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An Introduction to the Legal Design of Electoral Commissions

New constitutions tend to establish independent electoral commissions as state institutions to ensure free and fair elections. To prevent partisan capture of the electoral process, they manage elections, enforce party financing regulations, engage in law reforms, adjudicate electoral disputes, and much more. This paper seeks to provide an introduction into how electoral commissions are meant to protect democracy. It shows that electoral commissions are established as a response to the threat of partisan capture of the electoral process, which the executive, legislature, and judiciary fail to combat credibly. Therefore, they are located as independent institutions outside of the traditional branches of government. At the same time, electoral commissions must be accountable to some extent in order to prevent abuse of power and to ensure its public standing. The analysis is completed by an examination of some of the main tasks performed by electoral commissions.

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I. Introduction

Article 181 (1) f) of the South African Constitution establishes an "Electoral Commission" to "strengthen constitutional democracy" among other institutions with the same purpose. According to Article 190 (1), "[t]he Electoral Commission must […] manage elections [and] ensure that those elections are free and fair".

Generally, new constitutions often contain similar provisions on electoral commissions.[1] Examples include the constitutions of Algeria (2020), Angola (2010), Burundi (2018), the Democratic Republic of the Congo (2005, rev. 2011), Fiji (2013), Kenya (2010), Malawi (1994, rev. 2017), Mexico (1917, rev. 2015), and many others.[2] They establish electoral commissions as bodies to safeguard electoral integrity.[3] Their exact responsibilities vary from system to system. Alongside the main task of managing elections, electoral commissions may be mandated to monitor party and campaign financing, adjudicate electoral disputes, and engage in law reforms.[4] They may thus perform "quasi-executive", "quasi-judicial", and even "quasi-legislative" functions.[5] In this sense, recent academic work recognises independent electoral commissions as being located outside the traditional three branches of government.[6]

So, how are electoral commissions supposed to protect democracy? This paper seeks to provide an introduction into the legal design of electoral commissions. In doing so, it identifies abstract design principles and shows how they can be translated into concrete design choices in different contexts. For illustrative purposes, examples from various countries are given throughout the paper. The paper is divided into three main sections:

First, section II lays the groundwork for understanding independent electoral commissions by presenting the main argument for why they are established in the first place. In short, they are intended to protect electoral integrity in contexts where such protection is not credibly provided by actors of the executive, legislature, or judiciary.

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[1] For an overview: *Ginsburg/Huq*, How to save a constitutional democracy, 2018, pp. 194–195; *Pal*, Review of Constitutional Studies 21 (2016), 85.

[2] See for further constitutions with provisions on electoral commissions or similar bodies https://www.constituteproject.org/constitutions?lang=en& key=ecom&status=in_force, lastly accessed on 25.09.2023.

[3] Using the term "electoral commission", I do not wish to exclude functionally similar bodies with different names from my analysis. For the purpose of this paper, I use the term electoral commissions to describe different domestic bodies outside electoral courts that are established to protect electoral democracy by conducting election administration or parts of it as one central function. This also includes electoral boundary commissions. Thus, the term electoral commissions may refer to the "National Independent Election Authority" in Algeria (Art. 209 of the Constitution of Algeria), the "Supreme Tribunal of Elections" in Costa Rica (Art. 9 of the Constitution of Costa Rica), and the "National Electoral Institute" in Mexico (Art. 35 of the Constitution of Mexico). Scholarly work also refers to those bodies as, for example, "Electoral Management Bodies" (*Pal*, Review of Constitutional Studies 21 (2016), 85).

[4] A more detailed analysis is provided in section IV.

[5] Pal introduces these terms in *Pal*, Review of Constitutional Studies 21 (2016), 85 (94).

[6] For a detailed elaboration on their role outside the (functional and structural) tripartite of power, see *Tushnet*, The new fourth branch: institutions for protecting constitutional democracy, 2021, pp. 1–41; *Pal*, Review of Constitutional Studies 21 (2016), 85 (85–113).

Section III then examines how electoral commissions function as institutions. As they are located outside the traditional branches of government, their relationship with actors within these branches is of particular importance. In general terms: While electoral commissions must be independent of actors with conflicting interests (subsection III.1), they should be accountable to actors who share their interest in electoral integrity (subsection III.2). Furthermore, electoral commissions must have sufficient expertise as well as capacity to carry out the tasks assigned to them effectively (subsection III.3).

In section IV, the paper explores the tasks of electoral commissions. To this end, it focuses on electoral administration (subsection IV.1), participation in law reforms (subsection IV.2), and the enforcement of party regulations (subsection IV.3) as the main tasks of electoral commissions. In performing these tasks, they prevent direct partisan access to the electoral process and electoral competition. This makes electoral manipulation more difficult and costly and may even discourage partisan actors from attempting to manipulate elections in the first place or, at least, mitigate the effects of partisan interference.

II. Reasons for establishing electoral commissions

What are the reasons for establishing multifunctional electoral commissions outside the traditional branches of government? The argument is simple: Once elected, the government, or law-making majority of representatives, have an interest in consolidating their own status and in shielding themselves from accountability through electoral competition by interfering with the electoral process.[7] In this sense, democracy as a constitutional norm is non-self-enforcing, i.e. it is endangered by those who gain power through it.[8]

While in some contexts the genuine support for democratic values by the ruling party, public pressure, or effective judicial oversight can already be sufficient to prevent partisan interference with electoral integrity,[9] in other contexts traditional actors fail to credibly provide sufficient protection. In such contexts, additional safeguards become necessary. Electoral commissions are established to act as such safeguards. They are located outside the traditional branches of government due to specific shortcomings of the executive, legislature, and judiciary.[10]

1. Partisan interest in capturing elections

In a democratic framework, elections and state power are closely linked: Electoral success leads to power. Thus, those who want to gain or maintain power have an interest in manipulating the electoral process in their favour. This generally applies to political parties that try to succeed in electoral competition. While opposition parties usually do not have sufficient power to seriously endanger electoral integrity, the ruling party or coalition on the other hand are more likely to be able to threaten the freedom and fairness of elections and shield themselves from electoral competition.[11, 12]

This can be seen in less traditional democracies such as Hungary, where Orbán's Fidesz party imposed "several tricky changes" favouring itself in elections, including for example "right-wing-friendly" redrawing of electorate districts or the so-called "winner-compensation".[13] Another example is given by Poland, where the PiS government recently changed the composition of the National Electoral Commission in its favour. Six out of nine members of the new National Electoral Commission are selected by the factions in the legislature (Sjem) in proportion to their seats, and one is a judge of the PiS-controlled Constitutional Tribunal.[14] Partisan interference in electoral law by the ruling party can also be observed in more traditional democracies. A prominent example in this regard is the practice of gerrymandering, i.e. redrawing of electoral districts in one's own favour,[15] in the U.S.[16]

[7] *Ackerman*, Harvard Law Review 113 (2000), 633 (716).
[8] Introducing the term "non-self-enforcing norms" in this context *Khaitan*, Asian Journal of Comparative Law 2021, S40 (S53 ff.).
[9] The overall level of democracy in Germany, for example, is generally assessed as quite high (see, e.g., the 2022 indices of Freedom House (Rank 18 out of 210), https://freedomhouse.org/countries/freedom-world/scores?sort=desc&order=Total%20Score%20and%20Status, lastly accessed on 15.9.2023, or V-Dem (Rank 12 out of 179 in the Liberal Democracies Ranking), https://v-dem.net/documents/29/V-dem_democracyreport2023_lowres.pdf, lastly accessed on 15.9.2023, although Germany lacks an institution like the independent election commissions under examination.
[10] *Pal*, Review of Constitutional Studies 21 (2016), 85 (86). For a political science point of view, Pal refers to *Birch*, Electoral Malpractice, 2012.
[11] *Khaitan*, Asian Journal of Comparative Law 2021, S40 (S54).
[12] It should be noted that the threat to electoral integrity is not limited to the interest in self-entrenchment. Paul Kildea recognises further endangerment by foreign interference or external actor's financial influence. *Kildea*, Federal Law Review 2020, 469 (471). Electoral commissions might also be suited to react to such threats. However, this paper does not address the issue explicitly.
[13] *Notz*, How to Abolish Democracy: Electoral System, Party Regulation and Opposition Rights in Hungary and Poland, Verfassungsblog 2018, https://verfassungsblog.de/how-to-abolish-democracy-electoral-system-party-regulation-and-opposition-rights-in-hungary-and-poland/, lastly accessed on 15.9.2023. The article also provides a comprehensive explanation about the system of "winner-compensation".
[14] *Notz*, How to Abolish Democracy: Electoral System, Party Regulation and Opposition Rights in Hungary and Poland, Verfassungsblog 2018, https://verfassungsblog.de/how-to-abolish-democracy-electoral-system-party-regulation-and-opposition-rights-in-hungary-and-poland/, lastly accessed on 15.9.2023. I address the problem of executive and legislative interference with election commissions in section III. In particular, I argue for entrenching the composition in the constitution to immunise the commission from the ordinary political change in section III.1.b.
[15] *Collins* Dictionary, https://www.collinsdictionary.com/de/worterbuch/englisch/gerrymandering, lastly accessed 15.9.2023.
[16] Wasserman, Realignment – More Than Redistricting – Has Decimated Swing House Seats, The Cook Political Report 2023, https://www.cook-political.com/cook-pvi/realignment-more-redistricting-has-decimated-swing-house-seats, lastly accessed on 15.9.2023.

2. Shortcomings of the traditional branches of government

The interest in capturing elections leads to the need for safeguarding electoral integrity. The executive and legislature do not seem suited to credibly administrate elections impartially as their power depends on elections. Even where presidential elections and parliamentary elections are separated, they can share a common party identity, so that they do not have the credibility to organise elections neutrally for each other.[17]

Unlike the legislature or the executive, the judiciary is usually characterised by its impartiality.[18] However, due to the typical function of the judiciary it suffers from shortcomings which can lead to the conclusion that additional protection through a separated institution is necessary:

Large-scale administration, such as the administration of state elections, does not fit the role of the judiciary. The judiciary is mainly responsible for resolving disputes. Thus, institutions within the judiciary typically already lack the expertise and capacity to manage elections. Judges are neither trained nor accustomed to supervising large-scale administration. Moreover, judicial institutions usually do not have the structural flexibility and personnel capacity to administer elections. Managing the electoral process requires, for example, just little personnel between elections, but the demand increases dramatically at election time. The Australian Electoral Commission (AEC) has only 800 employees between, but 87,000 workers during elections.[19] This flexibility in staffing does not match the organisation of the judiciary in most countries.[20, 21]

As the judiciary is not suited to administering elections themselves, it could still protect electoral integrity by effectively controlling the impartiality of elections that are administered by the executive or legislature. As specialists in determining the legality of administrative acts, courts have the ability to oppose electoral fraud and other forms of unlawful interference in the electoral process. However, the judicial control suffers from significant deficits in this regard as well:

Courts make decisions exclusively on the basis of law. The scope of judicial inquiries is therefore limited.[22] This leads to three major difficulties with entrusting courts to safeguard electoral integrity. First, the courts' protection of electoral integrity is only as good as the law on which their decisions are based. They must apply the law, even if it favours a particular party.[23] Second, courts can only rule on cases that are brought before them, so the effectiveness of judicial oversight depends on whether (political) actors are willing and able to bring a case before the court. Third, if engaging in the electoral process, courts would participate in high-level politics as they would be likely to have a significant political influence. Typically, courts lack the political expertise to engage in such high-level politics, given their technical scope of determining lawfulness.[24, 25] Making decisions with such a significant electoral impact could also lead partisan actors to accuse the courts of bias and thereby harm the overall reputation of the judicial system.[26] Damage to the courts' public standing could rather be exacerbated by the absence of public or political accountability.[27]

In addition, courts lack certain capacities to oversee election administration. For instance, they usually do not have the power to launch police-like investigations into irregularities.[28] Furthermore, the judiciary often does not have the structures and means to react swiftly to a large number of cases, for example on election day.[29]

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[17] This is at least the case in party-political systems. Something else might be true for a truly Madisonian model of governance, which is characterised by genuine competition between the branches. In this sense, Tushnet argues that the Madisonian "argument about competition among the branches was defeated by the rise of political parties organized on a national scale". However, in such a system of competition, there might actually be no need for institutions beyond the three traditional branches in general since the traditional branches would check each other effectively. Going beyond what Tushnet says explicitly, in such a system the legislature and executive might be able to control the electoral process of the other branch. *Tushnet*, The new fourth branch: institutions for protecting constitutional democracy, 2021, pp. 12, 21.

[18] Referring to the judiciary, I also include constitutional courts in my analysis for the purpose of this paper. At the same time, I acknowledge that constitutional courts have a (slightly) different function than other courts, which leads Tushnet to understand them as part of the fourth branch (e.g. "[…] constitutional court and other fourth-branch institutions"). *Tushnet*, The new fourth branch: institutions for protecting constitutional democracy, 2021, p. 37.

[19] *Kildea*, Federal Law Review 2020, 469 (474).

[20] Khaitan comes to a similar result and argues that (constitutional) courts "typically lack the capacity to administer elections". Khaitan, Asian Journal of Comparative Law, 16 (2021).

[21] The only country I have come across in my research, whose constitution entitles an (electoral) court with administering election is Bolivia (Article 208 (1) of the Constitution of Bolivia). However, the image is somewhat confused due to "quasi-judicial" functions of electoral commissions.

[22] In this sense, Khaitan argues that "judicial reasoning is bounded perspectivally". *Khaitan*, Asian Journal of Comparative Law 2021, S40 (S58)

[23] Since electoral commissions are bound by the law, a similar concern can be raised regarding electoral commissions. I addressed this issue in section IV.2. In short, unlike courts whose function is exhausted in the application of the law, electoral commissions can be – and are in fact often – designed to engage in electoral law reforms and thereby serve a "quasi-legislative" function.

[24] *Kildea*, Federal Law Review 2020, 469 (471). Even if courts have the expertise necessary to enduringly engage in mega-politics, they might not have the discretion to take the decision's political impact into account.

[25] I argue for the need for political expertise regarding electoral commissions in section III.3 with reference especially to *Khaitan*, Designing Post-Partisan Guarantor Institutions (unpublished manuscript on file with the author), p. 8.

[26] *Kildea*, Federal Law Review 2020, 469 (471).

[27] *Khaitan*, Asian Journal of Comparative Law 2021, S40 (S58). This paper argues for some extent of political accountability regarding electoral commissions also for this reason in section III.2.

[28] In contrast, electoral commissions usually have the capacity to initiate court proceedings.

[29] For this reason, the Australian Election Commission often does not go before the courts but issues informal warnings instead. *Karp/Knaus*, Australian Electoral Commission finds 87 cases of election ads breaching law, The Guardian 2019, https://www.theguardian.com/australia-news/

Still, in some cases, the judiciary might provide sufficient protection despite its weaknesses. Here, context is crucial. In countries with powerful civil society actors or strong opposition rights, courts seem likely to be called upon to rule on cases of electoral irregularities and fraud. Their rulings may unmask illegal electoral interference. Especially in stable democracies, court rulings could thereby lead to civilian protests against the interfering party and support for institutions that oppose the illegitimate electoral outcome. The mere possibility of such judicial review of the electoral process could already deter any partisan interference. In severe cases, courts with strong public support could even annul the election and call for a new one.[30] At the international level, the exposure of electoral capture could increase international pressure or lead to sanctions against the interfering actor, especially if the country is deeply integrated into the international community. In such contexts, court rulings trigger further protection mechanisms and thus sufficiently safeguard electoral integrity.

In other cases, however, judicial protection alone cannot protect electoral democracy.[31] Especially in unstable democracies, the courts might fail to serve this function. This can be seen in Poland or Hungary, where the courts have been unable (or unwilling) to prevent partisan interference with the electoral process. Yet, this can also happen in more traditional democracies, as arguably demonstrated by the Fair Elections Act in Canada, where the Supreme Court only agreed on the unconstitutionality of one provision concerning freedom of speech, while not engaging against the further provisions allowing more partisan interference.[32, 33]

Against this background, electoral commissions are established to increase the guarantee of electoral democracy. They should not replace, but rather supplement existing protection mechanisms presented by the judiciary.[34] This seems particularly, but not exclusively, desirable in instable democracies, where the traditional branches of government are more likely to fail in safeguarding fair and free elections against partisan interference.[35, 36]

III. Institutional design

Having introduced the reasons for their establishment, this section discusses the institutional design of electoral commissions. The question of institutional design (What are the *characteristics* of effective electoral commissions?) can be distinguished from the question of operational design (What are the *tasks* of electoral commissions in order to be effective?), which will be addressed in section IV.

As electoral commissions are deliberately located outside the traditional three branches of power, their relationship with actors within the branches is crucial. On the one hand, the need for independence from partisan actors seems obvious, given that the very reason for establishing electoral commissions is to prevent partisan capture of elections. Therefore, the electoral commission itself needs to be shielded from partisan influence. On the other hand, some degree of accountability to the traditional branches is essential for the public standing and protection of the commission as well as to prevent the abuse of power by the electoral commission itself. To avoid conflicts with the requirement of independence, electoral commissions should be substantially accountable only to those whose interests are generally compatible with electoral integrity.

Furthermore, electoral commissions need to be able to protect electoral integrity; they must have sufficient expertise and capacity to carry out their role effectively. Because of their involvement in high-level politics, electoral commis-

2019/may/22/australian-electoral-commission-finds-87-cases-of-election-ads-breaching-law, lastly accessed on 15.9.2023.

[30] An example of the annulment of an election can be seen in Berlin, where the state's constitutional court required to repeat the 2021 election (VerfGH Berlin, 16.11.2022 – No. 154/21). However, examples are also given in less traditional democracies. Enjoying broad public support, courts in Kenya (1 September 2017) and Malawi (3 February 2020) recently annulled major elections due to violations of electoral integrity, leading to new elections. On the annulment in Kenya, see: *Burke*, Kenyan election annulled after result called before votes counted, says court, The Guardian 2017, https://www.theguardian.com/world/2017/sep/20/kenyan-election-rerun-not-transparent-supreme-court, lastly accessed on 15.9.2023. Regarding the annulment in Malawi, see: *Tew*, Strategic Judicial Empowerment, https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3323022, lastly accessed 15.9.2023, pp. 42–50; *Harding*, Malawi election: What the annulment means for democracy across Africa, BBC 2020, https://www.bbc.com/news/world-africa-51369191, lastly accessed 15.9.2023.

[31] In support, Tushnet argues on a more abstract level that "[i]n some settings, authorizing the constitutional court to perform all the tasks identified by the logic of conflicts of interest might be sufficient […]. In other settings, though, creating several fourth-branch institutions might well be the more sensible choice". *Tushnet*, The new fourth branch: institutions for protecting constitutional democracy, 2021, p. 37.

[32] See already section II.1.

[33] In more traditional democracies, partisan interference with the electoral process is usually less severe. Alongside further reasons, this can be explained by the scope of judicial control. While strong courts are effective against electoral fraud or other obviously unlawful behaviour, judicial review fails to react to minor undemocratic shifts in law or administrative practice.

[34] In this sense, Kildea argues that the Australian Electoral Commission "helps to safeguard the fairness and integrity of the electoral process". *Kildea*, Federal Law Review 2020, 469 (476).

[35] More radically, Khaitan argues that "[u]nless a polity wishes to risk counting solely on its cultural respect for democracy the management of free and fair democratic elections requires an electoral commission […] that is sufficiently independent of political parties". *Khaitan*, Asian Journal of Comparative Law 2021, S40 (S55). Kildea goes even further by claiming that "[f]ourth branch institutions, such as EMBs[, as he calls what I mean with electoral commissions], are therefore required if democracy is to be protected". *Kildea*, Federal Law Review 2020, 469 (471).

[36] This analysis also fits with Khaitan's more general approach to establish the need for "guarantor institutions". He argues that guarantor institutions are placed to protect non-self-enforcing constitutional norms, which he defines as norms that are likely to have powerful actors attempting to frustrate them. Furthermore, guarantors are only necessary if there is no sufficient protection within the traditional three branches. Electoral integrity is such a norm: It potentially has the ruling party in legislature and government as powerful actors trying to frustrate it and is, as argued above, not sufficiently protected by institutions within the traditional three branches. *Khaitan*, Asian Journal of Comparative Law 2021, S40 (S53 ff).

sions need political, legal, and administrative expertise in the highly regulated area of electoral administration. In addition, they need sufficient personnel and financial capacity as well as legal powers to carry out their tasks effectively.

1. Independence

Almost every constitution that includes provisions for an electoral commission introduces independence as a basic requirement of institutional design.[37] Similarly, the vast majority of scholars refer to independence as a necessary design feature.[38]

Since electoral commissions can be understood as guardians of electoral integrity, partisan influence or even capture endangers them as much as it endangers the electoral process.[39] Moreover, even in the absence of direct attempts at partisan influence, an electoral commission depending on partisan actors, such as the legislative majority or the government, has a strong incentive to maintain good relations with the ruling party or coalition. This may discourage the commission from investigating or controlling the ruling party or coalition, thereby creating partisan bias.[40]

Simply enshrining the commission's independence in a constitutional provision is not enough to protect the commission from partisan capture in practice.[41] Therefore, further legal design must ensure the independence of the commission. Independence is understood here as freedom from interests that conflict with the commission's function to ensure electoral integrity, especially partisan interests.

(a) First, independence includes the impartiality of the electoral commission and its members, i.e. the absence of conflicts of interest. (b) Second, the electoral commission must be free from control by external actors; partisan actors, such as the legislative majority or the government, must not control the commission's actions.

a) Impartiality

The impartiality of the commission is crucial to the impartiality of its actions. The commission must not have partisan interests that override its commitment to fair and free elections.[42] Two different approaches are taken to achieve impartiality: (aa) Some electoral commissions try to avoid party affiliations altogether. They aim to achieve neutrality as an institution by ensuring the neutrality of its members. (bb) Other electoral commissions only try to be neutral as a whole. While explicitly allowing partisan interests to enter the commission, they try to balance opposite interests so that they outweigh each other.

aa) General avoidance of partisan interest

Most legal systems with independent electoral commissions follow the first approach and seek to prevent the commission from having partisan interests by avoiding individual partisan interests of its members.[43] They establish rules that seek to achieve impartiality in two ways: First, they try to avoid partisan appointments. Second, they impose restrictions on the party affiliations during and after their time as a commission member, thus preventing the development of partisan interest during their time in office.[44]

(1) For appointing neutral members, the appointment body is decisive; biases within the appointment body lead to biased appointments. Therefore, members of electoral commissions should not be selected by an institution dominated by a partisan actor or coalition.

Instead, neutral bodies should be entitled to appoint members of the commission or at least have a veto right on any appointment. In this sense, Art. 100 of the Constitution of Costa Rica, for example, requires a super-majority of the Supreme Court to appoint members of the electoral commission. In India, the Chief Election Commissioner is chosen by the President (Article 324 (2) of the Indian Constitution), who is supposed to be a respected statesman and therefore above party politics.[45]

[37] Examples of these are provided by Article 209 of the Constitution of Algeria, Article 107 (1) of the Constitution Angola, Article 90 of the Constitution of Burundi, Article 81 (1) (a) of the Constitution of Kenya, Article 181 (2) of the Constitution of South Africa and so forth.

[38] For example: *Ackerman*, Harvard Law Review 113 (2000), 633 (721); *Appleby*, Australian Journal of Human Rights 23 (2017), 168 (171 f.); *Ginsburg/Huq*, How to save a constitutional democracy, 2018, pp. 194–196; *Khaitan*, Designing Post-Partisan Guarantor Institutions (unpublished manuscript on file with the author), pp. 5–7; *Kildea*, Federal Law Review 2020, 469; *Pal*, Review of Constitutional Studies 21 (2016), 85 (86–114); *Tushnet*, The new fourth branch: institutions for protecting constitutional democracy, 2021, pp. 42–77.

[39] Again, Poland gives a good example. As seen above, the ruling PiS party has changed the composition of the National Election Commission in their favour to capture the commission in order to interfere with the electoral process itself (see section II. 1).

[40] *Kildea*, Federal Law Review 2020, 469 (473, 480).

[41] One might imagine the case of a weak constitutional court unable or unwilling to protect the electoral commission's independence. This concern is addressed in section III. 1. b). But even in a system with a strong constitutional court, the term "independence" does not in itself provide sufficient clarity for effective protection. For instance, "independence" could be interpreted as mere freedom of governmental supervision allowing indirect forms of partisan influence. Klug addresses these "difficulties" of "translating […] this promise [of independence] into reality" in *Klug*, New York Law School Law Review 60 (2015), 153 (161).

[42] *Khaitan*, Designing Post-Partisan Guarantor Institutions (unpublished manuscript on file with the author), p. 7.

[43] *Khaitan*, Designing Post-Partisan Guarantor Institutions (unpublished manuscript on file with the author), p. 7.

[44] Speaking from *ex ante* and *ex post* mechanisms of independence: *Tushnet*, The new fourth branch: institutions for protecting constitutional democracy, 2021, pp. 20 f.

[45] *Ackerman*, Harvard Law Review 113 (2000), 633 (718). Notably, the Indian approach arguably failed in 1989, when the President used his power to appoint further commissioners and made political appointments. *Pal*, Review of Constitutional Studies 21 (2016), 85 (108).

The inclusion of international experts or representatives of international organisations without strong links to politics in the given country could further enhance the neutrality of appointments. This has the distinct advantage of breaking up a process that is otherwise likely to be characterised by interdependencies within inner-country politics.[46] This practice has not yet been applied in any of the electoral systems under examination. However, forms of such international vetting procedures have been implemented, for example, in Ukraine for the selection of members or heads of the High Anti-Corruption Court (2018), the National Anti-Corruption Agency (2019), the High Judicial Council (2019), the High Qualification Commission of Judges (2019), the Specialized Anti-Corruption Prosecutor's Office (2021), and the National Anti-Corruption Bureau (2022), where some significant success has been identified.[47]

As an alternative to bodies with neutral members, bodies of weighted multi-partisanship, i.e. bodies consisting of representatives of different parties and coalitions which are designed in a way that multi-partisan or cross-coalition agreement is typically necessary for any appointment, might serve a similar function of avoiding biased appointments.[48] In Botswana, for example, an "All Party Conference", defined as a meeting of all registered political parties, recommends candidates based on agreement (Article 65a (1) (c), (3) of the Constitution of Botswana). A similar requirement of cross-party agreement is suggested in Mexico, where according to Article 41 (5) Section A of the Constitution a two-thirds majority of the House of Representatives is necessary for electing members of the National Electoral Institute.

In any case, as the electoral commission itself, the appointment body is also endangered of partisan capture. Including more actors can mitigate the risk; maybe only some will be captured or by different governments. Thus, in the majority of examined countries several institutions are involved in the appointment procedure. Various combinations of actors are possible. In Botswana, for example, the "All Party Conference" creates a list of recommended candidates from which the Judicial Service Commission selects the commissioners. In Mexico, the appointment procedure involves, alongside the House of Representatives, the National Commission for Human Rights, the National Transparency Agency, and the Supreme Court of Justice (Article 41(5) Section A of the Constitution of Mexico).

The inclusion of further bodies can also provide additional advantages. Parliamentary participation, for example, can increase an appointment's democratic legitimacy and public acceptance. Including the judiciary, for example, could increase the safeguard of lawfulness of the election process.

In addition to the appointment body, the appointment criteria are of particular importance. In this regard, prohibitions of the appointment of applicants with current or former party affiliations or of those who hold public offices can guarantee neutrality. Following this principle, Section 6 (2) (b) of the South African Electoral Commission Act 1996 prohibits the appointment of a person who has "a high party-political profile".[49]

(2) Similar to existing bars on party affiliations of appointees, the later development of partisan interest can be prevented by imposing future bars on political offices or other positions in high-level party politics. According to Article 88 (3) of the Constitution of Kenya, "[a] member of the Commission shall not hold another public office". Going further, Article 41 (5) Section A (e) of the Constitution of Mexico even prohibits commissioners to "be hired by the executive organs of political parties or being candidates of public office for the next two years after their time in office at the Institute have concluded".

To avoid partisan removal, members of electoral commissions can usually only be removed on limited grounds,[50] typically including multi-partisan or judicial approval.[51] In addition, the conditions of service, such as the salary during the membership, can be made out of reach for the ordinary political process.[52] Lastly, prohibiting re-elections or lifetime appointments decreases interest in good relations with political parties included in the appointment procedure.[53]

[46] *Hooper/Hoppe/Matos*, To Trust is to Choose, Verfassungsblog 2021, https://verfassungsblog.de/to-trust-is-to-choose/, lastly accessed on 15.9.2023.
[47] *Ackerman*, Harvard Law Review, 718 (2000). Notably, the Indian approach arguably failed in 1989, when the President used his power to appoint further commissioners and made political appointments. *Pal*, Review of Constitutional Studies 21, 108 (2016).
[48] *Khaitan*, Designing Post-Partisan Guarantor Institutions (unpublished manuscript on file with the author), p. 11.
[49] Notably in this regard, Tushnet refers to Hans Kelsen, who already proposed that members of the constitutional court, which he saw as the single guardian of the constitution, should not hold high-level party positions and be appointed by neutral bodies in order to avoid conflicts of interests. *Tushnet*, The new fourth branch: institutions for protecting constitutional democracy, 2021, p. 16.
[50] See for example the Commonwealth Electoral Act 1918, Section 8 (3)–(4) in Australia.
[51] The Chief Election Commissioner in India can, for example, only be removed through impeachment due to Article 324 (5) of the Indian Constitution. Further Election Commissioners cannot be removed without the recommendation of the Chief Election Commissioner (Article 324 (5) of the Indian Constitution). *Ackerman*, Harvard Law Review 113 (2000), 633 (719). In Canada, the removal of the Chief Electoral Officer is only permissible for cause by the Governor General with approval of both houses of Parliament (Section 13 (1) of the Canada Elections Act, 2000).
[52] Again, India provides a good example stating that "the conditions of service of the Chief Election Commissioner shall not be varied to his disadvantage after his appointment" in Article 324 (5) of the Indian Constitution.
[53] Section 13 (2) of the Canada Elections Act, 2000, for example, prohibits re-appointments. Before 2014, the Chief Election Commissioner in Canada was elected for a lifetime. *Pal*, Review of Constitutional Studies 21 (2016), 85 (92).

bb) Balancing partisan interests

Not a constitutional institution, yet of significance for this study, the U.S. Federal Elections Commission (FEC) follows the second approach: Instead of aiming toward the impartiality of every single member, the FEC aims to be independent only as a whole by balancing the partisan interest of the different members of the FEC. For this approach, the composition of the commission is crucial. The FEC consists of six members, while only three members may represent the same party.[54] In practice, the FEC, therefore, is staffed with three Democrats and three Republicans.[55] Building on the distinct feature of a de-facto two-party system, the FEC attempts to achieve neutrality as a whole by creating a system in which partisan interests outweigh each other.

One limit of this second approach seems obvious. To rely on the balance of partisan interests through an equal representation of opposing partisan members, as seen in organisations like the FEC, can only be effective in a two-party system. As soon as more parties get involved, it is difficult if not impossible to avoid coalitions and satisfy the need for flexibility due to political change.[56]

But even in a two-party system, this approach comes with at least two major difficulties. Firstly, having a similar number of commissioners from both parties increases the risk of deadlocks.[57] In particular, both parties have the power to block investigation and enforcement against them through their members in the commission.[58] Secondly, and even more dramatically, this second approach to independence of balancing opposing partisan positions fails to take into account political change beyond the two parties that existed when the system was designed. An emerging third party would, at least as long as it is not established, not be considered by the system. This also leads to the most salient problem of this approach: Even if we achieve a balance between the two parties, this will not balance out every interest that conflicts with electoral integrity. Most evident, both parties share the common interest to exclude other parties from the electoral competition and therefore the interest to undermine electoral fairness regarding other actors.[59]

Thus, the second approach is less suited to provide internal independence.

b) Freedom of external control

Ensuring the commission's neutrality is not sufficient to guarantee that the commission acts impartially. Powerful partisan actors, such as the government or the legislative majority, could attempt to control the commission's actions in their favour. Thus, freedom from external control is crucial as well.

Since electoral commissions are mostly imposed as independent bodies, it seems clear that they ought not to be formed as executive office under ministerial supervision. In this sense, electoral commissions must be generally free from governmental control through explicit directions.

However, partisan influence can be exercised in more subtle ways. Indirect control might be carried out through funding.[60] If the commission's budget depends on the government or parliamentary majority, they can use this power to cut the funding if the commission acts against their will and thereby exerting pressure on it.[61] The mere possibility might already incentivise the electoral commission to comply with the ruling party's will in order to avoid sanctions.[62] Electoral commissions should, therefore, be financially out of reach of the government or legislative majority to some degree. Bruce Ackerman, for example, suggests allocating a certain percentage of the total governmental revenue to guarantee budgetary freedom.[63]

A distinct threat to the neutrality of the commission's actions is posed by the law-making majority of the legislature. The ruling party or coalition could change the law concerning the electoral commission. They might, for instance, favour themselves by changing the commission's composition, as seen in Poland.[64] They could also influence the commission by taking away some of its powers (such as on evidence or sanctions), imposing ministerial supervision, transforming the decision-making process, limiting or abolishing the commission's budgetary independence, and so forth. They could even abolish the electoral commission altogether.[65]

[54] See: Website of the Federal Election Commission, https://www.fec.gov/about/leadership-and-structure/, lastly accessed on 15.9.2023.
[55] *Pal*, Review of Constitutional Studies 21 (2016), 85 (90).
[56] Supporting this: *Khaitan*, Designing Post-Partisan Guarantor Institutions (unpublished manuscript on file with the author), p. 7. As far as my research is concerned, I have not found any electoral commission following this approach in a multi-party system.
[57] For example, the FEC has been criticised for frequent deadlocks and their inability to enforce the law they are charged with *Ackerman*, Harvard Law Review 113 (2000), 633 (713).
[58] In the case of the FEC, Ackerman goes on to argue that the FEC is provided "with a structure that virtually guaranteed administrative failure" for this reason. *Ackerman*, Harvard Law Review 113 (2000), 633 (717).
[59] *Khaitan*, Designing Post-Partisan Guarantor Institutions (unpublished manuscript on file with the author), p. 7; *Pal*, Review of Constitutional Studies 21 (2016), 85 (91).
[60] For instance, Kildea heavily criticises the lack of financial independence of the Australian Electoral Commission. *Kildea*, Federal Law Review 2020, 469 (475-6, 478, 482).
[61] *Pal*, Review of Constitutional Studies 21 (2016), 85 (91).
[62] *Kildea*, Federal Law Review 2020, 469 (473, 480).
[63] Ackerman argues for financial independence of what he calls the "integrity branch" but his argument is transferable. *Ackerman*, Harvard Law Review 113 (2000), 633 (694).
[64] See section II.1 with reference to *Notz*, How to Abolish Democracy: Electoral System, Party Regulation and Opposition Rights in Hungary and Poland, Verfassungsblog 2018, https://verfassungsblog.de/how-to-abolish-democracy-electoral-system-party-regulation-and-opposition-rights-in-hungary-and-poland/, lastly accessed on 15.9.2023.
[65] For a more detailed analysis, including some case studies of partisan interference in established democracies, especially regarding the Fair

Such interference by the legislative majority could be avoided by entrenching the electoral commission in the constitution. Constitutional change typically needs broad multi-partisan agreement.[66] Thus, constitutionalising the commission protects it from the ordinary political process and thereby significantly increases structural independence.[67, 68]

In systems of constitutional entrenchment, the level of detail of constitutional provisions varies from system to system.[69] The more precise the constitutional provision, the less room for the simple majority in parliament to change the legal design in their favour.[70] Thus, as a general principle, constitutional entrenchment of non-self-enforcing design features, i.e. aspects of institutional and operational design that the legislative majority is likely to have an interest in undermining, seems desirable for the independence of the commission.[71]

This might include general design principles, such as independence,[72] the general function to protect electoral integrity,[73] and more precise design aspects, such as the commission's mandate and precise tasks,[74] its budget and other capacities,[75] its relationship to (partisan) actors within the traditional three branches of government,[76] its composition,[77] the appointment procedure,[78] the removal procedure,[79] rules on internal decision-making,[80] and even the salary[81] as well as the tenure[82] of commission members and so forth.[83]

This is not to say that constitutional entrenchment is strictly necessary for a functioning electoral commission or that constitutional entrenchment combats all threats to independence effectively. Notably, this does not mean that statutory electoral commissions must fail. Political entrenchment might already be enough. Regarding the Australian Electoral Commission, Paul Kildea argues, for example, that "a long history of professional and nonpartisan electoral administration, combined with institutional independence and high public confidence in its performance" have already been sufficient to protect the commission's independence.[84]

Reversely, constitutionalising the electoral commission can be insufficient and fail to prevent partisan capture in some cases. Firstly, the constitution could already be biased due to its original drafting.[85] Secondly, and more importantly, the political environment is crucial. Constitutional provisions might only be a "parchment barrier"[86] in systems, where constitutional amendment is relatively easy for the ruling party due to the amendment rules or an overwhelming majority in the Parliament.[87] In Hungary, in this sense, the Fidesz party's replacement of the constitution allowed them to pack the electoral commission.[88] In other contexts, the constitutional court might be unwilling or unable to protect constitutional provisions including institutional design.[89] Here, a limit of legal design is reached.

2. Accountability

Sometimes understood as the counterpart to the commission's independence,[90] electoral commissions are usually and rightfully established with some form of accountability. Almost universally, this includes some legal accountability to the judiciary. As electoral commissions are bound by law, their actions can be subject to judicial review in almost all countries.[91] In addition, most systems also introduce some degree of political accountability. Typical in this context is the commission's duty to report to the parliament

Elections Act (2014) in Canada see *Pal*, Review of Constitutional Studies 21 (2016), 85 (89–93).

[66] *Pal*, Review of Constitutional Studies 21 (2016), 85 (96).

[67] *Khaitan*, Designing Post-Partisan Guarantor Institutions (unpublished manuscript on file with the author), p. 11; *Pal*, Review of Constitutional Studies 21 (2016), 85 (96); *Ackerman*, Harvard Law Review 113 (2000), 633 (692).

[68] While I acknowledge that this is not only true for written constitutions but also for small-c constitutions, my following argument focuses on written constitutions.

[69] Regarding the tasks of electoral commissions, at the more detailed end of the spectrum, one can find in Mexico. In contrast, the South African Constitution states general principles which are filled out by the statutory South African Electoral Commission Act (1996). Already referring to such a spectrum: *Pal*, Review of Constitutional Studies 21 (2016), 85 (97-99).

[70] *Pal*, Review of Constitutional Studies 21 (2016), 85 (97, 106–112).

[71] *Pal*, Review of Constitutional Studies 21 (2016), 85 (97, 110): "[A]n overall lesson […] is that EMBs [= Electoral Management Bodies] should be defined as specifically as possible in the constitution."

[72] See already footnote no. 37.

[73] For example: Article 86 (a) of the Constitution of Kenya, Article 190 (1) (b) of the Constitution of South Africa.

[74] For Example: Article 88 (4) of the Constitution of Kenya.

[75] *Pal*, Review of Constitutional Studies 21 (2016), 85 (91).

[76] For example: Article 181 (2)–(5) of the Constitution of South Africa. Article 103 of the Constitution of Costa Rica. For a detailed analysis of this aspect see: id. at, *Pal*, Review of Constitutional Studies 21 (2016), 85 (100–104).

[77] For example: Article 191 of the Constitution of South Africa.

[78] For example: Article 88 (2) of the Constitution of Kenya, Article 193 of the Constitution of South Africa, Article 100 of the Constitution of Costa Rica.

[79] For example: Article 194 of the Constitution of South Africa.

[80] For example: Article 41 of the Constitution of Mexico.

[81] For example: Article 324 (5) of the Constitution of India.

[82] For example: Article 101 of the Constitution of Costa Rica.

[83] A more detailed analysis is given by *Pal*, Review of Constitutional Studies 21 (2016), 85 (97–106).

[84] *Kildea*, Federal Law Review 2020, 469 (482).

[85] *Pal*, Review of Constitutional Studies 21 (2016), 85 (107).

[86] *Pal*, Review of Constitutional Studies 21 (2016), 85 (90, 96).

[87] *Pal*, Review of Constitutional Studies 21 (2016), 85 (96).

[88] *Landau*, Abusive constitutionalism, U.C. Davis Law Review 47 (2013), 189 (210).

[89] *Pal*, Review of Constitutional Studies 21 (2016), 85 (88).

[90] *Appleby*, Australian Journal of Human Rights 23 (2017), 168 (171 f.); *Kildea*, Federal Law Review 2020, 469 (472); *Pal*, Review of Constitutional Studies 21 (2016), 85 (111).

[91] A counterexample is given by Burundi's Independent National Electoral Commission regarding their "quasi-judicial" function of solving electoral disputes. In this area, "[t]he decisions of the Committee are unappealable […]" (Article 92 (1) (f) of the Constitution of Burundi). Another counterexample is given by Costa Rica, where, due to Article 9 of the Constitution, the Supreme Electoral Tribunal's decisions cannot be overturned by the judiciary. *Pal*, Review of Constitutional Studies 21 (2016), 85 (103).

or government.[92] The South African Electoral Commission, for example, is "accountable to the National Assembly, and must report on [its] activities and the performance of [its] functions to the Assembly at least once a year".[93] Another form of political accountability can be seen in the duty to transparency as imposed, for instance, in Algeria.[94] In Mexico, transparency of the Federal Electoral Institute is created through political appointees who may attend the Institute's meetings but are expressly barred from voting (Article 41(5) Section A of the Constitution of Mexico).[95]

While the duty to report or general transparency is not linked to any formal consequences, more substantial mechanisms of political accountability include sanctions for the members of the electoral commission. For example, most laws on electoral commissions foresee the possibility of a commissioner's removal in cases of misconduct.[96] In contrast to weaker forms of political accountability, such as reports or general transparency, which incentivise impartiality and professionality, substantial accountability might motivate the commission to act in compliance with the interest of those who are entitled to impose sanctions. Here, Micheal Pal identifies a "tradeoff between independence and accountability".[97] Having elected representatives influence the commission, he argues, can on the one hand be seen as legitimate oversight, but on the other hand limits the commission's independence.[98] Indeed, where unipartisan bodies can impose sanctions on electoral commission members, some tension with the commission's independence cannot be denied.[99] Electoral commissions should, therefore, not be accountable to unipartisan, but instead to bodies who have a genuine interest in supporting electoral integrity. For this reason, Tarunabh Khaitan suggests political accountability to bodies of weighted multi-partisanship.[100] Instead of giving the government or legislative majority the ability to remove commissioners, more parties and other (political) actors should be involved.[101]

In general terms, the electoral commission should not be substantially accountable to those with an interest in undermining electoral democracy. This principle is also applicable to legal accountability to the courts. That most systems impose general legal accountability can be understood as based on the assumption that courts mostly are not interested in capturing the electoral process.[102] However, where courts are more likely to be controlled by political parties, it seems as if it might be reasonable to make (some) decisions of the electoral commission unreviewable.[103]

Generally, accountability of the electoral commission is desirable as legitimate oversight over the commission and to ensure their effectiveness. Due to the significant impact electoral commissions have on the electoral outcome, they must be subject to some control to prevent overzealousness or partisan behaviour and to correct errors. Likewise, accountability is crucial for the commission's public standing and thereby for its effectiveness:

Electoral commissions affect high-level politics.[104] When administrating and supervising elections, their decisions and actions can have a substantial impact on the electoral outcome and thus the distribution of political power.[105] Their investigations and inquiries can significantly harm the professional reputation of politicians.[106] At the same time, there is a risk of electoral commissions making mistakes[107] or acting overzealous[108] or even partisan.[109] Some degree of accountability is therefore desirable to ensure adequate oversight of the commissions' power or as Ackerman puts it: "Once we have created our constitutional watchdogs, we must take steps to keep them under control."[110]

Accountability is also desirable from the point of view of the electoral commission. Public standing is crucial for electoral commissions.[111] For their legitimacy, it is necessary that their electoral administration is not only accepted by the "winner", but also by the "loser" of the election.[112]

[92] *Kildea*, Federal Law Review 2020, 469 (472).
[93] Article 181 (5) of the Constitution of the Republic of South Africa. Similar provisions can be found in, for example, Armenia (Article 194 (3) of the Armenian Constitution) or Botswana, where the electoral commission is even accountable "to the Minister for the time being responsible for matters relating […] [and] the National Assembly" (Article 65a (13) of the Constitution of Botswana).
[94] Article 210 of the Constitution of Algeria.
[95] For an overview of the Mexican regulation see *Pal*, Review of Constitutional Studies 21 (2016), 85 (104).
[96] This example has already been touched upon in section III.1.a)aa).
[97] *Pal*, Review of Constitutional Studies 21 (2016), 85 (111). Pal argues only in regard to constitutional entrenchment of electoral commissions, but the argument is transferable.
[98] *Pal*, Review of Constitutional Studies 21 (2016), 85 (111).
[99] This is, for example, also identified by *Appleby*, Australian Journal of Human Rights 23 (2017), 168 (172); *Khaitan*, Designing Post-Partisan Guarantor Institutions (unpublished manuscript on file with the author), p. 11 f.
[100] *Khaitan*, Designing Post-Partisan Guarantor Institutions (unpublished manuscript on file with the author), p. 11–14.
[101] See already above in section III. 1. a) aa).
[102] *Pal*, Review of Constitutional Studies 21 (2016), 85 (104).
[103] According to Pal, this can be seen in Mexico and Costa Rica. *Pal*, Review of Constitutional Studies 21 (2016), 85 (104).
[104] *Tushnet*, The new fourth branch: institutions for protecting constitutional democracy, 2021, p. 125; *Khaitan*, Asian Journal of Comparative Law 2021, S40 (S44)
[105] *Kildea*, Federal Law Review 2020, 469 (480).
[106] *Kildea*, Federal Law Review 2020, 469 (472).
[107] *Kildea*, Federal Law Review 2020, 469 (475).
[108] *Khaitan*, Asian Journal of Comparative Law 2021, S40 (S58); *Tushnet*, Institutions Protecting Democracy: A Preliminary Inquiry, Law and Ethics of Human Rights 2018, 181 (197).
[109] Ackerman recognises this regarding what he calls the "integrity branch" as "obvious dangers of partisan abuse". *Ackerman*, Harvard Law Review 113 (2000), 633 (694).
[110] *Ackerman*, Harvard Law Review 113 (2000), 633 (694).
[111] *Appleby*, Australian Journal of Human Rights 23 (2017), 168 (175–179); *Kildea*, Federal Law Review 2020, 469 (478 f.). Appleby argues that way regarding the Australian Human Rights Commission, but her argument can be generalised and applied to electoral commissions as well.
[112] *Khaitan*, Asian Journal of Comparative Law 2021, S40 (S43).

Without public and political acceptance, electoral commissions might be subject to attacks by partisan actors or even be ignored entirely.[113] This would not only undermine the authority of the electoral commission itself but also challenge the entire electoral process administrated by the electoral commission. To ensure general support, the commission's neutrality and professionalism must be visible and partisan influence detectable. Where public confidence in courts is high, some credibility can already be achieved by legal accountability. Further political accountability in the form of transparency towards the public and political parties in the parliament can increase the commission's credibility.

In addition, transparency can even reduce the risk of direct partisan capture of electoral commissions. Parties have to fear greater public backlash for trying to influence the electoral commission if the commission's decision-making process is transparent and influence is visible. Thereby, accountability increases the political cost of attempted partisan capture. In this sense, accountability could even prevent giving "institutional legitimacy" to partisan actors, who try to interfere with the electoral process by gaining legitimacy through the captured electoral commission.[114]

3. Ability to perform the given tasks effectively

Furthermore, electoral commissions need the ability to carry out their tasks effectively. This includes sufficient expertise, i.e. sufficient knowledge on how to perform their tasks and the skills necessary to carry them out.[115] In addition, electoral commissions need to have sufficient capacities to perform the tasks allocated to them. Both are strongly linked to the precise tasks given to the electoral commission. As the given tasks vary from system to system, the exact expertise and capacity required by different commissions also vary. However, some general considerations can be made.

As seen above, electoral commissions are mandated with highly political matters. They engage with various political actors[116] and their actions can have a significant impact on the electoral outcome.[117] When the political environment changes, the commissions must be able to react to those changes. They must keep a good reputation and, at the same time, perform their tasks in an impartial and effective manner. To balance these aims in each political environment, electoral commissions require political expertise.[118] On a basic level, this includes the ability to estimate how their actions will be received by the general public and by other political actors. Building on this basic understanding, timing is important; publishing a report on election day might have a different, unjustifiably higher impact than publishing it one month earlier. Sometimes it might be necessary to refrain from using their full power to avoid public and political attacks. The Australian Electoral Commission, for example, tends to issue warnings instead of taking legal steps to increase the swiftness of their actions, avoid the appearance of bias, and prevent backlash for incorrect legal actions.[119]

This leads to the second form of expertise that is generally required: legal expertise. Electoral commissions must have expertise in making legal assessments. This is often considered in the composition of electoral commissions. The South African electoral commission, for example, consists of five members, and one of them must be a judge.[120] Similarly, the Chairperson of the Independent Electoral Commission in Botswana must be a judge from the High Court.[121]

In addition to general political and legal expertise, various specific forms of expertise might be required due to the tasks the electoral commission performs. Different expertise requirements can partly explain differences in the composition of electoral commissions. If more types of expertise are necessary, a multi-membered electoral commission might be reasonable. Reversely, it can make sense to have a single-membered electoral commission where the commission's tasks are quite limited.[122]

The commission's capacity includes sufficient staff and financial resources. As seen in subsection III.2., electoral commissions should be financially independent to avoid indirect influence by the legislative majority or government. Since the work of electoral commissions is heavily linked to the electoral process, the need for personnel increases significantly during elections. Therefore, flexibility in their personnel structure is particularly significant.

Furthermore, electoral commissions must have sufficient legal authority, i.e. they must be legally empowered to perform what is necessary for them to fulfil their tasks. As their

[113] *Kildea*, Federal Law Review 2020, 469 (472 f.).
[114] *Khaitan*, Asian Journal of Comparative Law 2021, S40 (S54 f.).
[115] For a detailed exploration of the theory underlying expertise, see *Khaitan*, Designing Post-Partisan Guarantor Institutions (unpublished manuscript on file with the author), p. 8.
[116] *Khaitan*, Designing Post-Partisan Guarantor Institutions (unpublished manuscript on file with the author), p. 8 f.
[117] See already section III. 2.
[118] Tarunabh Khaitan calls this political nous. *Khaitan*, Asian Journal of Comparative Law 2021, S40 (S44).
[119] *Kildea*, Federal Law Review 2020, 469 (479 f.); *Karp/Knaus*, Australian Electoral Commission finds 87 cases of election ads breaching law, The Guardian 2019, https://www.theguardian.com/australia-news/2019/may/22/australian-electoral-commission-finds-87-cases-of-election-ads-breaching-law, lastly accessed on 15.9.2023.
[120] Section 6 (1) of the South African Electoral Commission Act. 1996.
[121] Article 65a (1) (a) of the Constitution of Botswana. Something similar is true for the Chairperson of the Australian Electoral Commission, see Section 6 (4) of the Commonwealth Electoral Act. 1918.
[122] *Khaitan*, Designing Post-Partisan Guarantor Institutions (unpublished manuscript on file with the author), p. 10. Khaitan's argument concerns guarantor institutions in general but is transferable.

tasks differ from system to system, there is no exhaustive list of legal powers electoral commissions need in order to be effective. These range from administrative powers, such as the power to register voters, to investigative powers, such as the power to conduct audits or to enter and search buildings, to judicial powers, such as the power to rule on cases on political partiality of state officials, to legislative powers, such as the power to submit draft laws or to veto new legislation. A particularly broad and vague empowerment is provided by Section 6 (3) of the Commonwealth Electoral Act, stating that the Australian Electoral Commission "may do all things necessary or convenient to be done for or in connection with the performance of its functions".

IV. Operational design

According to Section 5 (1) of the South African Electoral Commission Act of 1996, the Electoral Commission must "(a) manage any election; (b) ensure that any election is free and fair; […]; (e) compile and maintain voters' rolls […]; (j) continuously review electoral legislation and proposed electoral legislation, and to make recommendations in connection therewith" and so forth.[123] Similar lists of tasks of electoral commissions have been established either by statute, like in South Africa, or by constitutional provisions.[124] They address the question of operational design: What do electoral commissions do in order to protect electoral democracy effectively?[125]

Established in response to the threat of electoral interference, electoral commissions are meant to shield elections from partisan influence. This section focuses on three fundamental tasks given to electoral commissions in this regard:

1. In order to prevent political parties from capturing the electoral process, they take election administration away from the partisan executive or legislature and organise free and fair elections.
2. In order to prevent the legislative majority from imposing election law favouring themselves, they engage in electoral law reforms, partly even empowered with law-making capacities.
3. In order to prevent the partisan executive from biased enforcement of electoral law, they replace executive administration and enforce regulations concerning political parties themselves.

In performing these tasks, electoral commissions reduce partisan access to vulnerable aspects of the democratic process. Although this does not eliminate the party-political interest in manipulating elections, it increases the effort and time required for interfering with elections and the political costs of attempts significantly. This decreases the likelihood of successful election manipulation and disincentivises attempts of interference with electoral integrity in the first place.

1. Organisation of free and fair elections

Most fundamentally, the main task of electoral commissions is usually to manage fair and free elections.[126, 127]

The administration of high-level elections is an administrative mega-project. The preparation of elections already includes maintaining the electoral roll,[128] drawing electoral boundaries,[129] the registration of political parties for the election,[130] overseeing and regulating the nomination of candidates,[131] registration of candidates,[132] and so forth. The workload increases significantly when it comes to actually conducting the election. During the election campaign, electoral commissions impose and enforce the law on campaign advertisement[133] and educate voters and candidates about their rights and the democratic process.[134] On election day, the electoral commission must run polling stations[135] and ensure that voting is accessible for everyone,[136] and, most crucial for the electoral process, they count the ballots and proclaim the election results.[137]

[123] This list continues until: "[…] (p) appoint appropriate public administrations in any sphere of government to conduct elections when necessary".
[124] An example of such a constitutional provision is given by Article 88 (4) of the Constitution of Kenya.
[125] In acknowledge that electoral commissions not only protect electoral democracy against threats but also facilitate it. In this sense, Kildea claims that "we should reflect not only on their capacity to *protect* but also to *facilitate* certain values". *Kildea*, Federal Law Review 2020, 469 (471). Khaitan addresses some aspects of facilitation by calling it "the duty to nourish the norm". *Khaitan*, Asian Journal of Comparative Law 2021, S40 (S46). However, I focus only on their function to protect electoral democracy for the purpose of this paper.
[126] See, for example, Article 92 (1) (a–c) of the Constitution of Burundi or Article 190 (1) (a) of the Constitution of South Africa.
[127] Often electoral commissions are not limited to administering elections but are also responsible for the administration of referendums. I do not address this directly, but many of the following explanations are also applicable to the administration referendums.
[128] Article 88 (4) (a)–(b) of the Constitution of Kenya; Section 5 (1) (e) of the South African Electoral Commission Act of 1996.
[129] Article 88 (4) (c) of the Constitution of Kenya; Section 5 (1) (m) of the South African Electoral Commission Act of 1996; Article 76 (2) (a)–(b) of the Constitution of Malawi.
[130] E.g.: Section 5 (1) (f)–(g) of the South African Electoral Commission Act of 1996.
[131] E.g.: Article 88 (4) (d) of the Constitution of Kenya.
[132] E.g.: Article 88 (4) (e) of the Constitution of Kenya.
[133] E.g.: Article 41 (III) (A)–(B), (D) of the Constitution of Mexico.
[134] E.g.: Article 88 (4) (g) of the Constitution of Kenya, Section 7 (1) (c) of the Commonwealth Electoral Act. 1918.
[135] For an account of this process in Australia, see *Kildea*, Federal Law Review 2020, 469 (474).
[136] For the example of the Australian Electoral Commission, see *Australian Election Commission,* Annual Report 2020–21, https://www.aec.gov.au/About_AEC/Publications/annual-report/files/aec-annual-report-2020-21.pdf, lastly accessed on 15.9.2023. Due to their system of compulsory voting, the need for easy accessibility of elections in Australia is particularly high.
[137] E.g.: Section 5 (1) (n) of the South African Electoral Commission Act of 1996.

The varying workload leads to a distinctive feature of electoral commissions. The need for staff increases significantly during elections. As seen above, the Australian Electoral Commission, for example, has only 800 employees under normal circumstances but 87,000 workers during elections.[138] In this sense, electoral commissions need distinct flexibility regarding their personnel capacity. Furthermore, as the conduct of elections is an administrative megaproject, commissions need expertise regarding the logistics of large-scale administration.[139]

By administrating the election from outside the legislature or executive, electoral commissions limit access of partisan actors to the electoral process. Thereby, they take away direct partisan control over elections. In order to interfere with the electoral process, partisan actors must attempt to capture the electoral commission first.

2. Engagement in law reforms

An electoral commission, which is actually shielded against partisan influence of all kinds, which enjoys broad public support and has the expertise as well as the capacity to administrate elections, does not eliminate the partisan interest to capture elections. Being confronted with an effective and impartial electoral administration, partisan actors might seek other ways to manipulate elections in their favour.[140]

Since electoral commissions are bound by the law, their protection of electoral integrity is – like the protection practiced by courts –[141] only as effective as the law they apply.[142] Therefore, the ruling party or coalition in the legislature might be tempted to use their law-making majority to impose election laws favouring themself.[143] There are two possible solutions to combat this threat:

(1) Similarly to electoral commissions which are protected against the legislative majority through constitutional entrenchment, constitutionalising election laws might prevent partisan manipulation. Indeed, most systems entrench at least fundamental principles regarding the electoral process, such as the freedom and fairness of elections, in their constitutions and thereby immunise them against ordinary political change.[144] Like with the constitutional entrenchment of electoral commissions,[145] the more precise the constitutionalised provisions, the less discretion for the legislative majority, i.e. the less room for partisan manipulation by the legislative majority.[146] However, providing more detailed provisions also increases the threshold for desirable innovation. In addition, technological development might create demand for new regulations and thereby cause gaps in the constitutionalised election law, which can still be exploited for manipulation by the legislative majority.[147]

(2) Instead of or in addition to constitutionalising election laws, electoral commissions can prevent biased election law by engaging in law reforms. Thereby, electoral commissions perform a "quasi-legislative function".[148] A relatively weak form of participation in law reforms can be seen in Australia, where the AEC's role is primarily to give advice.[149] Slightly more powerful but rarely used in practice, the AEC is also entitled to comment on law reforms publicly and thereby create political pressure.[150] Joo-Cheong Tham suggests a statutory duty to comment on law reforms in response to its rare usage.[151] A more formal way of intervening in law reforms could be established by giving the electoral commission the ability to challenge statutes before a constitutional court that exercises strong-form judicial review. Even more drastic intervention powers could be provided for electoral commissions by vesting them with a genuine veto power. An indirect veto power, for example, is given to the Supreme Electoral Tribunal in Costa Rica. If the Supreme Electoral Tribunal denies their approval of an electoral law, the legislature needs a two-thirds majority to pass the law.[152] Considering that changing the power of the constitutionally entrenched electoral commission would also need a two-thirds majority, this can be seen as indirect constitutional veto power. Even stronger, the Supreme Electoral Commission has a direct veto power, i.e. a veto power that cannot be overruled by a two-thirds majority, within six months before an election.[153]

Having electoral commissions engage in law reforms allows greater flexibility than the constitutional entrenchment of electoral law. While advice or public commenting on law reforms might only slightly increase the political costs, a veto power like in Costa Rica might more effect-

[138] See already section II. 2 with reference to *Kildea*, Federal Law Review 2020, 469 (474).
[139] *Khaitan*, Designing Post-Partisan Guarantor Institutions (unpublished manuscript on file with the author), p. 8.
[140] Expressing a similar concern: *Pal*, Review of Constitutional Studies 21 (2016), 85 (88).
[141] See section II. 2.
[142] *Pal*, Review of Constitutional Studies 21 (2016), 85 (106 f., 110). Pal also refers to examples given by South Africa, the first one regarding the discrimination against prisoners and the second one concerning voter identification.
[143] *Pal*, Review of Constitutional Studies 21 (2016), 85 (88, 106 f., 110).
[144] For a detailed account of this with elaborations of examples in Bangladesh, Costa Rica, Ghana, India, Indonesia, South Africa, and Uruguay, see *Catt* et al., Electoral Management Design, 2014, pp. 46–48.
[145] See section III. 1. b).
[146] *Pal*, Review of Constitutional Studies 21 (2016), 85 (97, 106–112).
[147] *Pal*, Review of Constitutional Studies 21 (2016), 85 (110).
[148] *Pal*, Review of Constitutional Studies 21 (2016), 85 (94).
[149] *Kildea*, Federal Law Review 2020, 469 (481). Another example is given by the South African Electoral Commission, which has the function to "continuously review electoral legislation and proposed electoral legislation, and to make recommendations in connection therewith" (Section 5 (1) (j) of the also South African Electoral Commission Act of 1996).
[150] *Kildea*, Federal Law Review 2020, 469 (481).
[151] *Tham*, Election Law Journal: Rules, Politics, and Policy 12 (2013), 386 (398).
[152] Article 97 of the Constitution of Costa Rica; *Pal*, Review of Constitutional Studies 21 (2016), 85 (101).
[153] Article 97 of the Constitution of the Republic of Costa Rica; *Pal*, Review of Constitutional Studies 21 (2016), 85 (101).

tively prevent the legislature from imposing biased election laws as long as the electoral commission is able to operate effectively and impartially.

3. Enforcement of law regulating political parties

Going beyond the mere electoral process, electoral commissions are often tasked to enforce the laws regulating political parties. In performing this "quasi-executive" function, they serve the rationale of the law enforced and guarantee impartiality as well as political competition.

A risk of enforcing the law directly against political parties is imposed on the electoral commission's public standing. Parties who are subject to investigations, inquiries, or even sanctions might accuse the electoral commission of bias and, thereby, harm the commission's public reputation.[154] Electoral commissions can avoid such attacks by restraining their actions and, for example, only issuing warnings instead of taking formal steps.[155] However, this might lead to overcautiousness of the electoral commission.[156] Not enforcing the law because of the possibility of such attacks gives political parties factual control over the electoral commission. This is a clear example of the commission's engagement in mega-politics. It is therefore necessary that they have sufficient political expertise to predict the effects of their actions and not generally defer to political parties.

Further examination of this aspect focuses on enforcing campaign and party finance law. Alongside political expertise, electoral commissions must have some basic expertise in police-like investigation and accountant-like expertise in finding irregularities in statements of accounts. Furthermore, specific legal expertise is needed to determine violations of party finance law. In addition, electoral commissions need legal power for investigating and sanctioning political parties[157] or for referring the matters to public prosecution.[158] In this context, the swiftness of the commission is crucial as sanctions are more likely to have an impact before the actual election takes place, because they are more dangerous for political reputation of the addressee at this time. Electoral commissions therefore need sufficient personnel and financial capacity to act fast.

By overseeing financial disclosure, electoral commissions help to foster transparency and support the public in overviewing connections between donations and policy outcomes.[159] Effective enforcement and monitoring of party finance increase the effort necessary for corrupt donors to hide their donations and raises the political costs of corruption by making corruption more visible and traceable, which might increase public backlash. In addition, impartiality is required to uphold electoral competition.

V. Conclusion

To sum up, electoral commissions are established to safeguard electoral integrity, especially from partisan capture. To do so, they must be independent of actors with an interest in influencing the electoral process in their favour, especially partisan actors. For this reason, members of electoral commissions should be impartial and the commission as an institution should be free from external control by partisan actors. At the same time, electoral commissions should be accountable to actors with a shared interest in electoral integrity to ensure their impartiality and effectiveness. Lastly, electoral commissions must have the necessary expertise and capacity to carry out the tasks assigned to them effectively.

How these abstract terms translate into concrete design choices is highly context-depending: In systems with a strong civil support for and political commitment to free and fair elections, it might not even be necessary to establish an independent electoral commission; in other systems, it may be. Impartiality in the process of appointing members of electoral commissions may already be ensured by the involvement of several national institutions in some systems; in others, where national institutions cannot be trusted to act neutrally, it may be necessary to involve international experts or representatives of international organisations without strong links to domestic politics in the appointment process. Where the judiciary can be trusted to act impartially, it makes sense to make electoral commissions fully accountable to the judiciary through judicial review of their decisions; where this is not the case, it could be reasonable to make some decisions of the commission unreviewable.

Overall, even a perfectly designed electoral commission cannot fully guarantee electoral integrity. Despite all design, powerful actors might attempt and succeed in influencing elections. However, well-designed electoral commissions seem likely to increase the costs of attempts and make success less probable.

[154] *Kildea*, Federal Law Review 2020, 469 (479).
[155] *Karp/Knaus*, Australian Electoral Commission finds 87 cases of election ads breaching law, The Guardian 2019, https://www.theguardian.com/australia-news/2019/may/22/australian-electoral-commission-finds-87-cases-of-election-ads-breaching-law, lastly accessed on 15.9.2023.
[156] *Kildea*, Federal Law Review 2020, 469 (480).
[157] For examples in the case of Australia, see *Kildea*, Federal Law Review 2020, 469 (478 f.).
[158] The Australian Electoral Commission, for example, can "refer the matter to the Commonwealth Department of Public Prosecution". *Kildea*, Federal Law Review 2020, 469 (478).
[159] *Kildea*, Federal Law Review 2020, 469 (478).