



# Independent Regulatory and Oversight (Fourth-Branch) Institutions

Constitution-Building Primer No. 19





# Independent Regulatory and Oversight (Fourth-Branch) Institutions

International IDEA Constitution-Building Primer 19

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# 1. Introduction

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This primer discusses independent regulatory and oversight institutions. These are public bodies, politically neutral and independent from the three main branches of government, whose purpose is to ensure the integrity—and improve the quality and resilience—of democratic governance. Typical independent regulatory and oversight institutions found in modern constitutions include:

- Public service commissions, responsible for ensuring the integrity, impartiality and professionalism of the civil service.
- Electoral commissions, electoral tribunals or other electoral management or electoral justice bodies, which are responsible for ensuring the impartial management of elections. Countries with geographically based single-member electoral districts (constituencies) often have boundary commissions responsible for periodically revising district boundaries.
- Judicial service commissions, judicial appointments commissions or supreme councils of the judiciary, responsible for nominating judges and sometimes for supervising judicial ethics and conduct.
- Ombudsmen, responsible for investigating citizens' complaints against the administration, and sometimes initiating investigations.
- An auditor-general, courts of accounts or other supreme audit institution, responsible for auditing public accounts and ensuring financial integrity.
- Anti-corruption commission (or public ethics commission), responsible for enforcing ethical standards in public life and preventing or investigating corruption.

- Human rights commissions, to monitor and promote the enforcement of human rights.
- Gender equality/women's commissions, which assess policies from a gender perspective, promote gender equality and protect the rights of women.
- Minorities commissions, which assess the impact of government policies on ethnic, religious, cultural or linguistic minorities, or protect the rights of those minorities.

The primer examines the nature and purposes of these institutions. It discusses their benefits and shortcomings. It also answers some of the questions, in relation to these institutions, that are likely to arise in constitutional change processes: Which institutions are needed? How they should be appointed? How should their independence and neutrality be protected? How they should be held accountable? What should the constitution say about their mandate, powers and duties, and what should be left to ordinary law?

## Terminology

There is no standard, universally accepted collective term for these institutions. This primer uses the term 'independent regulatory and oversight institutions', following that used by Constitute Project's searchable repository of constitutional documents ([www.constituteproject.org](http://www.constituteproject.org)). This term is helpful because it emphasizes the politically and institutionally independent nature of these institutions, together with their regulatory and oversight (rather than executive, legislative or judicial) functions.

These institutions are also sometimes referred to as 'fourth-branch institutions' since they are additional to (and independent of) the three traditional branches of government. However, this term may be misleading, since in many countries the media, the public administration or even civil society may be referred to as a fourth branch; in any case, it is debatable whether these institutions constitute a coherent 'branch' of government or are merely a set of functionally distinct institutions.

Other terms sometimes used include 'electoral, integrity and regulatory institutions' (as used by Ackerman 2000) and 'state institutions supporting constitutional democracy' (as used in the Constitution of South Africa 1996).

## Advantages and risks

Independent regulatory and oversight institutions—if properly established, empowered, resourced and trusted—can help to improve the quality of

governance, strengthen the rule of law, encourage transparency and accountability, prevent corruption and ultimately reinforce both the quality and the resilience of democracy. They do this either by insulating certain types of state activity (such as civil service appointments or the holding of elections) from partisan politics, or by providing a dedicated mechanism for publicly scrutinizing and reporting on other types of state activity (such as enforcing human rights or gender equality).

However, these institutions are not a panacea. Serious questions remain as to their effectiveness in practice, especially in new democracies. They might lack the necessary funds, resources, staff and expertise to do their jobs properly. They might suffer from a lack of leadership and integrity, failing to take their duties seriously—adopting a passive and minimal interpretation of their role, taking bribes, acting in a partisan manner or otherwise undermining their own position and legitimacy. It may be possible—as discussed in the following pages of this Primer—to guard against such tendencies by carefully designing these institutions to ensure they have a clear constitutional mandate, secure sources of funding, and suitably balanced appointment and tenure mechanisms. Yet it is always wise to have realistic expectations. Even the best constitutional rules cannot completely protect these institutions in the absence of good leadership and supportive norms, values and public ethics.

Another consideration is that an over-reliance on independent regulatory and oversight institutions may encourage a tendency to address essentially political problems in a depoliticized, technocratic way. When these institutions cease to be ‘watchdogs’ or guardians of procedural propriety and instead adopt an activist, policymaking role, they may erode the legitimate function of partisan politics and diminish the ability of elected representatives to resolve important public issues. This can damage democratic legitimacy and accountability.

Finally, these institutions have associated costs, including salaries, allowances and office expenses. These costs can place unnecessarily heavy demands on the national budget, especially in countries with limited financial resources. In a small country, it might also be difficult to appoint people of the necessary standing, character and qualifications. Potential solutions include keeping such institutions relatively small and few in number—avoiding duplication by merging functions where possible.



## 2. What is the issue?

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### Historical and recent developments

The first generation of written constitutions made little or no provision for independent regulatory and oversight institutions. They generally relied on political means of preventing the abuse of power, through the separation of powers, checks and balances, and regular elections. By the beginning of the 20th century, this was changing. The demand for independent regulatory and oversight institutions increased in response to the rise of mass partisan democracy, progressive demands to purge corruption from politics and the increasing size and complexity of government.

During the era of decolonization after the World War II, independent regulatory and oversight institutions were embedded in new constitutions in Africa, Asia and the Caribbean. This was done in an attempt to preserve the institutional neutrality of the judiciary, the civil service and electoral administration in contexts where these norms were not adequately protected by tradition and convention.

Subsequent democratic transitions in Central and Eastern Europe, Latin America and sub-Saharan Africa were accompanied by a proliferation of independent regulatory and oversight institutions. In contexts with weak legislatures, parties and civil society, these institutions were seen as a more effective way to address corruption, build a culture of human rights and promote the inclusion of women and minorities.

## Independent regulatory and oversight institutions as checks and balances

Independent regulatory and oversight institutions can provide another type of check and balance, alongside relationships within and between the three traditional branches of government. They can function as *neutral guardians* (de Smith 1964), *vigilant monitors* and *autonomous administrators*.

*Neutral guardians* safeguard the procedural fairness and integrity of the political system. They separate the executive branch, which is partisan and seeks to pursue particular policy agendas, from the permanent institutions of the state, which are supposed to be neutral and non-partisan. Neutral guardians protect the democratic state from partisan manipulation and from the corruption of those in high office. Examples of neutral guardians include institutions responsible for ensuring the free and fair conduct of elections, appointing public officials or ensuring judicial independence.

*Vigilant monitors* track and report on government performance in particular policy areas. They might be involved in non-partisan policy research and analysis or can help to ensure that the interests of minority or vulnerable populations are adequately represented. Examples of this type of institution include human rights commissions, gender commissions and minority rights commissions.

*Autonomous administrators* have an administrative or regulatory role, which may even include aspects of delegated (mostly technical) policymaking within a defined sphere. These institutions are typically granted functional and operational autonomy over the types of decisions that—for the sake of good governance, continuity, long-term planning and technical competence—have to be kept at arm's length from politicians. Institutions associated with economic management and the allocation of revenues, such as finance commissions, as well as central banks, are often of this type.

## Functions of independent regulatory and oversight institutions

### Ensuring the integrity of electoral processes

If the government is responsible for the conduct of elections, there is a risk that it may use its access to state power to unfairly influence the outcome. To prevent this, many constitutions establish an independent body responsible for electoral management, such as the Election Commission in India (Constitution of India, article 324), the Electoral Commission in Fiji (Constitution of Fiji, article 75), the National Electoral Council and the Electoral Dispute Settlement Court in Ecuador (Constitution of Ecuador, articles 218–21), and the Electoral Service and the Electoral Court in Chile (Constitution of Chile, articles 94bis and 95).

Such bodies typically perform some or all of the following functions: conducting or supervising voter registration, registering political parties, verifying candidate nominations, establishing polling places, printing ballot papers, tallying and announcing election results, and resolving electoral disputes.

In countries using single-member plurality (first-past-the-post) electoral systems, an electoral commission or other electoral management body (EMB) may also be responsible for determining the boundaries of electoral districts in order to protect against gerrymandering (the deliberate manipulation of boundaries to influence election outcomes). This is the case in Barbados, Belize, Kenya, Malta, India, and Trinidad and Tobago. However, the redrawing of boundaries can be very controversial, and it may be advisable—where it is feasible to do so—to entrust this to a separate institution that is distinct from the EMB. This is the case in Mauritius, which has a separate Electoral Boundaries Commission (Constitution of Mauritius, section 38(1)) and in the Bahamas, which has a Constituencies Commission (Constitution of the Bahamas, article 69). The Constitution of Sierra Leone (article 34) also establishes a Political Parties Registration Commission, alongside the Electoral Commission, to implement laws on the registration of political parties.

### Protecting the impartiality of public administration and public appointments

Democratic states usually distinguish between: (a) the partisan political leaders who determine overall policy, set priorities and make strategic decisions; and (b) the permanent, non-partisan, professional administrative staff who manage day-to-day administration and handle the vast majority of ordinary public business. This distinction between politics and administration is important because it enables routine administration to be carried out by qualified personnel in a dispassionate, impartial and professional manner, thereby ensuring that citizens are treated equally by the public authorities, based on known and impersonal rules, without regard to their political connections.

To preserve this distinction between politics and administration, and to protect the civil service from political patronage, an autonomous public service commission may be created, with authority over the recruitment, selection, training, pay and conditions, discipline and removal of civil servants. Such commissions can also typically advise ministers on high-level and politically sensitive appointments that fall outside normal civil service rules, such as the appointment of ambassadors and permanent secretaries.

Some constitutions (e.g. Kenya, Nigeria) create a specialized police service commission to maintain the professionalism and integrity of the police force. This may be especially important where the police have a record of partisan abuse or corruption.

The Constitutions of Kenya (article 237), Saint Lucia (section 92), Trinidad and Tobago (article 124) and Zambia (article 224) even create independent

commissions to regulate the teaching profession and appoint teachers in state-funded schools, functions that could otherwise be subject to political patronage.

### Preserving the independence of the judiciary and legal system

Many countries have a dedicated institution responsible for appointing judges (e.g. a judicial service commission, judicial appointments commission or supreme council of the magistracy). These bodies are usually designed in a way that reflects the need for professional legal knowledge and for some element of self-regulation by the judiciary. (For more information on judicial appointment bodies, see International IDEA's Constitution-Building Primer No. 4 *Judicial Appointments*.)

The prosecution of offences is another area of public administration that needs to be protected against partisan manipulation. Otherwise a government could easily undermine the rule of law by selectively prosecuting political opponents while giving political supporters effective immunity from prosecution. Many constitutions therefore call for the appointment of a public prosecutor, who is distinct from the attorney-general or minister of justice, and who enjoys a position of political neutrality and operational independence similar to that of senior judges.

### Ensuring financial integrity and preventing corruption

Public funds must be properly accounted for to ensure they are used wisely, efficiently and in accordance with the law. Oversight of public finances remains an important function of legislatures and is often performed by legislative committees established for this purpose (public accounts committees). However, it is also common to appoint a specialized official or body with the technical expertise necessary to conduct a thorough audit of public finances. In countries with a common law tradition, this function is usually entrusted to a sole official (generally known as an 'auditor-general') who audits public accounts on behalf of—and who reports to—parliament. Countries with a civil law tradition usually have a collegial quasi-judicial body (typically known as a 'court of accounts').

Some constitutions also establish commissions with a mandate to tackle corruption, to promote clean and honest government, and to enforce the rules of integrity, financial probity and ethical conduct that are required of public office holders. Examples include Kenya's Ethics and Anti-corruption Commission (Constitution of Kenya, article 79), the Integrity Commissions in Saint Lucia (Constitution of Saint Lucia, sections 118–19) and Trinidad and Tobago (Constitution of Trinidad and Tobago, section 138), and Tunisia's Good Governance and Anti-Corruption Commission (Constitution of Tunisia, article 130).

### Ensuring administrative justice

All citizens should be treated fairly and with procedural correctness by the authorities. No one should suffer maladministration, undue delay, incompetence or unfair discrimination in her or his dealings with public authorities. There should be a complaint and redress mechanism to address situations in which citizens are treated unfairly or arbitrarily, or when they do not receive efficient and effective service. Many constitutions establish an ombudsman (also sometimes referred to as a 'parliamentary commissioner for administration') for this purpose.

The International Bar Association defines an ombudsman as an independent official who receives administrative complaints from aggrieved citizens and has the 'power to investigate, recommend corrective action and issue reports' (Hatchard, Ndulo and Slinn 2004: 208). Filing a complaint with the ombudsman is likely to provide a quicker, less formal and certainly much cheaper process of redressing grievances and securing administrative justice than going through the courts.

In some countries, such as Malta, the ombudsman is not limited to responding to citizens' complaints but can also conduct investigations on her or his own initiative. This enables the ombudsman to act as a general trouble-shooter for structural administrative failings or malpractices that might not otherwise be addressed through judicial or political channels. As a result, 'the institution has become more closely linked to safeguarding the rule of law and the interests of citizens' and 'is increasingly being seen as a promoter of the fundamental right of individuals to good administration and a defender of citizens against maladministration, abuse of power and improper discrimination' (Parliamentary Ombudsman—Malta 2014).

### Protecting freedom of information

Open public access to official information is essential in a democracy, in order to ensure transparency and public accountability in decision-making. However, access to some types of information (such as matters concerning national security, diplomatic sensitivity or ongoing criminal investigations) may legitimately be restricted in the public interest. There is therefore a need for an independent, non-partisan institution with the authority to apply the relevant freedom of information laws and review exceptions. Some countries entrust this role to the judiciary. Others have established an information commissioner. Currently, the office of information commissioner, being a relatively new institution, is generally created by statute rather than by the constitution (e.g. Canada's Access to Information Act 1985, Ireland's Freedom of Information Act 1997 and Bangladesh's Right to Information Act 2009).

As well as applying freedom of information laws in specific cases, information commissioners may also have a wider advisory role, beyond that normally entrusted to courts. For example, they may help develop policies related to the classification and release of official records in ways that balance the competing needs of transparency and legitimate confidentiality. They may have additional responsibilities related to the protection of personal information under data protection laws.

### Preserving media balance

Ensuring access to multiple sources of information, including those that challenge the government or enable the discussion of alternative viewpoints, is essential to both a democratic political system and an open society. The right to freedom of expression is a necessary, but not sufficient, basis for this media pluralism. Market mechanisms might result in the concentration of media ownership in the hands of a few ‘media barons’ who pursue their own agenda and fail in the civic, investigative and educational roles that the media should ideally play in a mature, well-functioning democracy. For this reason, many countries not only regulate the privately owned media in the public interest, but also establish statutory public broadcasting services. Examples in established democracies include Raidió Teilifís Éireann, the Irish public service broadcaster, established by the Broadcasting Authority Act 1960, and the Canadian Broadcasting Corporation, regulated by the Broadcasting Act 1991. State broadcasting, however, creates another potential danger—that the government might use its control over the media in a partisan way, to project its own messages while excluding other perspectives.

Several countries therefore establish an independent, constitutionally mandated institution responsible for delivering, overseeing or regulating public service broadcasting in a pluralist and non-partisan way. The Constitution of Tunisia (article 127), for example, establishes the Audio-Visual Communication Commission, which is responsible for ‘the regulation and development of the audio-visual communication sector’, ‘[ensuring] freedom of expression and information’ and ‘the establishment of a pluralistic media sector that functions with integrity’. It has ‘regulatory powers in its domain of responsibility’ as well as the right to be ‘consulted on draft laws in its areas of competence’. Likewise, the Constitution of Malta provides for a Broadcasting Authority (article 118), responsible for ensuring that ‘due impartiality is preserved in respect of matters of political or industrial controversy or relating to current public policy’ and that ‘broadcasting facilities and time are fairly apportioned between persons belonging to different political parties’ (article 119).

### Monitoring and promoting human rights, gender equality and minority rights

Human rights commissions help countries fulfil their constitutional and international human rights obligations. Some focus primarily on monitoring and reporting, while others have a wider public education and public advocacy function. For example, the Constitution of Fiji states that the Human Rights Commission is responsible for, among other things, public education about both the rights and freedoms recognized in the Constitution and those recognized by international law (section 45).

Some human rights commissions may even receive and investigate public complaints against alleged violations of human rights. Human rights commissions do not typically provide a means of legal redress or issue legally binding interpretations of constitutional rights; that adjudicative function remains primarily with the judiciary. In some instances, however, human rights commissions may refer cases to the responsible authorities for prosecution or may be entitled to participate in judicial proceedings as *amicus curiae* or even as a party.

Some constitutions establish specific institutions for the protection of women's rights, such as the Women's Commission in Nepal (articles 252–53), the Gender Commission in Zimbabwe (articles 245–46) and the Women and Gender Equality Commission in Guyana (article 212Q–212R). The functions of such a commission may include monitoring gender equality, investigating violations of gender rights, receiving and considering complaints against alleged infringements of gender rights, conducting research on gender-related issues, advising public and private institutions on how best to promote gender equality (Constitution of Zimbabwe, article 246), formulating policies and programmes on the welfare of women, reviewing the implementation of statutes and international covenants related to women's welfare, and bringing women into the mainstream of national development (Constitution of Nepal, article 253).

In societies where ethnic, linguistic, religious or other minority groups have been marginalized or excluded or have otherwise been unable to protect and promote their interests through the usual political channels, there may be a need for dedicated institutions that have a mandate to represent these groups and to guard and promote their interests. For example, the Constitution of India (article 350B) establishes a special officer for linguistic minorities whose duty is to investigate and report on all matters relating to the constitutional safeguards provided for linguistic minorities.

The Constitution of Nepal provides for a Language Commission (article 287) that advises on the use of official and minority languages and a National Inclusion Commission (articles 258–59) that looks after the interests of groups such as disabled people, senior citizens, labourers, peasants, economically disadvantaged people, and other marginalized and minority communities. Nepal's Constitution

is unusual in that alongside these general institutions, it also establishes an array of minorities commissions to address the needs and interests of specific groups: the Adibasi Janajati Commission, Madheshi Commission, Tharu Commission, National Dalit Commission and Muslim Commission. While this approach gives each group a distinct voice and recognition, it could also increase administrative costs, dilute resources, divide efforts and discourage cooperation between different minorities. Moreover, it may exclude any group not specifically named and provided for.

### Supervising constitutional transition and implementation

An independent (often temporary) institution may be established to ensure the implementation of the constitution immediately after its adoption. Kenya, for example, established a Commission for the Implementation of the Constitution (Constitution of Kenya 2010, Sixth Schedule), with a five-year remit to ‘monitor, facilitate and oversee the development of legislation and administrative procedures required to implement [the] Constitution’ and to ‘co-ordinate with the Attorney-General and the Kenya Law Reform Commission in preparing, for tabling in Parliament, the legislation required to implement this Constitution’. The commission reported to a select committee of parliament, called the Constitutional Implementation Oversight Committee (which is also specified in the Constitution).

### Economic management and revenue sharing

A central bank may be granted operational autonomy over matters such as the management of the money supply and interest rates, in order to insulate these decisions from short-term political or partisan pressures that might lead to boom–bust cycles.

Independent institutions may also have a role in monitoring and evaluating the effects of economic decisions. The Constitution of Tunisia (article 129), for example, creates a Commission for Sustainable Development and the Rights of Future Generations, which has the right to be consulted on ‘draft laws related to economic, social and environmental issues, as well as development plans’, and to give its opinion on ‘issues falling within its areas of responsibility’.

Some federal constitutions establish independent commissions for the sharing of revenues and expenditures between different levels of government (e.g. national and subnational institutions). The Constitution of India, for example, creates a Finance Commission (article 280), the members of which are appointed by the president (acting on the advice of the Council of Ministers). The Finance Commission may, among other functions, make recommendations concerning ‘the distribution between the Union and the States of the net proceeds of taxes which [are] divided between them . . . and the allocation between the States of the respective shares of such proceeds’.



Land is often among a country's most economically valuable—and politically contested—resources. In some countries, state control over the management, lease and sale of public lands has been a source of corruption, patronage and abuse of power. A land commission may therefore be created to isolate these valuable resources from political interference, and to manage them in a sustainable, equitable way. Commissions may also be created to protect other natural resources; the Constitution of South Sudan, for example, creates a National Petroleum and Gas Commission (article 174).

Finally, there are institutions responsible for economic planning, and devising and overseeing the implementation of development plans. For example, Uganda's National Planning Authority was established by article 125 of the country's constitution to 'produce comprehensive and integrated development plans for the country' and to 'publish independent assessments of key economic and social policy issues and options' (National Planning Authority Act 2002).

## 3. Basic design choices

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### Which independent regulatory and oversight institutions are necessary?

Demands for independent regulatory and oversight institutions arise from particular needs. They are normally created in response to specific problems, whether experienced or anticipated. Decisions about which institutions to establish must therefore begin by assessing which problems have arisen or are likely to arise.

In this respect, past performance is an important driver of constitutional design. For instance, where an effective court system, coupled with political accountability through competitive elections and active legislative oversight, has worked to protect human rights, there may be little demand to establish a human rights commission. In contrast, in countries where rights have been violated, and where both courts and legislatures have proven themselves unwilling to protect rights or incapable of doing so, there may be strong calls to create a powerful human rights commission.

Some problems that might motivate the creation of oversight institutions are universal, or nearly so. For example, since the risk that public funds may be mismanaged or misappropriated arises in just about every imaginable context, most (if not all) democratic political systems provide for an auditor-general, court of accounts or similar supreme audit body to ensure the independent inspection of public finances. Likewise, because of the inherent dangers of entrusting the conduct of elections to incumbent politicians, an electoral commission, electoral tribunal, or similar electoral management body may be necessary or beneficial in almost every country.

Other problems arise only in particular circumstances. For example, the need for a politically impartial body to determine the boundaries of electoral districts is greater in countries with single-member plurality or majoritarian electoral systems than in those using proportional representation, since the former are at a much greater risk from gerrymandering. It follows that the needs assessment for independent regulatory and oversight institutions must include an appreciation of their relationship to the overall constitutional design.

The solution is not always to create more independent regulatory and oversight institutions. It may be more effective to strengthen those that exist, to consolidate the functions of multiple institutions in order to improve their overall effectiveness, or to develop other innovative solutions that do not require the creation of new public bodies. For example, if one desires to increase the inclusion and participation of ethnic minorities in the political process, then it may—in some situations—be desirable to create an independent ethnic minorities commission to represent and advocate for the interests of such groups, but that need not be the only possible solution available to constitutional designers. Other ways to include and protect ethnic minorities might include, for example: (a) giving an existing institution, such as a human rights commission, a specific remit to focus on the impact of policies on minorities; (b) changing the electoral system to favour the inclusion of ethnic minorities; (c) introducing a representative quota, such as the reserved seats for scheduled castes and tribes in India; (d) strengthening minorities' legislative influence through a constitutionally mandated committee made up of ethnic minority members; and (e) giving representatives of these minorities a veto over certain legislation that affects their vital community interests. Some or all of these solutions may meet the real needs of ethnic minority groups as effectively, or more effectively, than the creation of a specialist ethnic minorities commission—and potentially at lower cost too.

#### Think point

Which fourth-branch institutions already exist? How effective are they? What are the vulnerabilities of democracy in the country—and which fourth-branch institutions might help make democracy more resilient?

### How much detail should the constitution include?

In some older democracies, important regulatory and oversight institutions are created by ordinary statutory law. In Canada, for example, the office of the chief

electoral officer is established and regulated not by the Constitution Acts, but by an ordinary statute, the Canada Elections Act 2000.

Other constitutions refer to independent institutions only in general terms, leaving the details to be regulated by ordinary law. For example, Liberia's Constitution (article 89) declares that, 'The following Autonomous Public Commissions are hereby established: (a) Civil Service Commission; (b) Elections Commission; and (c) General Auditing Commission. The Legislature shall enact laws for the governance of these Commissions and create other agencies as may be necessary for the effective operation of Government.'

The Constitution of Afghanistan goes a step further, specifying the mandate and functions of these institutions. Article 58 of the Afghan Constitution states that the Independent Human Rights Commission shall 'monitor respect for' and 'foster and protect' human rights. It gives every individual the right to complain to the commission about violations of personal human rights and mandates the commission to 'refer human rights violations of individuals to legal authorities and assist them in defence of their rights'. However, although the scope and responsibilities of the Human Rights Commission are defined, the Afghan Constitution leaves important details such as its composition, mode of appointment, terms of office and funding to be decided by the legislature.

The primary advantage of establishing or regulating these institutions by statute is flexibility. Adopting or changing a constitution is usually (and for good reason) a relatively difficult process, which typically requires clearing procedural hurdles such as a special majority or a referendum. Enabling the legislature to regulate independent institutions by ordinary statutes means that their powers, remit, composition, and rules of appointment and tenure can be amended more easily in response to changing needs.

However, flexibility cuts both ways. Institutes created or regulated by statute continue to be dependent, for their powers and their very existence, on the goodwill of the legislative majority. This may expose them to partisan manipulation and hinder their ability to perform their duties in a robust, neutral and fearlessly independent way. For this reason, reliance upon statutory provision is likely to be adequate, if at all, only in a stable democracy, in which democratic institutions are well established and where democratic and constitutional values are deeply entrenched at all levels of society.

Even in such benign contexts, establishing independent regulatory and oversight institutions in the constitution (rather than relying solely on statutes) may have both practical and symbolic benefits. It sends a signal that these institutions matter. It makes it clear, at the constitutional level, that these institutions are integral to the freedom and good government of the state, and that they are not to be tampered with for the sake of political expedience. Entrenching provisions for the independence and mandate of these institutions in the constitution may help protect them against future erosion.

In most contexts, therefore, robust constitutional protection will be needed if independent regulatory and oversight institutions are to function with effectiveness and resilience. This may include provisions regulating how members will be appointed and removed, the qualifications applicable to each office, rules of conduct, reporting requirements and funding provisions. Detailed constitutional provisions are likely to be particularly worthwhile in situations where: (a) these institutions are being set up anew by the constitution; (b) these institutions have in the past been weak, or have lacked administrative, financial and operational independence; or (c) the legislature is relatively weak, is not fully inclusive and representative of all sections of society, or is likely to be dominated by the executive, since in such circumstances the legislature might not be trusted to legislate for independent institutions in a way that respects their autonomy and neutrality.

The politics of the constitution-building process must also be considered. The inclusion of certain independent regulatory and oversight institutions in the constitution may be politically necessary to build confidence, especially among the opposition or minorities, in the integrity of the system as a whole. The willingness of the Kenyan opposition to accept a presidential system in 2010, for example, was based in part on guarantees that the president would be constrained under the new constitution by strong independent institutions. These would isolate functions such as the conduct of elections, public appointments and the management of public land from presidential interference.

### Think point

What level of detail is necessary and appropriate? How best can the competing claims of flexibility and institutional stability and resilience be reconciled?

## Design of independent institutions

### General considerations

The following general considerations should be taken into account in the design of constitutional provisions on independent regulatory and oversight institutions.

- *Independence and inclusion:* Members of independent institutions should be chosen in a way that emphasizes their political neutrality and independence—from partisan politics, from other institutions of government and from any special interest—while also being broadly

representative of the society's diversity, either in general terms or with reference to specific minority populations.

- *Professionalism and integrity*: Members of independent institutions must be professionally competent and must have the skills, qualifications and experience needed to perform their duties effectively. They must also demonstrate personal integrity, moral courage and a strong sense of public duty.
- *Security of tenure*: Members of independent institutions must have sufficient security of tenure and other guarantees (such as protection against arbitrary variation of their salaries) to ensure their independence.
- *Mandate*: Independent institutions must have a clear mandate and sufficient powers to perform their intended functions.
- *Resources*: Independent institutions must have the necessary resources (in terms of staff, finances, facilities, etc.) and sufficient autonomy over the management of these resources.
- *Accountability*: Without compromising their neutrality or independence, independent institutions must be publicly accountable—with provision for public reporting and scrutiny of their activities.

### International norms and standards

There is a growing body of international norms and standards relating to independent regulatory and oversight institutions. Some of these derive from international organizations, such as the United Nations, the Commonwealth or the African Union, while others come from international associations of office-holders, such as the International Ombudsman Association and the International Organization of Supreme Audit Institutions.

These international norms and standards are derived from experience of good practice. Even when they are not legally binding, compliance with them may help improve the functioning of independent institutions, as well as improving a country's image and reputation.

The United Nations General Assembly Resolution 48/134 on 'National Institutions for the Promotion and Protection of Human Rights' (known as the Paris Principles) 1993, is one influential example of such international norms. It requires national human rights monitoring bodies to be established, and sets out their powers and functions, their composition and guarantees of independence, and their ways of working—including 'in particular adequate funding'. Although the Paris Principles are directly applicable only to human rights monitoring bodies, their general themes and ideals can also provide a baseline standard that is applicable to other independent regulatory and oversight institutions.

#### Single-member vs. multi-member institutions

Some independent regulatory and oversight functions are entrusted to a sole individual official. Others are vested in a collegial body such as a board, committee or commission. General patterns can be observed. For example, the office of ombudsman is normally vested in one person (although Austria, which has an Ombudsman Board consisting of three members, is a notable exception). Most EMBs are collegial, but some countries (e.g. Grenada) have only an individual supervisor of elections. In civil law countries, the inspection of public finances is generally vested in a collegial court of accounts, while in common law countries a sole auditor-general is more usual.

The reasons for these choices are not always clear. Much depends on ‘path dependency’; countries tend to replicate what they know, from either their own experience or that of similarly situated countries. Nevertheless, the following considerations should be borne in mind in deciding whether a particular independent institution should consist of one individual or of several persons collectively:

- *Cost and capacity*: Multi-member institutions are inevitably more expensive than a sole official. They also require a larger pool of suitably qualified candidates from which to make appointments.
- *Responsibility and accountability*: A sole individual can take effective action and be held personally accountable for that action. A collegial body, in contrast, may dilute responsibility. However, collegiality can also provide an internal form of responsibility, if members hold one another to account.
- *Resistance to corruption*: Multi-member commissions may be more resistant to corruption than sole officials. One person might easily be bribed or swayed by personal connections, whereas it might be more difficult to corrupt all members of a multi-member commission.
- *Impartiality vs. balanced inclusion*: An institution headed by a sole official requires the holder of that office to be completely neutral and independent—which is often very difficult to achieve, especially in a deeply divided or politically polarized society. A multi-member commission can be constituted on the basis of balance (i.e. instead of trying to find one perfectly impartial appointee, some appointees may be chosen from all major parties).
- *Diversity*: Multi-member commissions can reflect gender balance and ethnic diversity in a way that no single official can. Moreover, a multi-

member commission can include people with a range of complementary qualifications, experiences and professional profiles.

- *Practical size for decision-making:* Three members is a practical minimum for any multi-member body; two are likely to disagree without a mediator. There is no universal maximum size of a multi-member body, but more than around 12 members becomes large and unwieldy. Smaller bodies can have less formal, and flatter, more internally deliberative, decision-making processes; larger bodies usually require more formal internal decision-making and stronger internal leadership.
- *Workload:* The size of the country and the expected workload of the independent institution must also be taken into account. A public service commission in a large country with many millions of citizens and a vast civil service will have a lot more work to get through than one in a small country with a small civil service. This may require a larger institution, which can divide its workload through subcommittees or delegate work to senior administrative staff.

## Appointment mechanisms

The mechanisms for appointing members of independent regulatory and oversight institutions should be designed to ensure that these institutions are politically neutral, and that integrity and objectivity are upheld. No party, faction, section of society or interest group should be especially favoured, and no relevant stakeholder should be excluded. This is necessary to build trust and confidence in the institution and therefore to ensure that all political actors respect its decisions.

### Bipartisan appointment mechanisms

Parliamentary systems derived from the ‘Westminster system’, which are typically characterized by two-party (or two-bloc) politics with a clearly differentiated government and opposition, often use a bipartisan selection process for appointments to independent regulatory and oversight institutions.

Bipartisan appointment mechanisms may require the prime minister and the leader of the opposition to agree on each appointment, with the aim of ensuring that those who are appointed are sufficiently impartial to be acceptable to both sides. For example, two members of the Elections and Boundaries Commission in Belize are ‘appointed by the Governor-General acting in accordance with the advice of the Prime Minister given with the concurrence of the Leader of the Opposition’ (Constitution of Belize, section 88(2)).



An alternative bipartisan approach is to allocate some appointments to the government and others to the opposition. This mechanism results in a politically balanced institution, in which individual members might have a partisan slant, but where these different partisan allegiances balance or cancel each other out. Such appointment mechanisms may be combined with an impartial chairperson and/or deputy chair who is chosen by some other means. In Dominica, for example, the Constituency Boundaries Commission consists of two members nominated by the prime minister and two members nominated by the leader of the opposition, while the speaker of parliament serves as the *ex officio* (and nominally impartial) chairperson (Constitution of the Commonwealth of Dominica, section 56). In the Bahamas, the Constituencies Commission consists of the speaker of the House of Assembly as an *ex officio* chair, a non-partisan deputy chair appointed from among the judiciary on the advice of the chief justice, two members appointed on the advice of the prime minister, and one recommended by the opposition leader (Constitution of the Bahamas, article 69).

Such bipartisan mechanisms have the advantage of including the opposition in the appointment process even if the opposition, perhaps owing to a disproportional electoral system, has only a very small parliamentary representation. The disadvantage is that minor parties and independent members are usually excluded, meaning that this system is less appropriate for countries with multi-party politics. Yet such appointment mechanisms could be amended to allow minor parties with parliamentary representation to participate. For example, in addition to those members nominated by the prime minister and the leader of the opposition, one or more members of a commission could be appointed after consultation with any minor parties or independent members in parliament.

#### Inclusive appointment mechanisms

Inclusive appointment systems, by contrast, are well adapted to multi-party politics. They typically rely on proportional representation to select members of independent regulatory and oversight institutions, with legislature acting as an electoral college for this purpose. Colombia's National Election Commission, for example, consists of nine members elected by the legislature in a plenary session 'in accordance with a system of proportional representation and on the basis of proposals submitted by the political parties or movements with legal personality or by coalitions formed between them' (Constitution of Colombia, article 264).

Variations in the electoral system may ensure an outcome that, if not strictly proportional, is at least politically balanced. In Austria, for example, the three members of the Ombudsman Board are elected by the National Council (lower house of the federal Parliament) in a way that ensures that the three largest parties are each able to nominate one member (Constitution of Austria, article 148G).

The principles of inclusion and balanced political representation, especially where one party is electorally dominant, may even require parties outside the legislature to be involved in selecting certain members of independent institutions. In Botswana, for example, five of the seven members of the Independent Electoral Commission are chosen from candidates nominated by an all party conference, which includes all registered political parties (Constitution of Botswana, article 65A).

### Supermajority appointment mechanisms

Supermajority mechanisms provide another means of selecting appointees who are as broadly acceptable as possible across the political spectrum. This mechanism can be used to select sole officials as well as members of multi-member bodies. In Portugal, for example, the ombudsman, the president of the Economic and Social Council, certain members of the Supreme Judicial Council and the members of the media regulatory body are elected by Parliament by a two-thirds majority vote (Constitution of Portugal, article 163). In Bulgaria, the members of the Supreme Judicial Council and the Inspectorate (a body established to ensure the integrity of the judiciary and prosecutors) are elected by a two-thirds majority of the National Assembly (Constitution of Bulgaria, articles 130, 132A).

In most cases, especially in a competitive multi-party system where legislative elections are conducted by proportional representation, a two-thirds majority rule should ensure that no single party is able to make appointments unilaterally, and that agreement would have to be reached with at least some of the opposition parties. However, in countries with majoritarian electoral systems, or with a dominant party, a two-thirds majority rule may fail to protect the opposition's interests. In Hungary, for example, the prosecutor-general and the commissioner for fundamental rights are appointed by a two-thirds majority vote of Parliament, but recent governments have enjoyed a two-thirds majority, giving them control over such appointments without having to consider the opposition.

### Inter-institutional appointments

Another way to promote the political neutrality and independence of regulatory and oversight institutions is to divide the power to appoint members between two or more bodies, institutions or branches of government. This is particularly relevant in presidential or semi-presidential systems, in which the power of appointment can be conveniently divided between the presidency and the legislature.

However, the ability of such inter-institutional mechanisms to protect regulatory and oversight institutions from partisan or personal influences depends on whether legislatures have real autonomy from the executive, which in turn depends on a combination of constitutional powers and partisan balance. If the

president's party controls the legislative majority, such rules are not guaranteed to ensure the independence and impartiality of the appointee unless a supermajority requirement is applied.

The order in which the president and legislature contribute to the appointment process is also very important. There are two ways in which this can happen. The first way is for the president to select and nominate a candidate, who must be confirmed by the legislature. Members of Chile's Directive Council of the Electoral Service, for example, are appointed by the president with the approval of a two-thirds majority of the Senate (Constitution of Chile, article 94bis). In Lithuania, likewise, the state controller and chair of the board of the state bank are nominated by the president and appointed by Parliament (Constitution of Lithuania, articles 67 and 84).

Constitutional rules that allow the president to nominate candidates (and the legislature only to confirm or reject that nomination) tend to give the president the upper hand, because the president can set the direction and take the initiative. The legislature is forced to either confirm the president's hand-picked appointee or veto the appointment and risk being criticized for 'obstructing' the president (particularly if he or she has a strong popular mandate). Legislative confirmation hearings, in such cases, at best force the president to nominate someone whose qualifications and record can be defended; at worst, they can descend into political theatre, in which ritualized partisan confrontation ultimately corrodes rather than enhances the legitimacy, independence and neutrality of these institutions.

The second way to share appointing power between the president and legislature is to enable the legislature to take the initiative, either by proposing a candidate who must then be confirmed by the president, or by selecting a shortlist of candidates from which the president must make the appointment. In Kenya, for example, members of several independent institutions are first 'identified and recommended for appointment in a manner prescribed by national legislation', then 'approved by the National Assembly' and finally 'appointed by the President' (Constitution of Kenya, article 250).

#### Appointments by a constitutional offices commission/constitutional council

An emerging trend is to establish a special commission or council responsible for appointing the members of independent regulatory and oversight institutions:

- In Fiji, there is a Constitutional Offices Commission consisting of the prime minister (as chair), the leader of the opposition, the attorney-general, two persons appointed by the president on the advice of the prime minister and one person appointed by the president on the advice of the leader of the opposition (Constitution of Fiji, article 132). The Constitutional Offices Commission is responsible for appointing to a

range of independent regulatory and oversight institutions, including the Human Rights and Anti-Discrimination Commission, the Electoral Commission, the Public Service Commission, the secretary-general to Parliament, the commissioner of police, the commissioner of the Fiji Corrections Service, the commander of the military forces, the auditor-general and the governor of the national bank (Constitution of Fiji, article 133).

- Nepal has a Constitutional Council, which is responsible for appointing members to Nepal's vast array of fourth-branch commissions. It is composed of the prime minister, chief justice, speaker and deputy speaker of the Lower House, the chair of the Upper House and the leader of the opposition (Constitution of Nepal, article 284).
- In Sri Lanka, there is a Constitutional Council, which consists of the prime minister, speaker, leader of the opposition, one member of Parliament appointed by the president, five persons nominated jointly by the prime minister and the opposition leader, and one member of Parliament nominated by third and minor parties (Constitution of Sri Lanka, article 41A). The council's functions include nominating members of a range of independent institutions, including the Election Commission, Public Service Commission, National Police Commission, Audit Service Commission, Human Rights Commission, Commission to Investigate Allegations of Bribery or Corruption, Finance Commission, Delimitation Commission and the National Procurement Commission.

The effectiveness of such appointing commissions or councils depends largely on their composition. In Fiji, four of the six members of the Constitutional Offices Commission either are members of the government or are appointed by the government; only two are opposition members. This gives the opposition a voice, but not a veto—and so does not prevent the government from making partisan appointments. Indeed, the opposition in Fiji has refused to attend commission meetings in the past, in protest against the impotence of their position. On the other hand, where the government does not have a majority in the appointing body, and where in consequence appointments require some mutual agreement between the government and opposition parties, such bodies may be effective.

### Overlapping and ex officio appointments

One independent regulatory and oversight institution may appoint the members of another. In Saint Lucia, for example, the director of audit is nominated by the Public Service Commission (Constitution of Saint Lucia, section 91). In Botswana, the members of the Delimitation Commission, responsible for revising

the boundaries of electoral constituencies, are appointed by the Judicial Service Commission (Constitution of Botswana, section 64).

Another in principle similar approach is for the chair of one such institution to be an *ex officio* member of another. In Jamaica, for example, the chair of the Public Service Commission is an *ex officio* member of the Judicial Service Commission—the assumption being that the chair of the Public Service Commission, being an independent official with experience of public management and some expertise in the selection of senior personnel, is a good person to include in the selection of judges.

This may be a way of balancing the need for political impartiality with professional ability. If we can trust one institution to be sufficiently neutral, independent and competent, then we can confidently expect those that it appoints to other institutions to have the same qualities. However, this depends on the integrity of the institution which has that power of appointment; if the institution having the authority to appoint becomes corrupt or partisan then its influence may quickly spread to others.

#### Employment of judges as members of independent regulatory and oversight institutions

Members of independent regulatory and oversight institutions may be chosen from the judiciary due to their presumed competence and neutrality. This is especially the case for EMBs in Latin America, where elections are often in the hands of a supreme electoral tribunal with a judicial character. Examples include the Constitutions of Costa Rica (article 142), El Salvador (article 208) and Paraguay (article 275). A similar requirement to appoint members of EMBs from among the judiciary is found in the Constitutions of Kosovo (article 139) and Pakistan (articles 213 and 218). However, where norms of judicial impartiality and integrity are weak, there is a risk that this approach can increase the incentives for corrupting and politicizing the judiciary.

#### Qualifications and experience

A constitution may prescribe certain skills, experience or qualifications to be possessed by those who are appointed to independent regulatory and oversight institutions:

- The Constitution of South Africa (article 193) provides that the auditor-general must be ‘a fit and proper person to hold that office’ and that in appointing an auditor-general ‘due consideration’ must be given to ‘specialised knowledge of, or experience in, auditing, state finances and public administration’.

- In Ghana, the Board of Directors of the Central Bank must be appointed ‘from among persons of standing and experience in financial matters’ (Constitution of Ghana, section 162).
- In Finland, the ombudsman and deputy ombudsmen must ‘have outstanding knowledge of law’ (Constitution of Finland, chapter 4, section 38).
- In Uganda the members of the National Planning Authority must have ‘relevant Masters-level qualifications’ (National Planning Authority Act 2002)
- Many judicial service commissions and similar bodies require some of their members (whether appointed or ex officio) to be serving or former judges, or to be qualified legal practitioners.

## Gender balance and representative characteristics

The legitimacy and trustworthiness of independent regulatory and oversight institutions, and their ability to recognize the public’s needs, may be enhanced if these institutions reflect the diversity of the society they serve. Such arrangements may be particularly necessary in deeply divided societies, where any suggestion that these institutions represent or serve one section of the population, to the detriment of others, must be eliminated by carefully ensuring a balanced and inclusive composition:

- The Constitution of South Africa (article 193) requires appointments to the Office of the Public Protector, the Human Rights Commission, the Commission for the Promotion and Protection of the Rights of Cultural, Religious and Linguistic Communities, the Commission for Gender Equality, the Auditor-General and the Electoral Commission to be made with consideration of the need to ‘reflect broadly the race and gender composition of South Africa’.
- The Constitution of Kenya (article 250(11)) specifies that if the chairperson of an independent commission is a man, the vice-chairperson must be a woman, and vice versa.
- In Kosovo, 4 of the 11 seats on the Central Electoral Commission are reserved for Serbian and other ethno-cultural minorities (Constitution of Kosovo, article 139).
- The Constitution of Sri Lanka (article 41B) requires the Constitutional Council, when making recommendations for appointments to fourth-

branch institutions, to ‘endeavour to ensure that such recommendations reflect the pluralistic character of Sri Lankan society, including gender’.

## Transparency and fair selection procedures

There should be transparency and fairness in the appointment process. The ‘macro-institutional’ rules discussed above (such as whether an appointment must be made by the joint consent of the prime minister and the leader of the opposition, or by the mutual agreement of the president and the senate, or by a two-thirds majority vote of parliament) are important, but the micro-institutional rules—such as how posts are advertised and whether impartial recruitment and selection processes are used—also matter. These details are rarely specified in constitutions, but they can greatly influence the quality, integrity and independence of the appointment process. There are some examples of emerging good practice. In Kenya, for example, interviews for key appointments are discussed on the record and on camera.

It would not be beyond the limits of constitutional innovation to require certain good recruitment and selection practices to be used, regardless of the formal mechanism of appointment prescribed. For example, if an appointment is to be made by the head of state acting ‘on the advice of the prime minister after consultation with the leader of the opposition’, then perhaps the prime minister and leader of the opposition could each be required to appoint two members of a selection panel, which would have to openly advertise the vacancies, draw up a profile for suitable candidates and conduct professional on-the-record interviews. The candidate selected on merit by that panel would then be recommended for appointment, provided that neither the prime minister nor the leader of the opposition objects in writing—which, if they do, would require the panel to reopen applications. Likewise, if an appointment is to be made by a two-thirds majority vote of parliament, perhaps a cross-party committee could similarly be required to undergo an open, transparent, merit-based recruitment process, and to interview candidates on the public record, before proposing a candidate for parliamentary approval. These are, of course, only speculative suggestions, but such details of the recruitment process ought to be given due consideration.

## Territorial politics and federal systems

In federal (and quasi-federal) systems, constitution-makers have to decide whether independent institutions will exist: (a) at the national (federal or union) level only; (b) at the subnational (state, regional or provincial) level only; or (c) at both the national and subnational levels. Such decisions require a careful balancing of diversity and unity.

Some considerations in favour of subnational (state, regional or provincial) institutions include:

- *Local knowledge and effective delegation*: Some institutions may be able to perform their duties more effectively if established at the subnational level, because of local knowledge, ability to work in local languages or sensitivity to local needs. In some countries the scale of the task may be such that delegation to subnational authorities is necessary.
- *Power-sharing and resource distribution*: Independent regulatory and oversight bodies can be part of the overall territorial division of powers and resources, particularly in terms of the distribution of patronage.
- *Trust*: If the people in one part of the country have long been persecuted and excluded from power, they might not trust national-level institutions, especially when these are dominated by a national majority who might not have empathy for the claims of minority communities.

Some arguments in favour of national (federal or union) level institutions include:

- *Protecting 'Minorities within minorities'*: Having fourth-branch institutions such as human rights commissions at the federal level can also help protect 'minorities within minorities' by providing a forum in which their rights can be articulated, even when local majorities are hostile to them.
- *Common minimum standards*: Independent regulatory and oversight institutions established at the national level may provide a basis for common minimum standards of integrity and good governance throughout the federation. In particular, they might be able to perform their functions with greater objectivity and neutrality, without being embedded in local power struggles and free from the pressure of local political interests.
- *Capacity and expertise*: There may be insufficient capacity at the subnational level to ensure that the important work of independent regulatory and oversight institutions is adequately performed. A single institution at the national level, with the best expertise, may be more effective.
- *Cost and efficiency*: A single national-level institution is likely to be considerably cheaper than a number of subnational institutions. A national institution might also be more efficient, avoiding conflicting mandates, confusion and unnecessary duplication of effort.



- *Trust through inclusion*: Having separate institutions at the subnational level is not the only way to inspire trust. It may be possible to do so through inclusion in a national institution.

India and Pakistan provide contrasting examples. India has two levels of EMBs: a federal Electoral Commission is responsible for organizing federal and state parliamentary elections (Constitution of India, article 324), while individual state Electoral Commissions are responsible for organizing municipal and village elections (Constitution of India, article 243K). This could be seen as an example of balancing the need for common standards, capacity and expertise, and the protection of minorities within minorities, with effective delegation of tasks in such a vast country. Pakistan has a single Electoral Commission, members of which are appointed from each of the country's four provinces (Constitution of Pakistan, articles 213 and 218); this is an example of an attempt to create trust through inclusion.

## Terms of office and security of tenure

Members of independent regulatory and oversight institutions typically serve for a fixed term of office that is longer than the legislative or executive term. Therefore appointments to these institutions are staggered against the electoral cycle, which helps maintain their political independence:

- In Israel, the normal term of Parliament is four years, while that of the state controller (whose office combines the functions of financial auditing and administrative redress) is seven years.
- The Constitution of Romania (article 140) provides that members of the Court of Auditors are appointed for nine years, while the president serves for five years and parliamentarians for four years.
- The Republic of Korea's Central Electoral Management Committee is appointed for a term of six years (article 114), while the president is elected for five years.
- Occasionally, as in Namibia (Constitution of Namibia, article 90), fourth-branch officials are appointed (like judges) for life or until retirement at a prescribed age. However, there may be disadvantages, in terms of efficiency, capacity and accountability, in having the same person occupy a given office for a very long period.

Security of tenure helps to preserve the independence of commissions and officials by protecting them from arbitrary removal. Typically, they can only be

removed via a special process that may require cross-party support or the demonstration of wrongdoing or unfitness for continued service.

- The Constitution of Slovakia (article 151A) provides that the public defender of rights may be removed only on the basis of: (a) a criminal conviction; or (b) an illness that does not allow her or him to perform her or his duties for a period of at least three months.
- The Constitution of Kenya (article 251) provides that ‘A member of a commission (other than an ex officio member), or the holder of an independent office, may be removed from office only for: (a) serious violation of this Constitution or any other law, including a contravention of Chapter Six [which sets out a code of conduct for those in leadership positions]; (b) gross misconduct, whether in the performance of the member’s or office holder’s functions or otherwise; (c) physical or mental incapacity; (d) incompetence; or (e) bankruptcy’.

The guarantees extended to members of independent institutions in this regard are often very similar to those enjoyed by judges. In some constitutions, this parallel is made explicit:

- The Constitution of Latvia provides that ‘Auditors General shall be appointed to their office and confirmed pursuant to the same procedures as judges, but only for a fixed period of time, during which they may be removed from office only by a judgment of the Court’ (Constitution of Latvia, article 88).
- The Constitution of India stipulates that the ‘Chief Election Commissioner shall not be removed from his office except in like manner and on the like grounds as a Judge of the Supreme Court’ (article 324). Therefore the commissioner cannot be removed except ‘on the ground of proved misbehaviour or incapacity’, and only by ‘the affirmative votes of a two-thirds majority of those present and voting’ (article 124).

Relying on supermajoritarian thresholds is a common means of protecting members of independent institutions from arbitrary dismissal. The comptroller-general in Costa Rica, for example, can be removed only by a two-thirds majority vote of the Legislative Assembly (Constitution of Costa Rica, article 183). However, as with the use of supermajorities to secure non-partisan appointments, it is only effective if no single party can expect to command a two-thirds supermajority (or other specified supermajority) in the legislature.

Giving a tribunal or independent advisory body the authority to remove a member of an independent institution can also preserve political independence. The Constitution of Kenya (article 251) prescribes several grounds for removing a member of an independent institution, including serious violation of the constitution or the law, gross misconduct and incapacity. Anyone can petition the National Assembly to remove a member on such grounds. The National Assembly considers the petition and shall, if the grounds of the complaint are justified, send it to the president. The president then appoints a tribunal that investigates the matter and produces a binding recommendation to the president on whether the person should be removed from office.

## Salaries and conditions of service

Since security of tenure would mean little in practical terms if the conditions of employment could be varied at will, constitutions may, and often do, include prohibitions against any reduction of the salary or any detrimental change to the conditions of service of incumbent fourth-branch officials:

- The Constitution of Zambia (article 199) provides that the salary and terms of office of the attorney-general, investigator-general, solicitor-general, director of public prosecutions, secretary to cabinet and auditor-general ‘shall not be altered to his disadvantage after his appointment’ and ‘shall be a charge on the general revenues of the Republic’.
- The Constitution of Mauritius (article 108) specifies that ‘Any alteration to the salary payable to any person holding any office to which this section applies or to his terms of office, other than allowances, that is to his disadvantage shall not have effect in relation to that person after his appointment unless he consents to its having effect’ and that ‘salaries and any allowances payable to the members of fourth-branch institutions shall be a charge on the Consolidated Fund’.

In the above examples, the salaries of the protected officials are ‘a charge on the general revenues’ or ‘a charge on the Consolidated Fund’. This means that they are fixed by an act of parliament and do not require re-approval in annual appropriation votes. Such a provision renders these payments stable and protects them from dependence on the government’s budgetary process.

## Adequate powers and operational autonomy

In order to perform their functions effectively, independent regulatory and oversight institutions need adequate powers. Constitutions often prescribe the

powers, functions, responsibilities and duties of these institutions in general terms. There may be scope for specific restrictions or limitations, or additional grants of powers, to be applied by ordinary legislation:

- The Constitution of the Netherlands (article 78A) sets out the general functions of the National Ombudsman—to ‘investigate, on request or of his own accord, actions taken by administrative authorities of the State and other administrative authorities designated by or pursuant to Act of Parliament’—but goes on to say that ‘the powers and methods of the National Ombudsman shall be regulated by Act of Parliament’ and that ‘additional duties may be assigned to the National Ombudsman by or pursuant to Act of Parliament’.
- The Constitution of Bangladesh (article 199) specifies the basic functions of the Election Commission—holding elections, setting constituency boundaries and voter registration—but these powers are granted ‘in accordance with this Constitution and any other law’. Therefore parliament can, by ordinary statute law, place certain conditions or limits on the scope of the powers conferred. Parliament may also confer upon the Election Commission ‘such functions, in addition to those specified in the foregoing clauses, as may be prescribed by this Constitution or any other law’ (article 199(2)).

In addition to a clear constitutional mandate, independent regulatory and oversight institutions also need operational autonomy as well as protection from political interference and external pressures in setting their own priorities and in the day-to-day exercise of their powers. As well as guarantees of security of tenure and funding, as discussed above, it may also be helpful to specify the operational autonomy of independent regulatory and oversight institutions in the constitution. This would provide legal guarantees of autonomy that might ultimately be relied upon in court and create normative expectations of autonomy that should be honoured by all parts of the political system:

- The Constitution of Croatia (article 93) states that ‘the Ombudsperson shall be autonomous and independent in his/her work’.
- The Constitution of Costa Rica (article 183) provides that the Office of the Comptroller General ‘has absolute functional and administrative independence in the performance of its work’.
- The National Audit Institution of Montenegro ‘shall enjoy functional immunity and may not be invited to account for an opinion given or a

decision made in performing their duties, except in the case of a criminal act’ (Constitution of Montenegro, article 144).

- The Electoral Commission and the Constituency Boundaries Commission in Saint Lucia ‘shall not be subject to the direction or control of any other person or authority’ (Constitution of Saint Lucia, section 57(11)).

## Reporting and accountability

While independent regulatory and oversight institutions must enjoy operational autonomy, especially from the executive branch, they also must be publicly accountable for their actions. They must be able to publicly justify their actions and to demonstrate that they are performing their duties with due diligence.

This may involve submitting reports about what they have done. In South Africa, for example, independent regulatory and oversight institutions ‘are accountable to the National Assembly and must report on their activities and the performance of their functions to the Assembly at least once a year’ (Constitution of South Africa, article 181).

Although independent institutions enjoy financial autonomy, they should also be held accountable for their use of funds. In the Bahamas, for instance, the accounts of the Public Service Commission, Judicial and Legal Service Commission, and Police Service Commission are audited and reported on by the Auditor General; the accounts of the Auditor General’s office are in turn audited and reported on by the minister of finance (Constitution of the Bahamas, section 136).

Such operational and financial reports should be published and made publicly available. It may also be specified—in the constitution, statutes or the standing orders of the legislature—that reports have to be debated in a plenary session of the legislature, so that reports which might be critical of government policy, raised for example by a human rights commission or auditor-general, cannot easily be ignored.

## Prohibitions and restrictions

Constitutions may contain rules intended to preserve the independence and non-partisan nature of independent regulatory and oversight institutions. These typically include: (a) prohibitions against members of these institutions simultaneously holding office in, or being candidates for election to, the executive or legislative branches; and (b) restrictions on the political activities or private business activities of members of these institutions:

- The Constitution of Kenya (article 88) disqualifies anyone who has in the preceding five years been a member of Parliament or of a County Assembly, or a candidate for election to either house of Parliament or a County Assembly, from being appointed to the Independent Electoral and Boundaries Commission. It also excludes anyone who is ‘a member of the governing body of a political party’ or who holds any other public office.
- The Constitution of Samoa (article 99B) prohibits the auditor-general from holding any other public position or engaging in any paid employment outside the functions of her or his office.
- In Slovakia, the public defender of rights ‘cannot be a member of a political party or a political movement’ (Constitution of Slovakia, article 151A(1)).
- The Constitution of Taiwan (Republic of China) states that ‘No Member of the Control Yuan shall concurrently hold any other public office or engage in any profession’ (article 103).

## 4. Contextual considerations

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### Political bargaining

Since independent institutions are often (wrongly) perceived as being of lesser importance, they are sometimes used as a constitutional bargaining chip. Sometimes they are offered in constitutional negotiations in order to gain agreement on other, more high profile, constitutional design choices. In such circumstances it may be hard to resist the political pressure to create additional independent institutions to respond to particular demands arising from political groups or sectoral interests.

- The inclusion of an unusually large number of independent commissions in Nepal (2015), for example, could be seen as an attempt to meet the demands of minorities and marginalized groups (in part by distributing public offices to leaders of ethnic groups) without substantially diluting the majority's control over policymaking.
- A Teachers Service Commission was created in the Constitution of Kenya (2010) partly to win the support of teachers (a substantial and influential voting bloc) in the referendum on adopting the Constitution.

### Resources, staffing and state capacity

Every independent regulatory and oversight institution costs money. Officials and commissioners need salaries, as well as offices and a range of support staff, to enable them to do their work. In countries with limited fiscal resources, an excess of such institutions may place an unacceptably heavy demand on public finances.

There are four possible responses to this problem. The first is to establish and constitutionalize only a small number of the most important independent institutions and to leave others to be established by statute, depending on available resources. The second is to combine the functions of institutions (for example, establishing an electoral and boundaries commission, rather than two separate bodies). The third response is to establish small commissions—either a sole official or as few as three members. Finally, to reduce staff costs, commissioners might occupy more than one role. For example, the chair of the public service commission might double as a member of the judicial service commission.

Each of these approaches has its disadvantages. Institutions established only by statute, and not in the constitution, may be less robust. Institutions combining functions may lose their focus or give rise to conflicts of interest. Small commissions or sole officials offer less scope for inclusivity. Persons performing multiple roles may become too powerful. As always in constitutional design, it is a matter of balance and compromise, to find a solution that is appropriate in a particular national context.

In a country with a limited pool of trained and qualified people, it might be difficult to find suitable candidates for appointment. In very small countries, one option may be to enable certain roles to be filled by non-citizens. This can be a convenient response to a lack of internal capacity, as well as a way to encourage the recruitment of neutral candidates. Constitutions occasionally make explicit provision for such appointments, but this is understandably rare, because it conflicts with other concerns about national sovereignty; reliance on non-citizens could undermine the authority of these institutions if they are perceived as being ‘foreign’ and may hinder the development of national expertise.

## Transitional difficulties

An excessive number of independent institutions might also complicate the constitutional transition and implementation process.

One way around this problem may be to specify deadlines for setting up certain institutions in the transitional provisions section of the constitution. Staggering these deadlines may avoid overburdening the political leadership and administrative staff in charge of the transition. The Fifth Schedule of the 2010 Constitution of Kenya, for example, provides that Parliament must enact the necessary enabling legislation to create the Kenya National Human Rights and Equality Commission and the Independent Electoral and Boundaries Commission within one year of the Constitution coming into effect, while other transitional provisions were staggered over two to five years.



## Political culture and public ethics

Members of independent regulatory and oversight institutions must set aside their personal preferences and loyalties in order to perform their functions in a neutral, objective and impartial manner. Such impartiality requires a well-developed sense of civic duty, which places loyalty to the integrity of the polity as a whole above adherence to ideology, party or any local, sectional, tribal, family or personal interest.

In jurisdictions with a well-established tradition of civil service professionalism and strong respect for judicial independence, it may be possible to rely on the senior civil service and the judiciary, as either: (a) part of a non-partisan appointing mechanism for independent officials or (b) a recruiting pool from which to draw qualified candidates with a commitment to neutrality. This is unlikely to be a satisfactory solution, however, in countries where the civil service and judiciary lack public trust, or have been compromised by partisan influence or sectarian, tribal or other conflicting loyalties.

## Patronage and corruption

Appointments to independent institutions can sometimes be abused as a source of patronage. A position as a commissioner can provide a lucrative reward for party loyalists, a convenient means of placating a potential rival or a harmless place to park old politicians. People may be cycled through these institutions, so that even if reappointment is prohibited, a person who has cooperated with the government and drawn their salary without asking too many difficult questions may be rewarded with another position.

Careful thought must be given to the method of appointing the members of these institutions in order to reduce such corruption as much as possible. While there is no 'ideal' institutional type for avoiding corruption, as a general rule the more openness and transparency the better. Any mechanism that encourages the selection of candidates based on merit and suitability is a step in the right direction.

### Think point

What are the threats to the independence, neutrality and integrity of regulatory and oversight institutions in this country? Can these threats be mitigated through careful and inventive constitutional reform? How might the substance or process of constitution-building help shape attitudes and expectations, in order to discourage corrupt behaviour?

## Effectiveness

Merely establishing an independent regulatory or oversight institution, through constitutional change or otherwise, is no guarantee of effectiveness. Without the right people, the right training, the right values and ethics, the right leadership and the right resources, constitutional design on its own will have only a limited impact. This is not a reason, of course, to avoid writing independent regulatory and oversight institutions into the constitutional text, but expectations about what they can achieve should be realistic. The day-to-day business of making these institutions work in practice should receive at least as much attention as finding the right words to put in the constitution.

Conversely, one cannot rush to conclude that these institutions are useless, simply because the problems they are designed to address (electoral fraud, human rights violations, misappropriation of public funds, etc.) persist. It might be that they are helping—albeit imperfectly—and that without them the situation would be worse.

## 5. Disadvantages and alternatives

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An over-reliance on independent regulatory and oversight institutions, it is argued, can result in vital decisions being taken outside of the realm of democratic politics and entrusted instead to opaque, technocratic institutions. Experts, rather than representatives of the people, are empowered.

Most of these concerns arise, however, in the context of established democracies where legislatures have traditionally been robust, where legitimate and principled parliamentary opposition has long been a recognized part of the political system, and where political controversies are covered by a lively media that forms part of an active civil society. In such favourable conditions, parliamentary committees may be a viable alternative to certain independent institutions. Sweden's Constitution, for example, requires Parliament to establish a special committee to monitor the constitutionality and legality of the government's actions (Instrument of Government, chapter 4, article 3; chapter 13, articles 1–2).

Nevertheless, this approach is unlikely to yield satisfactory results in countries that lack a strong tradition of legislative scrutiny, where sectarian or local interests distract parliamentarians from their wider duty of monitoring national policy implementation, or where parliamentarians lack the desire or capacity to perform these oversight functions. In any case, it is risky in any country to entrust certain functions—such as electoral management or the drawing up of the boundaries of electoral districts—to a committee of the legislature, because of the obvious conflicts of interest involved.

This is not, of course, to deny the value or usefulness of parliamentary committees. A parliamentary human rights committee may help keep human rights on the political agenda. Many countries have a women's caucus or women's committee, which may be able to promote women's participation in politics and address specific issues relating to gender rights. However, in most contexts, a

committee of this nature is likely to be a supplement to, not a substitute for, independent institutions. A human rights commission, or gender equality commission, is likely to have powers to deal with complaints, perhaps to seek redress at law on behalf of petitioners and to conduct its own research. It would be rare for a parliamentary committee to have those functions. An independent commission, on the other hand, may not be well equipped to introduce legislative changes or to propose amendments to bills as they go through the legislative process, whereas a parliamentary committee might be able to ensure, for example, that human rights issues and gender equality issues are considered during the legislative process.

## 6. Discussion questions

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1. What are the threats to democratic transition, consolidation or stability in the country (e.g. electoral fraud or gerrymandering, official corruption, weakness of the judiciary)? How effective have any existing independent institutions been at addressing these problems? To what extent could additional or constitutionally reinforced independent institutions provide a solution?
2. If existing independent institutions have been weak and ineffective, why is this? Is the problem constitutional (e.g. insufficient independence regarding appointments and tenure, unclear mandate)? Is constitutional change the answer, or should the leadership, resources, etc. of these institutions be improved?
3. What appointment mechanisms are suitable for each institution? How can the process of appointing independent commissions and officials ensure their neutrality, non-partisanship, capacity and competence, while at the same time reflecting other relevant considerations, such as gender balance and regional diversity in appointments?
4. How can independent institutions be protected from political control or other undue influences? What constitutional provisions (security of tenure, prohibition on partisan activities, adequate salaries, etc.) will preserve the neutrality and independence of these institutions, while ensuring that they are publicly accountable for the use of their powers and resources (e.g. through annual reports to parliament and regular audits)?
5. What powers should each institution have? How will the institution be effective at contributing to its overall goal? What should be the limit of its

powers, given the democratically weak mandate of independent institutions?

6. How future-proof is the constitution? Would its processes and mechanisms related to independent institutions still be workable and adequate in the event of major changes in political circumstances, such as a realignment of the party system?
7. In a federal or decentralized country, should independent regulatory and oversight institutions only exist at the centre, or should the states/provinces/regions each have their own such institutions? If the latter, should the centre have a supervisory role over state, district or regional institutions?
8. What are the expected costs of independent institutions? Can these costs be borne? Is there sufficient personnel capacity to meet the needs of anticipated institutions? What measures could be adopted to reduce costs, without compromising the quality of the institutions?

## 7. Examples

Table 1. Examples of independent institutions in the constitutional texts of selected democracies

Function or role	India (1950)	The Bahamas (1973)	Bulgaria (1991)	South Africa (1996)	Kenya (2010)	Tunisia (2014)
Supervising elections	Election Commission (art. 324); also State Election Commissions			Electoral Commission (art. 190)	Independent Electoral and Boundaries Commission (Sixth Sch., art. 28)	Elections Commission (art. 126)
Determining electoral boundaries		Constituencies Commission (sect. 69)			Independent Electoral and Boundaries Commission (Sixth Sch., art. 28)	
Judicial appointments	See note 2	Judicial and Legal Services Commission (sect. 116)	Supreme Judicial Council (arts. 130–130B).	Judicial Service Commission (art. 178)	Judicial Service Commission (art. 171)	Supreme Judicial Council (art. 112)
Civil service personnel management	Public Service Commissions at Union and State levels	Public Service Commission (sect. 107)		Public Service Commission (art. 196)	Public Service Commission (art. 233)	

## Independent Regulatory and Oversight (Fourth-Branch) Institutions

Function or role	India (1950)	The Bahamas (1973)	Bulgaria (1991)	South Africa (1996)	Kenya (2010)	Tunisia (2014)
Financial auditing	Comptroller and Auditor-General (art. 148).	Auditor-General (sect. 136)	National Audit Office (art. 91)	Auditor-General (art. 188)	Auditor-General (art. 229)	Court of Audit (art. 117)
Revenue sharing/ economic planning/ stewardship of resources	Finance Commission (art. 280)			Financial and Fiscal Commission (arts. 220–221)	Commission on Revenue Allocation (arts. 215–216) National Land Commission (art. 67)	Commission for Sustainable Development and the Rights of Future Generations (art. 129)
Integrity/ anti-corruption			Inspector-General (art. 132A)	Public Protector (art. 182)	Ethics and Anti-Corruption Commission (art. 79)	Good Governance and Anti-Corruption Commission (art. 130)
Investigation of complaints/ redress of grievances			Ombudsman	Public Protector (art. 182)		
Monitoring and protection of human rights			Ombudsman (Ombudsman also has human rights monitoring role)	South African Human Rights Commission (art. 184)	Kenya National Human Rights and Equality Commission	Human Rights Commission (art. 128)
Gender rights				Commission for Gender Equality (art. 187)	Kenya National Human Rights and Equality Commission	
Minority rights	Special Officer for Linguistic Minorities (350B)			Commission for the Promotion and Protection of the Rights of Cultural, Religious and Linguistic Communities (art. 185)	Kenya National Human Rights and Equality Commission	



## 7. Examples

Function or role	India (1950)	The Bahamas (1973)	Bulgaria (1991)	South Africa (1996)	Kenya (2010)	Tunisia (2014)
Media regulation/ public broadcasting				Broadcasting Authority (art. 192)		Audio-Visual Communication Commission (art. 127)
Other institutions established by the constitution		Police Service Commission (art. 118)			Teachers Service Commission (art. 237) National Police Service Commission (art. 246)	

### Notes:

1. Only institutions established in the constitution are included; institutions established on a statutory basis are not shown.
2. The text of the Indian Constitution includes a National Judicial Appointments Commission. However, since the validity of the amendment establishing this commission has been successfully challenged in the Supreme Court for infringing the 'basic structure' of the Constitution, the provisions establishing it are void.

Table 2. Examples of constitutional provision on powers, autonomy and composition of selected fourth-branch institutions in the Bahamas

	Public Service Commission	Judicial and Legal Service Commission	Constituencies Commission
Composition	Chair and ‘not less than two nor more than four’ other members, appointed by the governor-general on the advice of the prime minister after consultation with the leader of the opposition.	<ol style="list-style-type: none"> <li>1. The chief justice, ex officio (as chair).</li> <li>2. Another justice of the Supreme Court or justice of appeal, designated by the governor-general on the advice of the chief justice.</li> <li>3. The chair of the Public Service Commission.</li> <li>4. Two other members appointed by the governor-general on the advice of the prime minister after consultation with the leader of the opposition.</li> </ol>	<ol style="list-style-type: none"> <li>1. The speaker, ex officio (as chair).</li> <li>2. A justice of the Supreme Court (as deputy chair), appointed by the governor-general on the advice of the chief justice.</li> <li>3. Two members of the House of Assembly appointed by the governor-general on the advice of the prime minister.</li> <li>4. One member of the House of Assembly appointed by the governor-general acting in accordance with the advice of the leader of the opposition.</li> </ol>
Terms of office	Serve for three years or ‘until such earlier time as may be specified in the instrument’ by which they are appointed.	Members holding office under points 1–3 above are ex officio; those appointed under point 4 serve for a term of three years.	Members continue to serve until they cease to be a speaker, a justice of the Supreme Court or a member of the House of Assembly. A member appointed under points 2–4 serves until her or his appointment is revoked by the governor-general.
Removal mechanism	They may be removed from office only for an inability to exercise the function of their office (due to infirmity of body or mind or any other cause) or for misbehaviour. The question of removal must be referred to a judicial tribunal, which investigates the matter and makes a binding recommendation to the governor-general on whether to remove the commissioner.		Speaker serves as long as she/he is speaker. Judicial member serves at the pleasure of the chief justice. Appointees of the prime minister and leader of the opposition in effect serve at the pleasure of their appointers.
Mandate and functions	Has the power to make appointments (by binding ‘advice’ to the governor-general) to most public offices and to remove and exercise disciplinary control over persons holding or acting in such offices. Some senior offices require the approval of or consultation with the prime minister.	Most judicial offices, including members of the Supreme Court and Court of Appeal (other than the chief justice and president of the Court of Appeal), are appointed on its advice, as are other legal officers who are constitutionally required to possess legal qualifications.	Conducts a review of the number and boundaries of constituencies every five years, and makes recommendations to the governor-general, who presents the report to the House of Assembly. On the basis of that recommendation, a draft order for the revision of constituencies is laid before the House (with or without amendment) by the prime minister, and comes into effect if it is approved by a resolution of the House.

7. Examples

	Public Service Commission	Judicial and Legal Service Commission	Constituencies Commission
Autonomy, organization, status and reporting	<p>The governor-general, acting in accordance with the commission’s advice, may by regulation or otherwise regulate its procedure and, subject to the consent of the prime minister, confer powers and impose duties on any public officer or any government authority for the purpose of discharging the functions of the commission. Salaries of commissioners are charges on the Consolidated Fund—i.e. not subject to annual budget votes in Parliament.</p> <p>Operating accounts are audited by the auditor-general.</p>		
Restrictions on members	<p>Commissioners cannot be members of Parliament or public officers. Former members of the commission cannot be appointed to public office for a period of five years after serving on the commission.</p>	<p>Commissioners cannot be members of Parliament.</p>	

*Note:* typical example of ‘Westminster-export’ constitution—a parliamentary system in which the main political dynamic is between the government and the opposition.

Table 3. Examples of constitutional provision on powers, autonomy and composition of selected fourth-branch institutions in Tunisia

	Elections Commission	Human Rights Commission	Commission for Sustainable Development and the Rights of Future Generations
Composition	<p>‘The Commission shall be composed of nine independent, impartial, and competent members, with integrity.’</p> <p>Elected by the Assembly by a qualified majority.</p>	<p>‘The Commission shall be composed of independent and impartial members with competence and integrity.’</p> <p>Elected by the Assembly by a qualified majority.</p>	<p>‘The Commission shall be composed of members with competence and integrity.’</p> <p>Elected by the Assembly by a qualified majority.</p>
Terms of office	Serve for a single six-year term. One-third of its members are replaced every two years.	Six-year terms.	Six-year terms.
Removal mechanism	Nothing is explicitly stated in the constitution about removing commissioners, although ‘the process for oversight’ and ‘procedures for ensuring accountability’ may be prescribed by law.		
Mandate and functions	<p>‘Responsible for the management and organization of elections and referenda, supervising them in all their stages, ensuring the regularity, integrity, and transparency of the election process, and announcing election results.’</p> <p>‘The Commission has regulatory powers in its areas of responsibility.’</p>	<p>‘Oversees respect for, and promotion of, human freedoms and rights, and makes proposals to develop the human rights system. It must be consulted on draft laws that fall within the domain of its mandate.’</p> <p>‘The Commission conducts investigations into violations of human rights with a view to resolving them or referring them to the competent authorities.’</p>	<p>‘Shall be consulted on draft laws related to economic, social and environmental issues, as well as development plans.’</p> <p>‘The Commission may give its opinion on issues falling within its areas of responsibility.’</p>
Autonomy, organization, status and reporting	<p>The independent constitutional bodies act in support of democracy, and all state institutions must facilitate their work.</p> <p>These bodies shall enjoy a legal personality and financial and administrative independence.</p> <p>They are responsible to the Assembly and shall submit an annual report to it. The report of each independent constitutional body is discussed in a special plenary session of the Assembly.</p> <p>Organic laws (which must be passed by an absolute majority of members present, and if vetoed by the president can be overridden only by a three-fifths majority) establish the composition of these bodies, the representation within them, the methods by which members are elected, the oversight processes and the procedures for ensuring their accountability.</p>		

7. Examples

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	Elections Commission	Human Rights Commission	Commission for Sustainable Development and the Rights of Future Generations
Restrictions on members	Commissioners must declare their assets according to the provisions of the law.		

*Note:* Typical example of a 21st century, francophone constitution, with a semi-presidential system.

## References and further reading

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### Where to find constitutions referred to in this Primer

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# Annex

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## About the author

**Elliot Bulmer** is a Senior Programme Officer with International IDEA's Constitution-Building Processes Programme. He holds a PhD from the University of Glasgow and an MA from the University of Edinburgh. He is the editor of International IDEA's Constitution-Building Primer series and specializes in comparative approaches to constitutional and institutional design. In addition he is engaged in offering technical assistance and capacity building in support of constitutional change processes around the world, with recent projects on Afghanistan, Myanmar, Tuvalu and Ukraine.

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