European Union, the Organization of African Unity, and the Carter Center. Despite Taylor's reputation as a brutal warlord, the across-the-board victory for him personally and for the National Patriotic Party formed out of his rebel movement could best be explained by the uncertain security situation. Voters made a rational choice for the candidate most likely to bring stability soon and, they hoped, improved conditions eventually.

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[15] JEREMY I. LEVITT, THE EVOLUTION OF DEADLY CONFLICT IN LIBERIA: FROM "PATERNALTARIANISM" TO STATE COLLAPSE 203 (Carolina Academic Press, 2005).

These hopes, however, were quickly dashed. Taylor's authoritarianism combined with declining socio-economic conditions – by 2003, the average Liberian was, by most indices, worse off than before the civil war had started more than a decade earlier – led *The Economist* to dub the country "the worst place to live in 2003." Not surprisingly, an anti-Taylor umbrella group, the Liberian United for Reconciliation and Democracy (LURD),[16] emerged with the support of Guinea, whose territory had been repeatedly invaded by Taylor. LURD was soon joined by another armed group, the Movement for Democracy in Liberia (MODEL), supported by another of Liberia's aggrieved neighbors, Côte d'Ivoire.

As 2003 began, Taylor had been weakened considerably by the military pressure of the LURD and MODEL insurgencies, coupled with the political and economic isolation resulting from U.N. sanctions imposed because of his role in fomenting Sierra Leone's brutal civil war. By late May, with nearly two-thirds of Liberia loosely under rebel control, but with neither LURD nor MODEL strong enough to take the capital by storm, Taylor finally agreed to sit down with his opponents at peace talks, to be held in Accra under the auspices of ECOWAS. However, much to the embarrassment of the African diplomats who had set up the meeting, Taylor's attendance was cut short. On June 4, the U.N.-sponsored Special Court for Sierra Leone published its previously sealed indictment of the Liberian president. He faced some seventeen counts of war crimes and other serious violations of international humanitarian law stemming from the brutal Sierra Leonean conflict that he had precipitated as a sideshow to his own fight.[17]

While Taylor hastily fled back to Monrovia, the end game had clearly begun, especially after U.S. President George W. Bush declared on June 26, the eve of his first presidential trip to Africa, that "President Taylor needs to step down so that his country can be spared further bloodshed."[18] After protracted negotiations, a Nigerian-led West African peacekeeping force, acting under the authority of an apposite U.N. Security Council resolution, landed in Monrovia on August 4. On August 11, Taylor resigned the Liberian presidency, handed power over to Vice President Moses Blah, and accepted an offer of asylum in Nigeria.

Transitional Arrangements

Multi-party talks held in Accra, Ghana, created the National Transitional Government of Liberia (NTGL) from the remnants of Taylor's National Patriotic Party (NPP), the LURD and MODEL rebels, and representatives of civil society organizations. The Comprehensive Peace Agreement (CPA) provided for a four-way power-sharing arrangement that parceled out positions in the cabinet and the rest of the government. In

[16] Guinea's support of the LURD insurgency was the result of a bizarre – but for the region, not atypical – confluence of strategic calculations and highly personalized motives. LURD leader Sekou Damante Conneh's then-wife, Aïsha, is Guinean president Lansana Conté's influential court seer and putative natural daughter. Interview with Lamine Sidimé, Prime Minister, Republic of Guinea (Nov. 18, 2001).

[17] The Prosecutor v. Charles Ghankay Taylor, SCSL 2003-01-I (Mar. 7, 2003), *available at* http://www.sc-sl.org/Documents/SCSC-03-01-I-001.pdf.

[18] President George W. Bush, Remarks to the Corporate Council on Africa's U.S.-Africa Business Summit (June 26, 2003), *available at* http://www.whitehouse.gov/news/releases/2003/06/20030626-2.html.

the cabinet picked to work alongside NTGL chairman Gyude Bryant, a businessman with longtime political aspirations, the NPP retained five ministries, while five each were allocated to members of LURD and MODEL and six were entrusted to civic leaders. The 76 seats in the unicameral National Transitional Legislative Assembly (NTLA) created by the CPA were likewise divided up by participants to the negotiations. Supporters of the outgoing NPP government, LURD, and MODEL were each given twelve seats. Each of the eighteen registered civilian political parties, except for the NPP, was allocated one seat. Seven seats were reserved for representatives to be designated by civil society groups. Less than a quarter of the parliamentary seats – fifteen – were to be filled by election, with one representative chosen from each of Liberia's counties. In similar fashion, the Accra agreement parceled out Liberia's publicly owned corporations and autonomous government agencies and commissions. The transitional government took office on October 14, 2003. Under the CPA, confirmed by an apposite U.N. Security Council resolution, the transitional government would remain in office until January 16, 2006, when it would cede power to a government elected in a 2005 poll.[19]

During the transition, Liberia was, for all intents and purposes, under a regime of international trusteeship, the NTGL being propped up by the United Nations Mission in Liberia (UNMIL), headed for most of the period by a retired U.S. Air Force general, Jacques Paul Klein, who had previously served as the Special Representative of the Secretary-General in Bosnia-Herzegovina. For a change, the international community backed up the peacekeepers with the resources necessary for reconstruction and other humanitarian assistance. A February 2004 conference co-sponsored by the United States, the World Bank, and the United Nations, and co-chaired by U.S. Secretary of State Colin Powell and U.N. Secretary-General Kofi Annan, generated over $500 million in pledges. By then the U.S. Congress had already appropriated $447 million for the West African nation ($245 million for the international peacekeeping force and $200 for humanitarian assistance, in addition to the gratuitous $2 million congressional earmark for a bounty to secure the delivery of the deposed President Taylor to the international war crimes tribunal in Sierra Leone[20]), and various U.N. agencies had committed $177 million. At the end of the donors' conference, Secretary-General Annan pledged to "consolidate the peace, and make the peace process irreversible."[21]

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[19] The author's concerns, noted in an earlier study (*see* Pham, *supra* note 1), about the temptations facing representatives of the third sector who take a direct role in the NTGL have, regrettably, proved prescient. In one of their last acts of office, the 76 outgoing interim parliamentarians, including the *ex officio* civil society representatives, voted to override Chairman Gyude Bryant's veto and grant themselves the ownership of the state-owned vehicles, office furniture, and equipment – including, according to press reports, toilet paper – that had been assigned for their official use. *See generally* United Nations Office for the Coordination of Humanitarian Affairs, *Liberia: Scramble for Goodies Ahead of Political Handover*, IRIN NEWS, Nov. 21, 2005, *available at* http://www.irinnews.org/report.asp?ReportID=50214.

[20] Emergency Supplemental Appropriations Act for Defense and for the Reconstruction of Iraq and Afghanistan, FY 2004, Pub. L. No. 108-106 (2003).

[21] U.N. Secretary-General Kofi Annan, Address to the International Reconstruction Conference on Liberia (Feb. 6, 2004), *available at* http://www0.un.org/apps/sg/sgstats.asp?nid=769.

THE DEVIL IN THE DETAILS

The reality, however, fell short. Recall that before his ouster, Liberia's Taylor had incited a series of conflicts across the region, including civil wars in Sierra Leone (pacified) and Côte d'Ivoire (ongoing), plus various intrigues in and even an invasion of Guinea, an increasingly unstable country where a rising tide of ethnic and other tensions was held back only by the aging autocratic president, Lansana Conté, who survived an assassination attempt in January 2005 that the then-chief prosecutor of the Special Court for Sierra Leone explicitly blamed on Taylor's machinations.[22] A peace plan whose scope is limited to one country, no matter how well supported and faithfully implemented, has at best a tenuous chance of succeeding while regional conflagration remains a very real possibility, with violence and refugee crises spilling over ill-defined and porous frontiers.

Even aside from the regional considerations, the reconstruction effort in Liberia has suffered from contemporary international society's equivalent of Martin Luther's *articulus stantis vel cadentis ecclesiae*: that the "success" (read, "exit point") of international interventions in weak or failed states is measured by whether or not elections can be held by some arbitrarily established deadline, regardless of circumstances on the ground. While democratic elections are arguably the most significant factor in providing legitimacy to an emergent political order, their efficacy in this regard is negated if essential institutional reforms are sacrificed in a headlong rush to the ballot box. And perhaps no country knows this better than Liberia, where the 1996 Abuja II peace agreement paved the way for the ascendancy the following year of warlord Charles Taylor who, backed by his relatively well-disciplined military force and enriched by the booty he had acquired during the civil war, easily trounced his divided and under-funded civilian opponents in hastily organized elections – thus sowing the seeds of a renewed conflict.

The 2003 CPA did avoid the mistake of its abortive predecessors by providing for a two-year transition, during which the interim government – or, rather, the multinational peacekeeping force acting on the NTGL's behalf – would reestablish some modicum of control over national territory, demobilize and disarm combatants, and rebuild the collapsed institutions of state. UNMIL, unlike earlier U.N. peacekeeping operations, was mandated and funded to carry out this process of state-building. Furthermore, again unlike earlier engagements, there was a unity in the international mission: during his tenure, Klein, himself a former military officer as well as a diplomat, simultaneously held both political and military portfolios as special representative of the U.N. Secretary-General and commander of the peacekeeping force (although a Nigerian general managed routine day-to-day military operations).

While, at least to a certain extent, UNMIL succeeded in demobilizing and disarming the combatants in Liberia's long-running civil war, including some as young as twelve, and helping the interim Liberian authorities take the first steps toward rehabilitating the country's infrastructure and resuscitating the capacities of state

[22] Press Release, Special Court for Sierra Leone, Office of the Prosecutor, Prosecutor Welcomes Resolution on Charles Taylor and Calls for Leadership from U.S. President Bush (May 4, 2005), *available at* http://www.sc-sl.org/Press/prosecutor-050505.pdf.

institutions, the 2005 elections may still be remembered as the starting point for renewed conflict.

With few, relatively minor, exceptions, the electoral exercise was well-run.[23] Approximately 1.35 million citizens registered to vote in April and May 2005, in a process marred by localized violence but generally peaceful. Nearly three-quarters of the registered voters, some 1.012 million people, participated in the October poll and approximately 60 percent, more than 821,000, voted in the November presidential run-off. The international community facilitated the process through education, technical assistance, and security. The U.S. alone contributed over $10 million to the effort, most of it dispersed through civil society organizations involved in democratization efforts, including IFES (technical assistance for polling), the International Republican Institute (training for political parties), and the National Democratic Institute for International Affairs (civic education). More than 6,000 Liberians, including some 3,500 from local civil society organizations, were accredited to monitor the voting.

George Weah came in first among the field of 22 candidates in the first round, only to lose to Ellen Johnson-Sirleaf in the second round by a 59.4 percent to 40.6 percent margin. Weah has contested his defeat, claiming that the vote was rigged and demanding a re-run of the run-off. While he has called upon his supporters to keep their protests peaceful, some fear the possibility of violence, given that his base includes a high proportion of ex-combatants. Furthermore, legislative obstruction is a possibility. Weah's political party, the Congress for Democratic Change (CDC), is the largest group in the new 64-seat House of Representatives, holding fifteen seats; by contrast, Johnson-Sirleaf's Unity Party (UP) has only seven seats.

However, the real danger for Liberia's future lies not with the volatility of the defeated candidate but with the institutions that the winner inherited. Despite the care in managing the country's post-war transition, one important detail was omitted if not deliberately glossed over: no real consideration was given to what kind of government would take office after the voting and how it would govern.

Johnson-Sirleaf assumed power under Liberia's 1984 constitution, a ramshackle adaptation of the country's seriously flawed 19th-century constitution with adjustments to suit the exigencies of the 1984 dictator, Samuel Doe. Under this charter, the president, elected for a renewable six-year-term, holds broad powers that ensure a very centralized regime. According to the constitution, "All cabinet ministers, deputy and assistant cabinet ministers, ambassadors, ministers and consuls, superintendents of counties and other government officials, both military and civilian, appointed by the President pursuant to this Constitution shall hold their offices at the pleasure of the President."[24] While local mayors and traditional tribal chieftains are elected by their constituents, they too are subject to dismissal by the chief executive.[25] And while the constitution vests the legislature with the power to raise revenue, the chief executive exercises sole discretion

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[23] NICOLAS COOK, LIBERIA'S POST-WAR RECOVERY: KEY ISSUES AND DEVELOPMENTS, CRS REP. NO. RL33185, at 2-4 (2005).

[24] LIBERIAN CONST. art. 56 (a).

[25] *Id*. art. 56 (b).

in the disbursement of public funds to government agencies through a centralized system of presidential warrants.[26] As Sawyer comments succinctly, "A president who has the sole authority to determine disbursements of public funds through a warrant prepared by his assistant and passed unchecked by any other independent authority is empowered to exercise exclusive control over the public purse, notwithstanding the legislature's authority to review and approve the national budget."[27] In short, the unreformed Liberian constitution provides for precisely the "winner-take-all" system that has been the bane of many post-colonial African polities, with competing factions given little incentive to accept anything short of "total victory" – and with a history of breaking down, with tragic consequences.

The international community's almost obsessive rush to the polls in Liberia has meant, however unintentionally, that after last year's "successful" electoral exercise, the country simply reverted to a constitutional regime with few safeguards against the tyranny of the majority and almost no checks on the all-powerful chief executive. Everything is effectively gambled on the personal integrity of the winner – the inversion of the principle in *The Federalist Papers* that governments were designed for men and not angels[28] – even as recent history has shown that popular elections in the aftermath of regime change in Africa have returned leaders as disparate as South Africa's Nelson Mandela and Zimbabwe's Robert Mugabe (though the latter was admittedly not quite the same tyrant early in his tenure). While one always hopes for the best, it is more prudent to plan for the worst and, before embarking on the road of democratization, to ensure that the constitution erects hurdles to any dictatorial impulses, lest the experiment in democratic self-rule be stillborn and the very exercise of suffrage be transformed into one more barrier to a sustainable polity.

RETHINKING GOVERNANCE

It is at this point that Sawyer, who chaired Liberia's National Constitution Drafting Commission in the 1980s before he was pushed aside (and eventually jailed) by Doe, makes some interesting theoretical contributions premised on a series of conceptual distinctions:

Governance and Self-Governance. Whereas "governance" generally refers to the management of public affairs, and "good governance" denotes the embrace of civil society as government's partner in that administration, Sawyer proposes "self-governance" as a system of "polycentric institutional arrangements" crafted through "processes of constitutional choice and designed for problem solving by people themselves."[29] While these institutions of self-governance (which Sawyer also calls

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[26] *Id.* art. 32 (d) i.

[27] SAWYER, *supra* note 11, at 106-107.

[28] THE FEDERALIST NO. 51 (Alexander Hamilton or James Madison) ("But what is government itself, but the greatest of all reflections on human nature? If men were angels, no government would be necessary. If angels were to govern men, neither external nor internal controls on government would be necessary. In framing a government which is to be administered by men over men, the great difficulty lies in this: you must first enable the government to control the governed; and in the next place oblige it to control itself").

[29] SAWYER, *supra* note 11, at 8.

"democratic governance") include centralized institutions, the emphasis stretches beyond *the* government.

Development and Self-Reliant Development. Sawyer furthermore contrasts the term "development" as it typically appears in the literature, meaning "transforming people and society from a state of 'backwardness' associated with local traditions and lifestyles to a state of 'modernity,'" to his ideal of "self-reliant development as a companion to self-governance" and "a self-generated and self-sustaining transformatory process that obtains through self-governance."[30]

Participation and Constitutional Choice. Since "participation" can sometimes mean perfunctory involvement, Sawyer advocates "constitutional choice," where people establish and sustain their own systems of governance:

> Constitutional choice for democratic governance involves the challenge of a people arriving at a theory of governance suitable to their circumstances and establishing governance institutions based on that theory. It is a process by which the people of a society, through enlightened discourse oriented toward problem solving, make fundamental rules to address their governance dilemmas.[31]

The success of this process necessarily involves knowledgeable contestation in an open public realm as well as an ongoing mechanism for trial, error, and adaptation as circumstances require.

In the case of Liberia, it is clear that unitary sovereignty is wholly ill-suited to democratic governance. What check, asks Sawyer, can exist on a president who has the entire governmental infrastructure as a patronage machine? Next to none, because "citizens who may act only as seasonal voters cannot constitute a significant check on presidential power."[32] Holding elections without addressing the underlying governance issues is likely simply to perpetuate the cycle of fierce competition, breakdowns, and violent conflicts that has entrapped the nation for decades.

CIVIL SOCIETY AS THE FOUNDATION OF A NEW ORDER

In contrast to this vicious cycle of government predation, repression, and state failure, Sawyer argues that African countries in general – and Liberia is clearly foremost in his mind – need "a fundamental shift away from a system of unitary government so that there can be several centers of authority underpinned by a system of shared sovereignty in which ordinary people acting as empowered citizens can *meaningfully participate* in an array of governance institutions at local, provincial, national, and even regional scales where necessary."[33] Here he finds hope in the individual and social ingenuity with which Liberians have mobilized for their very survival through nearly three decades of violence: How have the Liberian people coped with the collapse of their

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[30] *Id.* at 9.

[31] *Id.*

[32] *Id.* at 107.

[33] *Id.*

state and all its consequences? What residual institutions sustained them? What potential do these offer for the post-war recovery?

In point of fact, arguably the largest lacuna in contemporary social sciences' understanding of African political processes is the impact of voluntary associations and other associational realities on governance at all levels of society.[34] Further, to the extent that social scientists *do* pay heed to this sector, as World Bank advisor Stephen Ndegwa has noted, they tend to concentrate on

> the reorganization of power relations in African states. The civil society thesis – that civil society actors are important contributors to democratic change – is essentially a statement on their positive contribution to altering power relations in Africa. Analysts therefore need to raise fundamental questions regarding where civil society actors derive their power to oppose the state and, even more importantly, where this power resides.[35]

Notwithstanding this caveat, Ndegwa has observed that the "one level of civil society action that has been largely ignored but that may lead to more durable changes in African political life is grassroots empowerment."[36]

In formulating and implementing donor-driven reconstruction programs such as Liberia's, there has a strong bias in favor of assessing *needs* and largely disregarding *potential*. As Sawyer notes, the *Joint Needs Assessment,* prepared by the NTGL, the United Nations, and the World Bank in the lead-up to the February 2004 international donors' conference,[37] was "disappointingly quiet on the critical question of what Liberians themselves possess, even in their state of misery."[38] The answer to the query, had it been posed, would have been voluminous, embracing a range of local, national, regional, and international third sector organizations covering the gamut of interests. In fact, a notable contribution of Sawyer's volume is its panoramic survey of Liberian civil society mechanisms for coping with violence and conflict, including the pan-ethnic *Poro* "secret societies" in northern and northwestern Liberia, the more limited *Kwee* institutions in the forests of the southeast, and the neighborhood watches in urban communities. Sawyer notes that while these local institutions have deep roots in the history of the country's indigenous communities, modern Liberians found them flexible and adapted them to help cope with state collapse and its attendant violence. Sawyer describes how *Poro* symbols and authority, for example, were creatively co-opted "to restrain the actions and behaviors of armed men who operated with hardly any supervision and whose loyalty was only to a leader in Monrovia,"[39] as well as how

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[34] *See generally* Michael Bratton, *Beyond the State: Civil Society and Associational Life in Africa*, 41 WORLD POL. 407 (1989).

[35] STEPHEN N. NDEGWA, THE TWO FACES OF CIVIL SOCIETY: NGOS AND POLITICS IN AFRICA 114 (Kumarian Press, 1996).

[36] *Id.* at 115.

[37] *See* NATIONAL TRANSITIONAL GOVERNMENT OF LIBERIA, UNITED NATIONS, & WORLD BANK, LIBERIA: JOINT NEEDS ASSESSMENT (2004).

[38] SAWYER, *supra* note 11, at 58.

[39] *Id.* at 60.

"appropriate rites of restoration were performed and … the basis for reconciliation established" between Guinean Loma communities and Mandingo communities during the long conflict.[40] The author also explores clan-based, community-based, religion-based, and economic-based organizations, as well as the more widely covered (and conventional) local and international nongovernmental organizations.

Noting the four types of capital – human, social, physical, and natural – Sawyer argues that Liberia, for all its devastations of recent years, still has a considerable pool of human and social capital with which post-conflict reconstruction must be built if it is to be sustained over the long term:

> What is important is that the Liberian reconstruction process be perceived essentially as one designed with emphasis on helping Liberians develop and utilize their talents and skills for wholesome and productive purposes, such that as individuals they become not only providers of their own livelihoods and drivers of their own future, but also contributors to the development of their communities and transmitters of values, knowledge, and skills to succeeding generations. It is further important, in this respect, that extant stock of social capital in Liberian society be assessed and used where appropriate as …"bonding" capital to strengthen within communities; as "bridging" capital to establish or strengthen cohesion among or between people of different communities; and as "linking" capital to nest communities within even larger communities. In this way, Liberians will be able to appreciate the need for ethnic-based institutions, such as clan-based organizations, and the support they provide their members; the importance of interreligious organizations, panethnic associations, alumni associations, and professional bodies – all of which serve to bring individuals of different communal groups into collective action and to build bridges among various communities; and the role of county-based or national-level organizations that help all of them develop a sense of nationhood.[41]

The result of this vision would be a democratic political order rooted in society, with its governance institutions built from the bottom up rather than imposed from the top down.

LESSONS AND PROSPECTS

While international intervention may provide some measure of relief in the short term, as I have argued elsewhere,[42] outsiders will never be able to address the root structural causes – cultural, social, economic, and political – of a cycle of governmental predation, repression, and failure such as Liberia's. The usual accoutrements in the international diplomatic toolkit, including sanctions, peacekeeping contingents, and power-sharing arrangements, can serve as stop-gap measures, but they will provide only temporary relief, perhaps mitigating some of the worst consequences of a state's collapse

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[40] *Id.* at 64.

[41] *Id*. at 79-80.

[42] *See* J. Peter Pham, *The Limits of Intervention, Humanitarian or Otherwise*, 6 HUM. RTS. & HUM. WELFARE 1 (2006).

and the ensuing chaos. State failure results from a confluence of forces – ancient ethnic tensions, stagnant politics, economic deterioration, political repression, social exclusion, plus, in Liberia, the end of the Cold War – that push the polity over the edge. It is, more often than not, a case of what sociologist Charles Ragin has termed "multiple conjunctural causation," where the historical outcome stems from a complex combination of structural and situational factors.[43]

Just as state failure has multiple causes, national identity is a multi-dimensional phenomenon that involves not only the public institutions and the monopoly of coercive power in a territory, but also the cultural and political bonds that unite different individuals into a single community. Anthony Smith of the London School of Economics has defined the nation as "a named human population sharing an historic territory, common myths and historical memories, a mass, public culture, a common economy and common legal rights and duties for all members."[44] A failed state is likely to lack one or more of these elements. In Liberia, many if not all of these constitutive elements have been historically absent. Even after reforms in the last years of Americo-Liberian domination eliminated the *de jure* exclusion of the majority of indigenous peoples from the national life, a sense of *de facto* alienation persisted.

An effective and sustainable response to such state failure, however, requires that citizens take responsibility for their fate. Establishing a popularly elected government will not, by itself, be enough to build a free society out of Liberia or any other failed state. Rather, a stable and free society presupposes not only a democratic polity, but also a culture of liberty and a free economy. These three institutions are inherently interdependent: none can endure for long without the other two. The dependence of the economy on the basic rule of law and functional organs of government is relatively straightforward. Peruvian economist Hernando de Soto has, in recent years, clearly demonstrated that the principal obstacle to development in many countries is the lack of access to clear legal property titles and, consequently, to credit markets.[45] A government of laws provides this. Likewise, as Francis Fukuyama, among others, has shown, the economy depends on certain moral and cultural variables, including social trust and cohesion.[46] For this culture to thrive, in turn, it depends on the conditions established by a market-based economy and a democratic regime, which can guarantee the requisite freedom from want and fear. And, of course, a stable democratic government requires material prosperity – or at least the reasonable opportunity to pursue it – and a culture that respects individual rights and encourages personal responsibility and tolerance for others.

If Liberia is ever to overcome its historical state weakness and rejoin the international community as a viable sovereign entity, all of this requires reconstructing

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[43] *See* CHARLES RAGIN, THE COMPARATIVE METHOD: MOVING BEYOND QUALITATIVE AND QUANTITATIVE STRATEGIES 23-30 (University of California Press, 1987).

[44] ANTHONY D. SMITH, NATIONAL IDENTITY 14 (Penguin, 1991).

[45] *See* HERNANDO DE SOTO, THE MYSTERY OF CAPITAL: WHY CAPITALISM TRIUMPHS IN THE WEST AND FAILS EVERYWHERE ELSE (Basic Books, 2000).

[46] *See* FRANCIS FUKUYAMA, TRUST: THE SOCIAL VIRTUE AND THE CREATION OF PROSPERITY (Free Press, 1995).

the nation's foundations from the bottom up. While hostilities in the Liberian civil war, now seen as a paragon of post-Cold War conflict in developing regions, began in December 1989, violence had been systematic for years, predating even Doe's overthrow of the Americo-Liberian oligarchy in 1980. In retrospect, the structures and symbols of the Americo-Liberian-dominated republic contained the seeds of their own destruction – including the official motto, the national sense of historical mission and identity, the general sense of community, and the institutions of government, all of which reflected the experience and aspirations of the dominant settler minority rather than the indigenous majority. Consequently, the country's post-conflict reconstruction also requires the strengthening – if not the wholesale overhaul – of those institutions of civil society that, if not destroyed during the years of fighting, remain compromised by either their involvement with previous regimes or their self-absorbed pursuit of individual interests. This charge, advanced by Liberians themselves, covers political parties, religious groups, and other non-governmental organizations. Sawyer, for example, discreetly notes that during the most recent conflict, "donor-driven NGOs were also more easily manipulated by Charles Taylor's government" through threats to withdraw their legal registration: "Ensuring donor funding and keeping in the good books of the government require[d] such skillful navigation that some NGOs spen[t] much more time on these than pursuing the objective for which they were established."[47]

Only with civil society renewed and reinforced can Liberia develop a culture – and a truly national identity – that can give hope to peace-building and national reconciliation. Amos Sawyer made the same point in a memorandum that he circulated shortly after the signing of the CPA in August 2003: "No degree of external support can help Liberia in the long-run if Liberians are not the driving force in peace-building but are simply the beneficiaries of peace-building programs driven by others. And no peace-building approach can yield sustainable outcomes if it does not empower Liberians by strengthening their individual and collective capacity to do things for themselves, to rely on their own resources, and then seek assistance from others."[48] With this in mind, Sawyer, in his present work, issues an advisory to local NGOs operating today in Liberia that merits quoting at length:

> A major shortcoming of most local NGOs ... is that many are wholly dependent on international donor support; consequently, they are donor-driven in their agenda and have a life span determined by external funding sources. Moreover, it is not infrequent that donor interest and local needs diverge. A classic example has to do with approaches to reconciliation. Donors seem more willing to support superficial projects in reconciliation characterized by radio jingles and sound bites than to invest in long-term solutions that could emerge from research and policies that provide new approaches to social ordering and opportunities to transform conflict. Preference for short-term, quick-fix approaches have often encouraged the creation of local NGOs, as reported in the number of jingles played on the

[47] SAWYER, *supra* note 11, at 76.

[48] Amos Sawyer, Peace-building in Liberia: Foundational Challenges and Appropriate Approaches (Aug. 21, 2003) (privately circulated memorandum, on file with the author).

> radio, for example. Considered closely, such arrangements look very much like a scam pulled on both the targeted population, which is promised a quick fix, and on tax payers of the donor country, whose money may not have been effectively or efficiently used.[49]

Without this perspective, the entire project of post-conflict reconstruction that the international community undertook in Liberia – and which it will, undoubtedly, undertake elsewhere – is for naught at best and, at worst, patronization masquerading as humanitarianism. Even if the exercise is motivated by an enlightened self-interest, such as to build a stable state whose citizens pose a threat neither to one another nor to other members of the international community, then legitimacy takes on great significance. A state accepted as legitimate by a majority of its citizens, because it gives voice to their aspirations and contains reasonable means for political compromise, is ultimately in everyone's interest, national and international. Without the assurance that voting will produce some sort of legitimate regime within which citizens have a stake, their only rational course of action will be driven by the logic of self-preservation: recourse to whatever ties offer the prospect of protection, whether social, economic, territorial, ethnic, religious, or other. The result will be a return to the failed state of warlords and civil strife – the scenario of the "weak state" vulnerable to terrorist networks and drug cartels that the Bush administration's 2002 *National Security Strategy*[50] identified as a major threat to the U.S. and other countries. That weak state, ironically, was the *raison d'être* for the international community's intervention in the first place.

Given the multitude of challenges facing post-war Liberia, it would have perhaps been preferable to postpone elections while including within the brief of the transitional government (and UNMIL) the mandate to help Liberians undertake a process of constitutional choice regarding governmental institutions and other structures – to say nothing of the other conditions that a democratic polity presupposes. What should have taken place, as Sawyer puts it in his compelling argument, is a broad-based consultative process featuring "open, informed, and enlightened deliberations with a careful exercise of choice" that rely upon "a deep understanding of how existing patterns came about and how they are relevant to changing circumstances."[51] The ideal result would have been characterized by the establishment of

> autonomous sites of decisionmaking powers where citizens can act in matters that affect them…. Citizens' participation in town, city, and county councils and on boards that make decisions about schools, health care delivery, security, and the vast array of public goods is at the core of a system of democratic governance and the foundation of democratic peace.[52]

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[49] SAWYER, *supra* note 11, at 76.

[50] National Security Strategy of the United States of America (September 17, 2002), *available at* http://www.whitehouse.gov/nsc/nss.pdf.

[51] SAWYER, *supra* note 11, at 114.

[52] *Id.* at 107.

But, given that the international community had committed itself to staging a vote last year and that Liberia's politicians and people had come to expect it, the electoral process had to go forward. Even so, the recent elections represent just the start of Liberia's transition – the first step in the process of establishing authentic self-governance through thorough constitutional reform. Having intervened in Liberia, the international community must remain actively engaged in this reform process and avoid the temptation to proclaim the election an "easy success" and pull out quickly.[53]

Ellen Johnson-Sirleaf's freshly inaugurated administration should be strongly encouraged to examine the bases of its legitimacy by the international community – especially by the United States, whose influence in Liberia has survived despite some rather egregious failings in the past. Without substantive outreach to the opposition, the new government will have great difficulty establishing its hold on the war-torn country. Among the possible areas for compromise is reform of the constitution – mercifully, a not-too-onerous process by nature of the relevant provision – to incorporate adequate checks and balances on the exercise of political authority as well to embody the aspirations of all the peoples of today's Liberia.[54] As Sawyer, one of the country's most loyal sons, wisely suggests, only by reinventing itself on the basis of its rich patrimony of human capital and associational patterns might Liberia indeed become the "home of glorious liberty" that its national anthem has long proclaimed, and only then might the international community, honorably and responsibly, proclaim that its mission has been accomplished.

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[53] One positive indication is the innovative legal plan, the Government and Economic Management Assistance Program (GEMAP), signed in September 2005 by representatives of the international donor community and the NTGL to ensure that the resources, revenue, and donated money for the country reaches the population in need. The terms of the agreement provide for the positioning of the foreign experts, armed with co-signature authority, in key state financial and revenue-producing sectors. It remains to be seen how the Johnson-Sirleaf administration implements the accord.

[54] A possible starting point for discussions might be something similar to the twelve proposals made by a veteran Liberian civil servant, Yarsuo Weh-Dorliae, and endorsed by Amos Sawyer and other leading scholars. *See* YARSUO WEH-DORLIAE, PROPOSITION 12 FOR DECENTRALIZED GOVERNANCE IN LIBERIA: POWER SHARING FOR PEACE AND PROGRESS (Bushfire Publications, 2004).

ARTICLE

The Law of *Zakat* Management and Non-Governmental *Zakat* Collectors in Indonesia

By Alfitri*

A. Introduction

Zakat is an obligation of Muslims to give a specific amount of their wealth – with certain conditions and requirements – to beneficiaries called *al-mustahiqqin*.[1] The concept of *zakat* exemplifies Islam's strong concern with social and economic justice. It serves as an "equitable redistribution of wealth and income, which is enforced through moral obligation and fiscal measures."[2]

As many have argued, however, the redistributive economic impact of *zakat* depends on how it is administered, especially with regard to collection and distribution.[3] Unfortunately, the administration of *zakat* in Indonesia is not adequate, and therefore the full potential of *zakat* has not yet been realized. [4] Much remains to be done.

Indonesia's difficulty in *zakat* management stems from the fact that Indonesia is not an Islamic state. The willingness of a regime to regulate *zakat* administration directly very much depends on its policy toward Islam. Meanwhile, the voluntary sector's role in *zakat* management depends in part on the availability of facilitative law, which has the potential to enhance credibility and accountability and thereby foster public trust.

Significantly, the Indonesian government did promulgate a law of *zakat* management in 1999. This article will examine the law, its background, and its impact on the existence of nongovernmental *zakat* collectors in Indonesia.

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[1] Al-Qaradawi, *Fiqh az-Zakah* (24th ed., Beirut: Mu`assasat al-Risalah, 1997), 37-38; Abdullah Ibn Muhammad ath-Thayyar, *az-Zakah wa Tatbiqatuha al-Mu'asirah* (2nd ed, al-Riyad: Maktabat al-Tawbah, 1993), 12.

[2] Mohammed Ariff, "Introduction," in Mohamed Ariff (ed.), *Islam and the Economic Development of Southeast Asia: The Islamic Voluntary Sector in Southeast Asia* (Singapore: Institute of Southeast Asian Studies, 1991), 2.

[3] Taufik Abdullah, "*Zakat* Collection and Distribution in Indonesia," in Ariff (ed.), *Islam and Economic Development*, 50-84.

[4] See Bahtiar Effendy, *Islam and the State in Indonesia* (Singapore: Institute of Southeast Asian Studies, 2003), 164-165.

B. *Zakat* and the Argument for State Involvement

1. The Concept of *Zakat*

There are two types of *zakat* in Islam: a flat fee imposed on each person, called *zakat al-fitr,* and a tax on wealth, called *zakat al-mal*.[5] *Zakat al-fitr* refers to the obligation of every Muslim (except those who are absolutely destitute) to contribute a certain amount of staple food or pay an equivalent monetary amount in the month of Ramadan before the Muslim festive season celebration known as *Ied al-Fitr*.[6] The *zakat al-fitr* flat fee is one *sa`* – a little more than two kilograms of wheat, barley, dates, or rice – or the monetary equivalent.[7] All Muslims – including the poor, as long as they will still have food for the first day of *Ied al-Fitr* – must pay *zakat al-fitr* for themselves and their dependents.[8] The proceeds are devoted to helping feed the needy during the *Ied al-Fitr* celebration. Accordingly, even though many have-nots must pay *zakat al-fitr*, they are also the major recipients of the proceeds.[9] In practice, payers usually give *zakat al-fitr* directly to beneficiaries without interference from the state or any other third party.[10]

Unlike *zakat al-fitr*, *zakat al-mal* is levied only on Muslims whose wealth exceeds a threshold called *nisab*.[11] Before *nisab* is calculated, the basic needs of the payer and his family, as well as their financial obligations and debts due, are taken into account. Further, the funds are held for one year by the lunar calendar, and *nisab* is recalculated at the end.[12] These requirements distinguish *zakat al-mal* from *zakat al-fitr*, and enable *zakat al-mal* to be regulated by the state much like a tax.

God commanded the Prophet Muhammad, as the head of the Islamic community in Medina, to collect *zakat*. This command is enshrined in the Qur'an, chapter IX: 103, and it is a persuasive argument for a Muslim state to be involved in *zakat* collection and distribution.[13] As a matter of fact, the collection and distribution of *zakat al-mal* was managed by the state in the era of the Prophet and his successors (the four rightly guided caliphs),[14] and it continued to be a function of Muslim governments until the fall of Ottoman Empire.[15] Furthermore, much like a tax, the minimum threshold of *zakat* on

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[5] See Ariff, "Introduction," 2.

[6] See al-Qaradawi, *Fiqh*, 917; Muhammad Nejatullah Siddiqi, "The Role of the Voluntary Sector in Islam: A Conceptual Framework," in Ariff (ed.), *Islam and Economic Development,* 17-18; Mohamed Ariff, "Resource Mobilization through the Islamic Voluntary Sector in Southeast Asia," in Ariff (ed.), *Islam and Economic Development,* 39.

[7] See Al-Qaradawi, *Fiqh*, 932; Siddiqi, "The Role," 18; Ariff, " Resource," 39.

[8] See al-Qaradawi, *Fiqh,* 924, 930; Siddiqi, "The Role," 18.

[9] Ath-Thayyar, *az-Zakah*, 126; al-Qaradawi, *Fiqh,* 922.

[10] See Monzer Kahf, *The Principle of Socio-Economic Justice in the Contemporary Fiqh of* Zakah, 6, at http://monzer.kahf.com/papers/english/socioeconomic%20justice.pdf (14 June 2005).

[11] Monzer Kahf, *Zakah*, 3, at http://monzer.kahf.com/paper/english/zakah.pdf (14 June 2005).

[12] *Ibid.*, 3-4.

[13] Al-Qaradawi, *Fiqh,* 66.

[14] Siddiqi, "The Role," 21-22.

[15] Kahf, *Zakah*, 8. According to Kahf, Yemen is the only Muslim country that has retained this task without interruption since the Prophet era. See *ibid*.

savings or investments is 85 grams of gold, and the rate of *zakat* is 2.5%; as for livestock, both the minimum threshold and the rate depend on the type and the number of animals.[16]

2. Management of *Zakat*: State *vis-à-vis* Civil Society Organizations

Management of *zakat* is financially self-sustaining. Those who collect and distribute *zakat al-mal* are paid from *zakat* proceeds. *Zakat* collectors are among the *zakat al-mal* beneficiaries in Islam.[17] Hence, imposing the obligation of collecting and distributing *zakat* on the state does not burden the national budget.[18]

If a state is unable or unwilling to administer *zakat* – such as a state that does not implement *Shariah* (Islamic law) and maintains a secular stance, or one where Muslims are a minority – the voluntary sector must undertake the role of gathering and distributing *zakat* for the benefit of the community.[19] This is because managing *zakat* is a religious obligation imposed on the state or those who are responsible for Islamic affairs.[20] If the state does not fulfill this function, Islamic tenets require that it be carried out on behalf of the entire Islamic society by any Muslim in the region. If the collection and distribution of *zakat* is not performed, the Islamic society in the region will face responsibility for this disobedience on Judgment Day.[21] (The importance of the state or the voluntary sector in *zakat* collection and distribution does not negate the individual's payment directly to *zakat* recipients. As long as *zakat* payers fulfill the requirements of *zakatability*[22] and channel their funds to appropriate recipients, their payments are considered valid.)

In order to implement *zakat* properly, involvement by the state or voluntary sector is indispensable. *Zakat* differs from the voluntary act of giving alms, such as *sadaqah* and *infaq* in Islam, or tithing in Christian churches.[23] It is a religious obligation

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[16] For more details about *zakatable* items, *nisab*, and *zakat* rates, see Al-Qaradawi, *Fiqh,* 121-533; Ath-Thayyar, *az-Zakah,* 77-101; Kahf, *The Principle,* 17-18; Kahf, *Zakah*, 3-4; Siddiqi, "The Role," 15; Ariff, "Introduction," 2; H. A. Jazuli and Yadi Janwari, *Lembaga-Lembaga Perekonomian Umat (Sebuah Pengenalan)* (Jakarta: RajaGrafindo Persada, 2002), 41-45.

[17] Other groups of beneficiaries are the poor (*al-fuqara*); the indigent (*al-masakin*); those whose hearts have been reconciled to the truth, such as new converts to Islam (*al-mu`allaf*); those in bondage (*ar-riqab*); debtors (*al-gharimin*); those in the cause of God (*fi sabilillah*); and wayfarers (*ibn as-sabil*). See al-Qur'an, chapter IX (at-Tawbah): 60; Ariff, "Introduction," 2.

[18] Kahf, *Zakah*, 5.

[19] See Ariff, "Introduction," 4.

[20] See *ibid.* See also al-Qur'an, *at-Tawbah* (IX): 103.

[21] See Al-Qaradawi, *Fiqh*, 979-980; Nakamura Mitsuo, "Introduction," in Nakamura Mitsuo, Sharon Siddique, and Omar Farouk Bajunid (eds.), *Islam and Civil Society in Southeast Asia* (Singapore: Institute of Southeast Asian Studies, 2001), 12; Siddiqi, "The Role," 19; Ariff, "Introduction," 4.

[22] The term '*zakatability*' is derivation from the term '*zakatable*' which means items that are subject to *zakat*. It comes from two words '*zakat*' and 'able' which mean having the condition of being subject to *zakat*. See Kahf, *The Principle*, 16

[23] Raj Bhala, "Theological Categories for Special and Differential Treatment" (2001-2002) 50 *University of Kansas Law Review* 689.

that employs a form of taxation with very specific rules.[24] *Zakat* payers who calculate and make their payments in every *Ramadan* month, for example, neglect the requirement that *zakat* must be held, recalculated, and paid after one lunar year; likewise, distributing *zakat* evenly to all who seem needy is invalid.[25] If *zakat* implementation does not meet the religious requirements, it becomes a mere voluntary act of giving alms. In addition, *zakat* should be well managed and strategically distributed on the grounds of fairness, lest some deserving recipients receive too much while others receive too little.

C. Law No. 38/1999 of *Zakat* Management and the Philanthropic Sector

1. *Zakat* Management in Indonesia before Law No. 38/1999

Involvement of the state in managing *zakat* was somewhat unclear in early Indonesia. Even though the state founded the Ministry of Religion in January 1946 and assigned it (among other things) to administer Islamic religious matters,[26] the role of this Ministry was uncertain from the start. Government Regulation No. 33/1949, amended by Government Regulation No. 8/1950, and Regulation of the Minister of Religion No. 5/1951, did not assign *zakat* matters to the Ministry.[27] The exclusion of *zakat* also can be seen from the original structure of the Ministry in 1946: it contained only bureaus of Islamic Religious Information, Islamic Marriages, and Islamic Education.[28]

There was a hope that the state would become more concerned about *zakat* when Soeharto ascended to the presidency in 1967. However, his regime showed an ambivalent attitude toward Islam. Early during his reign, Soeharto severely controlled political Islam but strongly supported Islamic spirituality.[29] This ambivalence can be seen in Soeharto's stated willingness to take charge of the "massive national effort of *zakat* collection" and to take a hand in collecting and distributing *zakat* reports annually, as he said in his official speech celebrating *Isra' Mi`raj* (the Prophet Muhammad's ascension) at the Merdeka Palace in October 1968.[30] The service that Soeharto offered, however, was on behalf of himself as a Muslim private citizen, and not as President. Because he aimed to maintain a clear distinction between religion and the state, he could not act as a provisional *zakat* collector in his official capacity as head of state.[31]

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[24] *Ibid*.

[25] See Kurniawati, (ed), *Kedermawanan Kaum Muslimin: Potensi dan Realita Zakat Masyarakat di Indonesia Hasil Survei di Sepuluh Kota* (Jakarta: Piramedia, 2004), 5.

[26] See Deliar Noer, *Administration of Islam in Indonesia* (Ithaca, NY: Cornell Modern Indonesia Project, Southeast Asia Program, Cornell University, 1978), 8.

[27] See Noer, *Administration*, 18; C. A. O. Van Nieuwenhuijze, *Aspects of Islam in Post-Colonial Indonesia* (The Hague: W. van Hoeve, 1958), 222-223.

[28] See Noer, *Administration*, 20. Compare to the current organizational structure of the Ministry of Religion, which includes the Directorate of *Zakat* Development. See http://humasdepag.or.id/struktur.php (12 June 2005).

[29] Robert W. Hefner, *Civil Islam: Muslims and Democratization in Indonesia* (Princeton, NJ: Princeton University Press, 2000), 59.

[30] See Abdullah, "Zakat Collection," 51.

[31] See Ariff, "Resource," 33.

Not long after his first appeal, Soeharto officially instructed three high military officers to establish an organizational apparatus for the nationwide *zakat* collection. Presidential Decree No. 07/PRIN/10/1968 gave impetus to incorporating the matters of *zakat* into the responsibilities of the state.[32] The governor of Jakarta, Ali Sadikin, was the first official to implement the Presidential decree by issuing a gubernatorial decision to establish a semi-autonomous *zakat* agency, called BAZIS, for Jakarta in December 1968.[33] East Kalimantan formed its BAZIS in 1972, followed by West Sumatra in 1973, West Java and South Kalimantan in 1974, and North Sulawesi and South Sulawesi in 1985.[34] The BAZIS administration in each province had a structure quite similar to that BAZIS of Jakarta, with the governor as general chairman assisted by an executive chairman and a board of advisers.[35] Following the structure of government at the administrative level, each provincial BAZIS also had three basic levels: regency (*kotamadya* or *kabupaten*), district (*kecamatan*), and village (*kelurahan*).[36]

The state-endorsed *zakat* organizations have not been alone in *zakat* management. Besides the BAZIS and the traditional system of *zakat* payment, which still continues, a second system of *zakat* collection and distribution has also flourished through Islamic social and educational organizations.[37] Many of these organizations are branches of national Islamic organizations such as *Muhammadiyah* or *Nahdatul Ulama*. They work in a local area and are more oriented to their communities in using *zakat* proceeds.[38]

Unfortunately, the enthusiasm of the voluntary sector in *zakat* management has not been matched by clear regulations to strengthen its structures and accountability. Thus, the nature of *zakat* organizations is fragmented. The semi-governmental BAZIS were formed by gubernatorial decisions, while the Islamic social and educational organizations simply followed the regulations on foundations, with no specific *zakat* regulations at first.

The problem was somewhat ameliorated in 1991, when the Minister of Religion and the Minister of Home Affairs issued a joint decision (*Surat Keputusan Bersama*, or SKB) on the supervision and guidance of BAZIS.[39] Article 1 stipulates that a BAZIS is a voluntary organization that manages the acceptance, collection, distribution, and utilization of *zakat* (as well as the voluntary forms of giving: *infaq* and *sadaqah*).[40] This SKB thus excluded from its coverage the quasi-state institutions also known as

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[32] Abdullah, "Zakat Collection," 51, 80.

[33] See M. Dawam Raharjo, *Perspektif Deklarasi Makkah: Menuju Ekonomi Islam* (Bandung: Mizan: 1987), 190-197.

[34] Ariff, "Resource," 34; Raharjo, *Perspektif,* 189.

[35] Ariff, "Resource," 34; Raharjo, *Perspektif,* 189.

[36] Ariff, "Resource," 34; Raharjo, *Perspektif,* 189.

[37] Abdullah, "Zakat Collection," 55.

[38] Ariff, "Resource," 33; Abdullah, "Zakat Collection," 54.

[39] SKB No. 29 year 1991/No. 47 year 1991.

[40] Surat Keputusan Bersama Menteri Agama dan Menteri Dalam Negeri No. 29 year 1991/No. 47 year 1991, article 1.

BAZIS.[41] Further, the SKB exemplifies the ambivalent attitude of the state toward Islam. On the one hand, the state takes advantage of the enthusiasm of its local apparatuses and local citizens in managing *zakat*. On the other hand, the state is reluctant to legislate *zakat* into law or to assign its own officials to function as national or regional collectors.[42]

Moreover, the SKB confirmed the findings of the Philanthropy and Law in South Asia (PALISA) project team, which conducted research in Bangladesh, India, Nepal, Pakistan and Sri Lanka, that Indonesian "philanthropic and nonprofit organizations are registered and regulated through multiple channels."[43] This is true for the nongovernmental BAZIS. Before the promulgation of Law No. 16/2001 on foundations, establishing a foundation in Indonesia was straightforward: the founders would authenticate their purposes and agreement to the public notary,[44] they would register the act of the public notary in the district court and then announce it in the State Gazette,[45] and the foundation would be officially established with state supervision. If, however, the foundation also would function as a *zakat* collector, it would be subject to the supervision of officers of the Ministry of Home Affairs and the Ministry of Religion from the central level to the regional level. In this way, laws and regulations with regard to the status and registration of BAZIS fell short during this period.

2. The Law of *Zakat* Management and Its Effectiveness

The demise of Soeharto's authoritarian New Order regime in May 1998 brought about many changes in Indonesia. In terms of politics, the changes were marked by the emergence of 181 political parties between May and October 1998.[46] Surprisingly, this occurred at a time when Indonesia faced socioeconomic and political uncertainty as a result of monetary crisis of 1997, which had caused the collapse of the economy and triggered riots in a number of big cities.[47]

The political euphoria surrounding Soeharto's fall also provoked many Muslims to form political parties. Having being marginalized politically in both the Soekarno and Soeharto regimes, 42 of the 181 parties used Islam as their ideological basis or symbol.[48] Whether for religious or political reasons, some of the Islamic parties campaigned on the perennial issue of Islam and state as well as the implementation of *Shariah.* Outside the political arena, too, some Islamic groups emerged to fight the degradation of socio-

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[41] See Jazuli, *Lembaga*, 39-40.

[42] Effendy, *Islam*, 164, 166.

[43] Mark Sidel and Iftekhar Zaman, "Philanthrophy and Law in South Asia: Key Themes and Key Choices" in Mark Sidel and Iftekhar Zaman (eds.), *Philanthrophy and Law in South Asia* (San Francisco and Manila: Asia Pacific Philanthropy Consortium, 2004), 22.

[44] Rustam Ibrahim, Abdi Suryaningati, and Tom Malik, "Indonesia," *APPC Conference* (September 5-7, 2003), 138.

[45] *Ibid*.

[46] Effendy, *Islam,* 200.

[47] *Ibid*.

[48] *Ibid*.

religious and political circumstances, which, they argued, conflicted with Islamic values; they called for *Shariah* implementation.[49]

Against this backdrop, Law of *Zakat* Management No. 38/1999 was enacted by B. J. Habibie, who ascended to the presidency in this transition period, replacing Soeharto. It is not clear whether the transition sovereign recognized the potency of *zakat* to deal with impoverishment during the economic collapse or simply sought to win Muslim political support before the 2000 presidential election in the People's Consultative Assembly. Law No. 38/1999, however, seemed to promise enhanced direction and accountability to *zakat* collector agencies in Indonesia. The Law covers both the semi-governmental collector agencies and the nongovernmental ones. It requires balance auditing and annual reports to the government, and encourages public disclosure.[50]

Soon after, the Minister of Religion issued Decision No. 581/1999 on the Implementation of Law No. 38/1999 (MRD No. 581/1999). Together, the Law and the Decision specifically address government-formed *zakat* collector bodies, known as BAZ, and nongovernmental collector institutions, known as LAZ.[51] Both BAZ and LAZ have the same functions: to collect, distribute, and utilize efficiently *zakat* proceeds – both *zakat al-mal* and *zakat al-fitr* – as well as other charity funds in Islam, "according to the stipulation of Islamic tenets."[52]

But the shortcomings of the Law and the Decision soon became clear. Neither of them, for example, elaborates on the phrase "according to the stipulation of Islamic tenets." Likewise, though it stipulates *zakatable* items in article 11 sections 1 and 2, Law No. 38/1999 simply asserts in section 3 that the calculation, *nisab*, rate, and time of payment should follow Islamic law.[53] In fact, the concepts of *zakat* in Islamic jurisprudence may vary from one Islamic school of law to another, and they are scattered throughout the books of Islamic law.

In addition, Law No. 38/1999 generally regulates the institutions that manage *zakat*, but, unlike the laws of some other Muslim countries, it does not make *zakat* payments obligatory.[54] It is up to Indonesian Muslims whether to perform *zakat* or not.

Why did the state take a "neutral" position with regard to the scope and the obligatory nature of *zakat*? Three possibilities come to mind.

First, cognizant of its "secular" stance, perhaps the state wanted to avoid getting involved in defining religious tenets, such as the details of *zakat,* and enforcing them. Although this neutral stance might lead to legal uncertainties when *zakat* payers object to a new interpretation of *zakatable* items, such as incomes of contemporary occupations and services, controversy might be minimal because the state does not make *zakat*

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[49] See *ibid.*, 209-210, 217-218.

[50] See Undang-Undang No. 38/1999, articles 6, 7, 18 (s 4), 19, 20.

[51] See *ibid.*, articles 6 (s 1), 7; Keputusan Menteri Agama No. 581/1999, article 1 (s 1-2).

[52] Undang-Undang No. 38/1999, article 8.

[53] *Ibid.*, article 11 (s 1-3).

[54] See Kahf, *Zakat*, 8-11.