

# DEMOCRACY'S BABY BLOCKS: SOUTH AFRICA'S ELECTORAL COMMISSIONS

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*Like many other transitional democracies, South Africa has chosen to run its two national postapartheid elections by an independent electoral commission, not by the existing government. Although the results were widely considered legitimate, the perception of legitimacy was due in large part to the public's low expectations. To keep the public confidence, and to avoid the sorts of large-scale breakdowns in the electoral process that might undermine it, the current Electoral Commission must embrace major reforms. One of the Electoral Commission's most pressing problems is the fact that opposition parties believe it is strongly biased in favor of the ruling political party, the African National Congress. The Electoral Commission also has failed to devolve meaningful power to provincial officials, increasing the risk that it will botch the details of election management. The author proposes several measures to help resolve these concerns.*

## INTRODUCTION

One of the most important tasks facing a nation aspiring to become a consolidated democracy<sup>1</sup> is to design electoral machinery that produces free and fair elections.<sup>2</sup> The initial transition to democracy

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<sup>1</sup> Juan Linz and Alfred Stepan explain that a nation's democratic consolidation is complete upon acquiring three attributes: Behavioral consolidation requires that no major element of society work towards establishment of a nondemocratic regime; attitudinal consolidation demands that a strong majority of people favor democracy as the best governing system; constitutional consolidation occurs when there is a societal commitment to dispute resolution within the apparatus of the democratic state. Juan J. Linz & Alfred Stepan, *Problems of Democratic Transition and Consolidation: Southern Europe, South America, and Post-Communist Europe* 5-6 (1996).

<sup>2</sup> While there is no agreed upon international definition of "free and fair elections," Arvid Bro Thuetsad and Camilla Selch define a free election in terms of the "freedom and opportunity of the voters in question to associate in political parties and to propagate policies of their choice without coercion and restriction of any kind." Arvid Bro Thuetsad & Camilla Selch, *What Do We Mean by Free and Fair Elections?*, in *South African Election Update: November 1998-June 1999*, at 13, 13 (Bob Jones ed., 2000). Fairness requires "equal opportunities for the exercise of political freedom for both individuals and groups," including equal opportunity for parties "to win the support of the electorate." *Id.* Danish political scientists Jørgen Elklit and Palle Svensson acknowledge that, so defined, "free" and "fair" are difficult to keep analytically separate. See *id.* This definition will be used for the purposes of this Note. But cf. International Covenant on Civil and Political Rights,

is complete only once a government elected by free and fair means has de facto and de jure authority to run the country.<sup>3</sup> If democratic consolidation is to follow, there must be a deepening commitment to democracy in the law and among the people. This commitment in turn depends upon free elections as a necessary, although insufficient, condition.<sup>4</sup> Elections play this central role in democratic development because democratic leaders derive their authority to rule from public confidence—that they are the choice of the majority of voters.<sup>5</sup>

Many transitional democracies have shied away from the election administration model favored by developed democracies, where elections are run by government bodies and disputes are adjudicated by the judiciary.<sup>6</sup> For public confidence in their results, government-administered elections depend upon an independent and impartial civil service and judiciary, neither of which exist in many new democra-

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Dec. 19, 1966, art. 25(b), 999 U.N.T.S. 171, 179 (defining free and fair elections in terms of citizen's right to "vote and to be elected at genuine periodic elections which shall be by universal and equal suffrage and shall be held by secret ballot, guaranteeing the free expression of the will of the electors").

<sup>3</sup> Linz & Stepan, *supra* note 1, at 3.

<sup>4</sup> See *id.* at 4 (cautioning against "electoralist fallacy," which fails to see free elections as only part of consolidation).

<sup>5</sup> Leaders of established democracies also derive legitimacy from the perception that they were the choice of the people. One legal scholar analyzing the 2000 presidential election in the United States has argued that the United States Supreme Court's decision to halt the Florida recount deprived George W. Bush of public confidence that he won at the ballot box, thereby reducing confidence in the "legitimacy of his election." See Michael W. McConnell, Two-and-a-Half Cheers for *Bush v. Gore*, 68 U. Chi. L. Rev. 657, 660-61 (2001) (arguing that remand to Florida Supreme Court to attempt recount in line with constitutional standards would have "reassur[ed]" American people as to legitimacy of winner). Public confidence that leaders were selected in free and fair elections is even more important in emerging democracies, which lack alternative public institutions (such as the Supreme Court) with sufficient credibility to imbue leaders with legitimacy. Cf. Why It Matters, *The Economist*, Mar. 9, 2002, at 12 (characterizing Robert Mugabe's motivation for undermining democratic processes in Zimbabwe as desire to combine power of dictator with legitimacy of democratic leader).

<sup>6</sup> For example, the United Kingdom uses various government bodies to administer elections. The Home Office in England (like its counterparts in Scotland and Northern Ireland) oversees the electoral law using county sheriffs, the mayor of London, chairmen of district councils, a chief electoral officer, or local authority officers as returning officers. Constitutional Assembly, Republic of South Africa, Theme Committee Six: Workshop of Election Commission (May 22, 1995) (submission by Justice Z.R. Chesoni, Chairman, Electoral Commission of Kenya) (on file with Constitutional Assembly database and the *New York University Law Review*). Returning officers are responsible for prepoll planning, conducting the actual elections, and counting and reporting of votes. H.F. Rawlings, Law and the Electoral Process 213 (1988). Boundary Commissions composed of High Court judges, appointees of the Home Secretary, and appointees of the Secretary of State for the Environment draw parliamentary constituency boundaries. *Id.* at 18-20. Electoral petitions, or challenges to election results or practices, are made to Election Courts composed of two High Court judges. *Id.* at 221.

cies.<sup>7</sup> Instead, aspiring democracies have employed electoral commissions to manage elections,<sup>8</sup> hoping that granting responsibility for managing the electoral process to an independent institution will ensure free and fair results.<sup>9</sup>

However, merely creating an electoral commission to administer elections does not create public confidence in election results.<sup>10</sup> Rather, the constitution or enabling legislation must give an electoral commission some combination of legislative,<sup>11</sup> administrative,<sup>12</sup> and adjudicative powers,<sup>13</sup> with two principal requirements of credible election administration in mind. First, for election results to be fair,

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<sup>7</sup> See John Murphy, *An Independent Electoral Commission, in Free and Fair Elections* 25, 25-26 (Nico Steytler et al. eds., 1994) (criticizing use of government department to administer election absent independent civil service and judiciary). The legitimacy of government-administered elections also may depend on the division of election responsibilities between unrelated government departments, creating internal checks and balances to substitute for the external check of an electoral commission. See Chesoni, *supra* note 6, at 13 (describing checks and balances in UK election administration).

<sup>8</sup> Eastern European countries, including Hungary, Slovenia, Romania, Poland, Czechoslovakia, Bulgaria, and Russia all used electoral commissions in their postcommunist transitional elections. See Peter Harris, *Presentation to Theme Committee Six, South African Constitutional Assembly 7* (1995) (on file with the *New York University Law Review*). They also played a positive role in difficult elections in Bangladesh in 1991 and in Ghana in 1992. *Id.*

<sup>9</sup> See Murphy, *supra* note 7, at 35 (discussing how electoral commission can ensure free and fair results).

<sup>10</sup> For example, section 61 of Zimbabwe's Constitution creates the Electoral Supervisory Commission (ESC) to supervise elections. See Zimb. Const. § 61. Its strictly limited powers, however, prevent it from serving as an effective monitor of the electoral process. Murphy, *supra* note 7, at 36. In fact, the ESC aided President Robert Mugabe's efforts to improperly influence the March 2002 presidential elections by increasing polling sites in rural, progovernment areas and decreasing voting stations in more opposition-friendly cities. Rachel L. Swarns, *New Rules in Zimbabwe Likely to Aid Mugabe's Side*, *N.Y. Times*, Mar. 7, 2002, at A4. As a result, many opposition voters waited ten to fifteen hours to cast their ballots, Rachel L. Swarns, *Mugabe's Aides Declare Him Winner of Zimbabwe Vote*, *N.Y. Times*, Mar. 14, 2002, at A3, while others never cast their ballots at all, helping Mugabe to victory. Rachel L. Swarns, *Mugabe Holds Large Lead in Election in Zimbabwe*, *N.Y. Times*, Mar. 13, 2002, at A5.

<sup>11</sup> Legislative powers can include drafting the electoral act itself, advising on electoral legislation pending before the legislature, and creating regulations to implement legislation passed by a legislature. Murphy, *supra* note 7, at 43; see also Larry Garber, *Nat'l Democratic Inst. for Int'l Affairs, Election Commissions: Responsibilities and Composition 2-3* (no date) (on file with the *New York University Law Review*) (noting range of legislative powers assigned electoral commissions internationally).

<sup>12</sup> See Murphy, *supra* note 7, at 44-45 (detailing potential administrative roles of electoral commissions, including control over creation of voters' roll, registration of parties, selection of election personnel, and monitoring of election behavior).

<sup>13</sup> See *id.* at 45-50 (discussing potential adjudicative powers, including declaration of election results and determination of election violations). The scope of adjudicative powers assigned electoral commissions varies widely from such countries as Zimbabwe, where electoral commissions have no role and where the ordinary courts adjudicate election disputes, to countries such as Haiti where the electoral commission has the power to cancel elections. *Id.* at 46.

the commission must be independent and impartial.<sup>14</sup> In order for the commission to be insulated from the political process, an alternative mechanism for political accountability is necessary to constrain the commission's expenditure of public funds.<sup>15</sup> Second, the administration of the election must be efficient, or free from administrative or technical breakdowns, to prevent charges of manipulation of results from undermining confidence in the election.<sup>16</sup>

Emerging from decades of white minority rule,<sup>17</sup> South Africa has held two postapartheid elections, first in 1994 and again in 1999. In each election it employed an electoral commission, in part to lend credibility to the election results.<sup>18</sup>

At first glance, it would appear that the commissions have been successful in this task, as most groups inside and outside of South Africa accepted the election results as legitimate.<sup>19</sup> However, the source of public confidence in the election results was not the existence of efficient, independently managed elections.<sup>20</sup> Rather, such acceptance was due to forgiveness of electoral-process deficiencies by a

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<sup>14</sup> See Harris, *supra* note 8, at 3 (including independence and impartiality among requirements for effective election administration). If fair elections require "equal opportunities for the exercise of political freedom for individuals and groups," a nonpartisan electoral commission's impartiality is essential to guarantee "equal opportunities" and thus a fair election. Thuetsad & Selch, *supra* note 30, at 13.

<sup>15</sup> See Kader Asmal, Editorial, *Kriegler Strikes at the Government with a Broken Sword*, Sunday Times (Johannesburg), Jan. 31, 1999, <http://www.suntimes.co.za/1999/01/31/insight/in06.htm> (opining that even independent agencies must be held accountable "to safeguard public funds"). Independent agencies also must be checked to ensure that decisions are rational and comply with the law. Those familiar with the American legal system would assume that courts fill that role. See Cass R. Sunstein, *On the Costs and Benefits of Aggressive Judicial Review of Agency Action*, 1989 Duke L.J. 522, 522 (contending "most obvious goal" for judicial review of administrative agency action is ensuring agency compliance with legislative commands). However, in South Africa, the judiciary lacked sufficient credibility to play such a role. See *infra* notes 34-35, 56 and accompanying text.

<sup>16</sup> See Harris, *supra* note 8, at 3-4 (identifying importance of efficiency to credibility of electoral process). Administrative breakdowns that undermine the credibility of election results corrode the foundation upon which the legitimacy of a democratic leader's rule rests. See *supra* note 5 and accompanying text (explaining that legitimacy of democratic leaders depends upon public confidence that such leaders are choice of people).

<sup>17</sup> On apartheid, see generally Segregation and Apartheid in Twentieth-Century South Africa (William Beinart & Saul Dubow eds., 1995); South Africa: From Apartheid to National Unity, 1981-1994 (William Gutteridge ed., 1995).

<sup>18</sup> The specific political conditions surrounding the creation of each commission influenced both its structure and the scope of powers ceded it by the government. See discussion *infra* Parts I.A.1, II.A.1.

<sup>19</sup> See *infra* notes 64, 175-76 and accompanying text. But cf. *infra* note 185 and accompanying text (remarking on higher rate of distrust of electoral institutions among nonblack voters).

<sup>20</sup> Both elections were characterized by large-scale administrative breakdowns—which affected the accuracy of results—and by severe incursions into commission independence by political elites. See discussion *infra* Parts I.B, II.C.

country happy to be governed by liberation leaders.<sup>21</sup> As social consensus fades, continued public confidence in election results will depend upon the credibility of the electoral process.<sup>22</sup> Not only must the commission improve its performance to meet escalating expectations,<sup>23</sup> it must do so now, to develop sufficient institutional credibility to ensure future compliance with controversial decisions.<sup>24</sup>

This Note examines South Africa's two postapartheid electoral commissions at work. It looks at the institutional-design choices that went into formulating the two bodies and reviews the problems that resulted from these decisions. Finally, this Note presents some suggestions for institutional reform. Part I describes the powers and structure of the transitional Independent Electoral Commission (IEC). It evaluates the IEC's performance in the 1994 elections, identifying both deficiencies that needed to be addressed in a permanent body and some solutions offered to those defects. Part II continues with a description of the constitutional and legal framework for the permanent Electoral Commission (EC), focusing on the difficulties the government and the EC had in defining the terms of their relationship, and the Constitutional Court's attempt to resolve this dispute. It then analyzes the performance of the EC in the 1999 elections, again noting institutional problem areas in need of reform. Part III proposes concrete reforms South Africa should adopt to ad-

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<sup>21</sup> See Steven Friedman & Louise Stack, *The Magic Moment: The 1994 Election*, in 7 *South African Review: The Small Miracle: South Africa's Negotiated Settlement* 301, 325 (Steven Friedman & Doreen Atkinson eds., 1994) (describing South Africa as "forgiving and forgetting" failures of Independent Electoral Commission (IEC)).

<sup>22</sup> Zimbabwe is an example of this phenomenon. As social consensus supporting President Robert Mugabe's Zimbabwe African National Union-Patriotic Front (ZANU-PF) splintered, Zimbabweans turned to the electoral process to register their dissatisfaction with Mugabe's rule. See Rachel L. Swarns, *Zimbabwe Vote Heralds Shift in Southern Africa*, N.Y. Times, Mar. 9, 2002, at A3 (commenting on "healthy trend" of citizens participating in vigorous, multiparty democracy). The broad intimidation and fraud wreaked by Mugabe supporters destroyed confidence in the election results, although fear of an army crackdown prevented widespread protests. See Rachel L. Swarns, *Zimbabwe Moderate Offers Assurances to the Opposition*, N.Y. Times, Mar. 14, 2002, at A8.

<sup>23</sup> See, e.g., Indep. Electoral Comm'n, *The South African Elections of April 1994*, at 84 (1994) ("In the glow of elections of national reconciliation the electorate was indulgent. Its forbearance should not be tried again.").

<sup>24</sup> One measure of electoral-commission legitimacy is whether parties who disagree with a decision of the body nevertheless comply. Cf. John C. Yoo, *In Defense of the Court's Legitimacy*, 68 U. Chi. L. Rev. 775, 776-77 (2001) (defining institutional legitimacy as "the belief in the binding nature of an institution's decisions, even when one disagrees with them"). An electoral commission, which, like a court, cannot implement a decision physically, will only be able to gain such legitimacy by making decisions based on reasoned procedures that are viewed as plausibly fair and just. Cf. *Planned Parenthood v. Casey*, 505 U.S. 833, 866 (1992) (explaining U.S. Supreme Court's legitimacy as product of "making legally principled decisions under circumstances in which their principled character is sufficiently plausible to be accepted by the Nation").

dress the problems identified in Parts I and II, changes that need to occur before the EC's failures begin to undermine the credibility of election results.

## I

### THE 1994 INDEPENDENT ELECTORAL COMMISSION

The 1994 IEC was an unusual institution, as it was designed to supplant the state in administering an election without enlisting international support.<sup>25</sup> This Part explores that Commission in detail. Part I.A considers the factors that led to the creation of a parallel state to administer the transitional election and describes how the Independent Electoral Commission Act (IEC Act) 150 of 1993<sup>26</sup> structured this vast institution. Part I.B evaluates the IEC's performance in the transitional election. Part I.C then draws upon these experiences to identify problem areas in the IEC's performance and some potential solutions.

#### A. *Creating a Parallel State: Formation of the IEC*

##### 1. *Rationale Behind the IEC*

The 1994 South African elections were part of the transition to a constitutional democracy supporting multiple parties.<sup>27</sup> They were South Africa's first ever nonracial elections; apartheid South Africa had held numerous elections based on a racially restricted franchise.<sup>28</sup> Under the previous dispensation, the Department of Home Affairs (DHA), a government ministry, administered elections pursuant to an electoral law passed by Parliament.<sup>29</sup> The DHA-administered elec-

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<sup>25</sup> See Friedman & Stack, *supra* note 21, at 302.

<sup>26</sup> Independent Electoral Commission Act 150 of 1993.

<sup>27</sup> See Thuetsad & Selch, *supra* note 2, at 15 (characterizing electoral transition as "[t]he goal for the 1994 election").

<sup>28</sup> The Natives Representation Act of 1936 took away the right to vote for the few thousand Africans who had the right at that time. Tim Nuttall et al., *From Apartheid to Democracy: South Africa 1948-1994*, at 15-16, 33 (1999). The subsequent Separate Representation of Voters Act of 1956 did the same for "coloureds," or mixed-race voters. *Id.* at 33-34. The 1983 constitution created houses of Parliament for coloureds and Indians, but legislation could be passed without the assent of those houses. See S. Afr. Const. (Republic of South Africa Constitution Act 110, 1983) § 32 (giving President's Council, which was composed of majority white delegates pursuant to section 70 of that Act, power to pass legislation where houses could not agree). Blacks continued to be denied the franchise. See § 52 (granting right to vote to "white," "coloured," and "Indian" voters, but not to blacks).

<sup>29</sup> Murphy, *supra* note 7, at 25. Election disputes were adjudicated by the provincial division of the Supreme Court for the province in which the dispute arose, with leave to appeal to the appellate division. §§ 180 to 181 of Electoral Act 45 of 1979.

tions were at least efficient, with results that enjoyed legitimacy even among the supporters of white opposition parties.<sup>30</sup>

However competent the apartheid government was in administering whites-only elections, no one on the Kempton Park Technical Committee drafting the IEC Act advocated that the DHA retain its role.<sup>31</sup> There were at least three reasons why this was the case. First, while the DHA had run elections efficiently for three million voters from common socioeconomic backgrounds, the transitional election had a potential electorate more than seven times as large (twenty-two million),<sup>32</sup> with the vast majority of voters exercising the franchise for the first time. The postapartheid DHA admitted that despite its experience in running apartheid elections, it did not have sufficient institutional capacity to run multiracial elections.<sup>33</sup> Second, and more important, any election administered by the apartheid government was unlikely to enjoy legitimacy in the eyes of the people. By administering and enforcing oppressive, racially biased policies passed by a racially restricted legislature, the civil service and judiciary lacked the necessary imprimatur of impartiality and independence.<sup>34</sup> The resulting lack of popular confidence in the government institutions denied the DHA the support it needed to run postapartheid elections.<sup>35</sup>

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<sup>30</sup> See Khehla Shubane, Centre for Policy Studies, *Exploring Some Ideas on the Conduct of Future Elections: Some Thoughts 2* (1995) (on file with Constitutional Assembly database and the *New York University Law Review*) (noting that English-speaking opposition parties did not protest conduct of election officials despite decades of National Party (NP) rule). The Conservative Party, an Afrikaans-speaking opposition party, did make allegations of electoral fraud in the late 1980s. However, the courts did not find evidence of wrongdoing in any one of the thirteen cases brought. See Claire Robertson, *Contesting the Contest: Negotiating the Election Machinery*, in *The Small Miracle: South Africa's Negotiated Settlement*, supra note 21, at 44, 48. Black political parties generally ignored the outcome of white elections because, regardless of which party won, black interests remained subjugated to white interests. See Shubane, supra, at 3.

<sup>31</sup> See Robertson, supra note 25, at 40 (describing failure of apartheid government to nominate member of committee in favor of strong Department of Home Affairs (DHA) role). The technical committee at Kempton Park, site of transitional negotiations, was composed of representatives of the National Party government, the African National Congress (ANC), the Democratic Party, and the Inkatha Freedom Party. See *id.* at 47.

<sup>32</sup> See Shubane, supra note 30, at 4.

<sup>33</sup> See Dep't of Home Affairs, *The Agency Responsible for the Conduct of Future Elections 3* (no date) (on file with the *New York University Law Review*) (stating that current DHA structures could not possibly deal with newly enlarged electorate).

<sup>34</sup> See Murphy, supra note 7, at 25 (concluding that blurred distinction between government and National Party made apartheid civil service and judiciary inappropriate referees); see also Interview with Richard Rosenthal, Member, Kempton Park Technical Committee on Electoral Commission, in Cape Town, S. Afr. (Oct. 25, 2001) (transcript on file with the *New York University Law Review*) ("Courts couldn't be trusted, the legislature could not be trusted because it remained dominated by the National Party, and nor could the administration be trusted, because it was a product of its masters.").

<sup>35</sup> See Murphy, supra note 7, at 25 (finding "decline in public support for the institutions of government which [were] seen as illegitimate and unaccountable to the people").

Third, the unique political climate at transition led both the ruling, white minority National Party (NP) and the liberation African National Congress (ANC) to favor creation of an electoral commission.<sup>36</sup> The NP, as the governing party, favored a larger role for the DHA,<sup>37</sup> but it was strongly opposed to international administration of the transitional election because it believed this would undermine national sovereignty.<sup>38</sup> While the ANC was willing to agree to a South African administrator, it would not allow that administrator to be the apartheid government's DHA,<sup>39</sup> making an electoral commission the only politically acceptable alternative.<sup>40</sup>

## 2. IEC Structure

The rationale behind the formation of a transitional electoral commission played a large role in determining the scope of authority given to the IEC. If the IEC was to supplant the discredited apartheid state in managing the electoral process, it had to be afforded broad legislative, administrative, and adjudicative powers. Accordingly, the 1993 IEC Act<sup>41</sup> gave the IEC expansive authority to organize and administer the transitional elections.<sup>42</sup> It charged the body with deter-

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<sup>36</sup> The fact that both the NP and the ANC supported an electoral commission is surprising in light of political-process-lockup theory, which argues that political parties use their current power to strengthen their hold on future power. See Samuel Issacharoff & Richard H. Pildes, *Politics as Markets: Partisan Lockups of the Democratic Process*, 50 *Stan. L. Rev.* 643, 673 (1998) (describing phenomenon in which dominant political party creates electoral rules that prevent challenges from other parties). Given their divergent electoral positions both at transition and for the future, support by both parties for an electoral commission seems at first inconsistent with this theory. However, it appears that the ANC and NP did seek to use their negotiating power in the transitional negotiations to strengthen their respective electoral positions, with joint support for an electoral commission reflecting the lack of information about the behavior of the new electorate. Robertson, *supra* note 31, at 44.

<sup>37</sup> See Robertson, *supra* note 31, at 48 (describing NP proposal to allow DHA to administer election with IEC ensuring it did so fairly).

<sup>38</sup> See *id.* at 50.

<sup>39</sup> See *id.* at 48 (explaining liberation parties' skepticism about neutrality of DHA). For the ANC, the electoral commission would in essence serve as a "democracy branch," checking the impulse of the NP government to use its control over the electoral machinery to manipulate the election results. See Bruce Ackerman, *The New Separation of Powers*, 113 *Harv. L. Rev.* 633, 718 (2000) (discussing use of electoral commissions as "democracy branch" and as check on "predictable efforts by reigning politicians to entrench themselves against popular reversals at the polls").

<sup>40</sup> See Robertson, *supra* note 31, at 52 (calling electoral commission "trade off" between ANC and NP).

<sup>41</sup> Independent Electoral Commission Act 150 of 1993.

<sup>42</sup> Section 41 of the Independent Electoral Commission Act (IEC Act) 150 of 1993 granted the IEC sweeping regulatory power in nearly all areas related to the transitional elections. § 41. These regulations took precedence over any conflicting parliamentary acts. See John Murphy et al., *Postscript—The Legal Framework of South Africa's First Democratic Election*, in *Free and Fair Elections*, *supra* note 7, at 240, 244 (explaining that



mining the election results and then certifying whether those results were the product of a "free and fair" election.<sup>43</sup> To aid in its certification process, the IEC was given the power to investigate and adjudicate violations of election laws.<sup>44</sup>

Allocating broad powers to the IEC was insufficient on its own to ensure that election results would not be tainted by the residues of apartheid. The major concern of the Kempton Park Technical Committee while drafting the IEC Act was protecting against interference by the apartheid government, civil service, and, to a lesser extent, the opposition parties, which would undermine the credibility of the results.<sup>45</sup>

Accordingly, three sets of safeguards were employed to ensure the IEC's independence. First, the IEC Act strictly regulated the qualifications and behavior of the IEC commissioners.<sup>46</sup> The Act granted power to recommend commissioners to the interim Transitional Executive Council,<sup>47</sup> which comprised one member from each political party.<sup>48</sup> The Act required that the Council select commissioners who were impartial, qualified to run an election, and lacking in any "high party political profile[s]."<sup>49</sup> The Act also imposed limita-

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since section 1(xxxix) defines "Act" to include regulations made under it, section 34 supremacy clause extends to IEC regulations); see also Interview with Richard Rosenthal, *supra* note 34 ("[T]he Commission was basically afforded the authority . . . to make the subordinate legislation as it saw fit, to amend it and not have to submit to the approval of the legislature.").

<sup>43</sup> § 4(2) (listing objects of Commission). These objects also included conducting voter education. § 4(2)(d).

<sup>44</sup> See §§ 24(d), 28.

<sup>45</sup> Richard Rosenthal, a member of the Kempton Park Technical Committee, which drafted the IEC Act, explained that the primary concern of the Act was to make the IEC "impervious to influence by any party competing in that election and in particular by the governing party, which was the last apartheid government." Interview with Richard Rosenthal, *supra* note 34.

<sup>46</sup> See § 6 (detailing restrictions on commissioner behavior).

<sup>47</sup> See § 5(1) (granting State President power to select commissioners based on advice of Transitional Council).

<sup>48</sup> § 4 of Transitional Executive Council Act 151 of 1993. The Council acted where possible on the basis of consensus, giving small parties influence disproportionate to their support in the population. See § 25 (requiring, where consensus is not possible, majority of two-thirds to three-quarters for decision); see also Interview with Richard Rosenthal, *supra* note 34 (asserting that "consensual process . . . almost suspended the majoritarian principle").

<sup>49</sup> § 5(1) of Independent Electoral Commission Act 150 of 1993. Part of the reason for excluding those with "high party political profile[s]" from the IEC was the desire to expand the transitional process to include civil-society leaders, or leaders of autonomous institutions outside of government and the parties. Murphy, *supra* note 7, at 29. In practice, the shortage of individuals without political affiliation mandated selecting commissioners from different political parties in the hope that their biases would "balance each other out." Friedman & Stack, *supra* note 21, at 304.

tions on commissioner employment after leaving the IEC<sup>50</sup> and limited removal of commissioners to situations of misconduct or incapacity.<sup>51</sup> Second, groups that had the potential to interfere with the IEC's administration of the election were instead integrated into the election process. The Kempton Park Technical Committee identified political parties as such groups.<sup>52</sup> A Party Liaison Committee was established as an outlet where the parties could mediate disputes among themselves and with the IEC, without resorting to formal adjudication structures or violence.<sup>53</sup> Third, the IEC Act gave the IEC fiscal independence, or freedom from government attempts to use appropriations (or the lack thereof), to influence IEC action.<sup>54</sup>

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<sup>50</sup> Commissioners could not hold an executive appointment or elected position in a political party for eighteen months after leaving the IEC and could not serve in any legislature elected during their term on the Commission. § 6(2)(a), (h). The Act also initially barred commissioners from service in state institutions, including appointments to any branch of government or tertiary education institution, except to return to previously held public office at the same level. This restriction subsequently was lifted. See § 1(b) of Independent Electoral Commission Amendment Act 5 of 1994 (amending § 6(2)(a) of Independent Electoral Commission Act of 1993).

<sup>51</sup> See § 11(2) of Independent Electoral Commission Act 150 of 1993. Commissioners could only be removed by the Special Electoral Court acting on the basis of an application lodged by the President, the Transitional Executive Council, Parliament, or a political party. See § 11(1). This provision insulated commissioners from politically motivated removals.

<sup>52</sup> See Interview with Richard Rosenthal, *supra* note 34 ("[T]he parties had to work with the commission. There had to be a sort of collaboration at that level."). Given the partisan history of the military and police force, the Committee also believed that integration of these groups was critical to avoiding a coup. See *id.* (discussing credible threat of military coup). To mitigate this threat, the military and police were placed at the disposal of the IEC. § 24(e). South Africa is not unique in giving an electoral commission some control over the military in an attempt to control partisan behavior. Both the Philippines and Guatemala gave their respective electoral commissions control over their politically active militaries. Murphy, *supra* note 7, at 37.

<sup>53</sup> See §§ 5 to 6 of Electoral Act 202 of 1993. The South African Party Liaison Committee was based in large part on a similar Election Council used to great effect in Southern Rhodesia's (Zimbabwe's) 1980 transitional election. See Murphy, *supra* note 7, at 30-32 (describing Rhodesian system and noting its potential application in South Africa).

<sup>54</sup> See §§ 16 to 17 of Independent Electoral Commission Act 150 of 1993 (guaranteeing IEC "necessary resources" to complete task and naming IEC Chief Executive Officer also as IEC's accounting officer). Even in the absence of such a provision, however, the government still would have been under sufficient political pressure to spend whatever necessary to ensure a successful election. See Interview with Judge Dennis Davis, Member, Kempton Park Technical Committee on Electoral Commission, in Cape Town, S. Afr. (Nov. 7, 2001) (transcript on file with the *New York University Law Review*) ("I don't think finance was a problem. You just had to have the election . . . and [the government was] going to give them the money that they required to run it."); see also Charles Nupen, *Election Authorities: Seminar on Current Trends in Electoral Systems 7* (1994) (on file with the *New York University Law Review*) (noting that funding was not issue for IEC because it developed its own budget). The only constraint on IEC expenditures was section 17(2) of the IEC Act, which empowered the Auditor-General to audit IEC records. See § 17(2).

Creating such an independent body came with the inherent risk of abuse of power, and the IEC Act therefore included two measures designed to constrain IEC action. First, the Special Electoral Court<sup>55</sup> was set up to oversee the IEC.<sup>56</sup> It reviewed all Commission decisions for integrity and propriety,<sup>57</sup> except the determination of the election's free and fairness when the Commission's conclusion was final.<sup>58</sup> The IEC Act also imposed a separation of powers within the institution by dividing tasks between autonomous subcomponents, hoping such a division would create an internal brake on abuse of power.<sup>59</sup> The Act established three autonomous offices—Administration,<sup>60</sup> Monitoring,<sup>61</sup> and Adjudication<sup>62</sup>—all of which were accountable to the IEC.<sup>63</sup>

### *B. The IEC and South Africa's Transitional Election*

The 1994 South African elections were by most accounts successful, as they achieved their major objective: a peaceful transition to

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<sup>55</sup> The court was composed of a chairperson, who had to be a judge of the Appellate Division of the Supreme Court, and two other Supreme Court judges, all of whom were selected by the Chief Judge, as well as two other members to be selected by the Transitional Council. § 32(2).

<sup>56</sup> While those familiar with the American legal system would look to courts to review independent agency actions for compliance with the law and for rationality in decisionmaking, *supra* note 15, the judiciary's involvement with apartheid made its use inappropriate. See Interview with Richard Rosenthal, *supra* note 34 (relating, in reference to election process, "what one couldn't do was to trust the issue to the judiciary").

<sup>57</sup> See § 33(1)(a) (giving Special Electoral Court final power of review).

<sup>58</sup> See § 36(6)(a) ("Any decision of the Commission in terms of [free-and-fair determination] . . . shall be final and not subject to appeal or review."). The Special Electoral Court also was granted power to hear appeals on legal decisions made by the Commission. § 33(2)(a).

<sup>59</sup> As Judge Dennis Davis, a member of the technical committee that drafted the IEC Act, explained, "the question really arose as to how on earth would you . . . monitor the administration . . . . So what you really wanted to do was to basically try to separate the functions out so that there would be at least some internal supervision one over the other." Interview with Judge Dennis Davis, *supra* note 54.

<sup>60</sup> § 19. The Administration Directorate was charged with organizing 9000 voting and 900 counting stations, and to employ personnel to run those stations who would not be perceived as biased. See Friedman & Stack, *supra* note 21, at 305 (describing functions of Administration).

<sup>61</sup> § 22. Monitoring had the general responsibility of overseeing the election, which included investigating party and candidate violations of the Electoral Code of Conduct, mediating disputes between the political parties, observing the polls on election day, and gathering and analyzing the information the IEC would use in its ultimate determination of whether the election was free and fair. Friedman & Stack, *supra* note 21, at 305-06.

<sup>62</sup> § 25. The Adjudication office organized tribunals to hear election disputes. Friedman & Stack, *supra* note 21, at 306.

<sup>63</sup> Each section describing the powers of the head of the directorates and secretariat included a statement of that head's independence from the other two heads and subordination to the Commission as a whole. See §§ 21(3)(b)-(c), 24(i)-(j), 27(c)-(d).

multiparty democracy with results that were not challenged by any major player.<sup>64</sup> However, such acceptance came in spite of the IEC's performance, rather than because of it. The institution emerged from the election as "the butt of dinner table banter and washroom jokes."<sup>65</sup> The reasons for the dismal evaluation of IEC performance were massive administrative failures during the elections, followed by messy "vote adjustments" that drew into question the accuracy of the election results.<sup>66</sup>

The administrative problems on election day included a large-scale shortage of items necessary to conduct voting at many polling stations.<sup>67</sup> The lack of supplies compounded difficulties created by the IEC's failure to train local election officials adequately.<sup>68</sup> These officials, many of whom were administering their first election, failed to keep the records necessary to conduct ballot reconciliation, the process by which ballot boxes are matched to polling stations to ensure the integrity of the vote count.<sup>69</sup> As a result, the IEC abandoned the entire reconciliation process, dramatically impairing the accuracy of the vote count.<sup>70</sup>

Breakdowns and political dealings in the counting phase were as troublesome as the administrative glitches in the voting phase, which led some analysts to label the results "negotiated."<sup>71</sup> The IEC failed to train counting staff adequately in the use of sophisticated computer

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<sup>64</sup> See, e.g., Nupen, *supra* note 54, at 15 (concluding that despite shortfalls, election was success); see also Friedman & Stack, *supra* note 21, at 323 (noting lack of objection to IEC proclamation that election was free and fair).

<sup>65</sup> Friedman & Stack, *supra* note 21, at 314.

<sup>66</sup> See Interview with Judge Dennis Davis, *supra* note 54 (identifying major criticisms of IEC performance).

<sup>67</sup> For example, thirty-five percent of districts experienced ballot paper problems, and twenty-five percent of districts were missing equipment such as ultraviolet lights or invisible ink necessary to prevent double voting. See Friedman & Stack, *supra* note 21, at 314, 317 (detailing precinct equipment shortfalls).

<sup>68</sup> A survey done by the European Union Election Unit in the last two weeks before the election found nine percent of all voting stations unprepared. R.W. Johnson, *How Free? How Fair?*, in *Launching Democracy in South Africa* 323, 332 (R.W. Johnson & Lawrence Schlemmer eds., 1996). Five percent of all stations had no officials to train polling officers, fourteen percent lacked trained voting officers, and six percent lacked appointed monitors. *Id.* at 332-33.

<sup>69</sup> See Friedman & Stack, *supra* note 21, at 320. Shortage of ballot papers also led to the printing of nine million extra ballots during the election in such a manner that reconciliation would not be possible. See *id.*

<sup>70</sup> See *id.* (observing that ballot reconciliation is "standard protection against fraud," and recounting how Electoral Commission (EC) Chairman Johann Kriegler instructed voting stations not to reconcile ballots).

<sup>71</sup> See *id.* at 319, 324 (using words "negotiated election" in title of article's section on "the vote count and result"); Johnson, *supra* note 68, at 330-32 (explaining "plethora of rumours of a 'deal'" over vote results and speculating that "the election result *was* to some extent the 'negotiated' result of popular report").

equipment, crippling the Results Control Centre (RCC), which was responsible for tabulating results.<sup>72</sup> These difficulties, coupled with evidence of a hacker's entry into the computer systems, resulted in the closing of the RCC days after the counting had begun, but before it had been finished.<sup>73</sup>

As the IEC closed down computer tabulation, the NP came forward with evidence of widespread fraud and threatened to bring suit challenging the validity of the election.<sup>74</sup> Then, inexplicably, no new vote totals were given over the next two days.<sup>75</sup> This was followed by the announcement of election results that made all parties happy: the ANC had won just under the two-thirds of seats in the National Assembly (NA) needed to unilaterally write the constitution; the NP had claimed just over the twenty percent needed to enter the Government of National Unity, and the Inkatha Freedom Party, a Zulu-dominated regional party, did sufficiently well in Zulu areas to claim power in the province of KwaZulu-Natal.<sup>76</sup>

These results alone would have raised questions of a negotiated election result. The IEC's slipshod handling of its post-election duties only heightened these suspicions.<sup>77</sup> For example, the IEC gave the Analysis Department of the Monitoring Directorate just a few hours to prepare the report that was to form the basis of the Commission's free-and-fair determination.<sup>78</sup> It then certified the election as free and fair immediately upon hearing the report, having spent little time on deliberation.<sup>79</sup> Moreover, in making its legislatively mandated post-election report, the IEC engaged in self-serving minimalizations of serious election shortcomings.<sup>80</sup> While the IEC was correct in noting

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<sup>72</sup> See Friedman & Stack, *supra* note 21, at 321 (connecting "puzzled queries" by computers to failure to train Results Control Centre (RCC) staff on difference between batch tallies and final counts).

<sup>73</sup> See *id.* at 321. After the RCC was closed, auditors and part of the Monitoring Directorate finalized the vote tally with simpler technology than that employed by the RCC. *Id.*

<sup>74</sup> See Johnson, *supra* note 68, at 330 (describing NP affidavits indicating voting irregularities such as individuals voting repeatedly).

<sup>75</sup> See *id.* at 331.

<sup>76</sup> See interview with Judge Dennis Davis, *supra* note 54 (noting that election results that emerged were "remarkably wonderful for everybody").

<sup>77</sup> Suspicions also were raised by the fact that all parties dropped their challenges to the election results. See Friedman & Stack, *supra* note 21, at 325.

<sup>78</sup> See *id.* at 324. The decision to ask for the report came only after widespread criticism of IEC's plan to approve the election without a report. See *id.*

<sup>79</sup> See *id.* This decision may have reflected the political situation, as the IEC could not have thrown out an election when none of the major parties wanted a new election and where the people accepted the results as roughly accurate. See *id.* at 325.

<sup>80</sup> For example, the IEC recognized the prevalence of "no-go" zones, or areas where one political party prevented other parties' access. See Indep. Electoral Comm'n, *supra* note 23, at 53 (stating, in IEC Report, that significant parts of country were no-go zones). However, the post-election IEC Report claimed they had no "significant effect on the out-

that many of the election's problems were largely outside its control,<sup>81</sup> it came under criticism for not acknowledging the depth of those problems in an effort to make the election appear more fair than it really was.<sup>82</sup>

### *C. Moving Forward: Lessons from the 1994 Elections*

Legislators drew two major lessons from the experiences of the transitional IEC that informed their formulation of a permanent electoral body.<sup>83</sup> The first concerned separation of powers: the same body charged with administering the election cannot be expected to render a credible judgment as to whether that election was free and fair.<sup>84</sup> Such a concentration of powers violated the principle that one should not be a judge in his own case and, in so doing, created an internal conflict of interest that undermined the credibility of the IEC's post-election analysis.<sup>85</sup>

To address this problem, the IEC concluded that it was better to limit the scope of a future commission to election administration.<sup>86</sup> A streamlined commission would allow the body to develop into a small,

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come of the elections," *id.* at 54, because parties that could not campaign in those areas had little chance of winning votes there. See *id.* (arguing that political parties "acted wisely in not wasting their efforts on lost causes").

<sup>81</sup> See *id.* (noting that IEC's strategy to counteract effect of no-go zones "could not reverse a national trend in a few weeks"). The breadth of the problem makes such a claim plausible. See Tom Lodge, *Intimidation and Restriction on Voter Choice—Lessons from the 1994 Elections*, in *South African Election Update: November 1998-June 1999*, *supra* note 2, at 16, 16 (tallying at least 165 no-go zones characterized by pressure ranging from "vigorous persuasion" to outright intimidation).

<sup>82</sup> For example, R.W. Johnson criticized the IEC's claim that voters in no-go zones were unlikely to be undecided as "uncomfortably reminiscent of the type of [racial] reasoning which became all too familiar to South Africans in the apartheid era," in that it presumed people's preferences on the basis of race. Johnson, *supra* note 68, at 329.

<sup>83</sup> These lessons remain important in considering current proposals to reform the EC. See discussion *infra* Part III.

<sup>84</sup> See Friedman & Stack, *supra* note 21, at 302 ("[A] touch of the absurd [exists] in asking the IEC to monitor and judge itself.").

<sup>85</sup> The self-serving minimalizations that characterized IEC's post-election analysis can best be understood as the product of this conflict of interest. Popular confidence in the election process depended upon IEC claims that it was prepared to conduct the election, which it made with advertisements stating: "We are ready; are you?" Such pronouncements of readiness fed skepticism about the willingness of the IEC to be subsequently critical of its performance, skepticism that was reinforced by post-election misrepresentations. See Johnson, *supra* note 68, at 326 (claiming IEC was responsible for much cynicism surrounding its election certification).

<sup>86</sup> The IEC claimed that a future electoral commission would not need to perform a monitoring function because civil society and the political parties would be able to assume responsibility for monitoring the election. *Indep. Electoral Comm'n*, *supra* note 23, at 86. Political parties already had played an important monitoring role in the 1994 elections through the presence of party agents in the voting and counting phases. See David Pottie, *The Role of Political Parties in Election Monitoring and Observation*, in *South African*

permanent unit of election experts, engaged in "research, planning, legal drafting, standardisation and training," with an additional policymaking component capable of advising Parliament.<sup>87</sup> This body still would determine the final election results, but it no longer would have to certify that the election was free and fair.<sup>88</sup> The preference not to involve a future electoral commission in a free-and-fair determination reflected the difficulty any institution would face in declaring an election free and fair in the absence of a justiciable standard by which to make that assessment.<sup>89</sup> Instead, a judgment that an election was in fact free and fair would emerge from courts resolving electoral petitions on a case-by-case basis.<sup>90</sup>

A second lesson legislators drew from the IEC's troubles was that administrative inefficiencies could themselves corrode institutional independence. The ability of political parties to negotiate a result through backroom dealings was due at least in part to the IEC's lack of confidence in its results;<sup>91</sup> given that any final vote tally was subject to a plausible fraud challenge, generating a result that all parties would support was necessary to prevent the election from being over-

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Election Update: November 1998-June 1999, *supra* note 2, at 87, 87 (describing party agents as critical to legitimacy of 1994 election results).

<sup>87</sup> See *Indep. Electoral Comm'n*, *supra* note 23, at 87 (suggesting that electoral agency composed of experts would enhance credibility of electoral process in cost-effective manner).

<sup>88</sup> See *id.* at 86 ("In future, however, there should be no necessity for any certification over and above the formal declaration of an election result."); see also Commonwealth Secretariat, *The Legal and Administrative Framework for Future Elections in South Africa: Report on Consultations with the Independent Electoral Commission (IEC) and with the South African Government 4* (1994) (citing separation of responsibility for administration and responsibility for oversight of elections as issue for South Africa to address). A racially integrated judiciary could replace the adjudication secretariat in resolving election disputes, albeit with either expedited procedural rules or a special electoral court to hear time-sensitive election claims. See Commonwealth Secretariat, *supra*, at 6 (noting that ordinary courts may be able to handle electoral disputes in future); *Indep. Electoral Comm'n*, *supra* note 23, at 86.

<sup>89</sup> See *Thuetsad & Selch*, *supra* note 2, at 15 (finding no clear South African jurisprudence or agreed upon international definition on which to base interpretation of "free and fair"). Note, however, that *Thuetsad and Selch* also argue that South African laws prohibiting certain election practices, coupled with international norms, could guide an interpretation of "free and fair." *Id.*

<sup>90</sup> See *id.* at 15-16 (stating that, where IEC had had to "certify" election as "*substantially* free and fair," new EC would only have to "ensure and promote conditions conducive to a free and fair election," leaving "determination of issues of freeness and fairness to the Electoral Court, if any of the election stakeholders should want to question the result, or any other aspect, of the election" (bold omitted)).

<sup>91</sup> See *supra* notes 67-69 and accompanying text (describing administrative errors that undermined accuracy of results).

turned.<sup>92</sup> Accordingly, protecting any future commission from political interference required designing an effective election-management plan that would minimize inefficiencies.<sup>93</sup>

Creating such a model required at least two changes. First, the poor performance of local officials in both the voting and counting phases demonstrated the need to develop a reservoir of election talent in local communities.<sup>94</sup> Doing so required a clearly defined role for provincial and municipal government officials in election administration, something which was absent in the IEC's founding legislation.<sup>95</sup> The Commonwealth Secretariat, which observed the 1994 election, suggested incorporating such officials using the principle of subsidiarity which devolves decisionmaking authority to the most local

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<sup>92</sup> It is not coincidental that the mysterious "vote adjustments" took place immediately after the NP announced its intention to challenge the election results. See *supra* notes 74-79 and accompanying text.

<sup>93</sup> Neither the IEC Act nor Electoral Act 202 of 1993 specified how the IEC was to administer the elections. The IEC itself developed an election-management plan with the help of the nonvoting international members. See *Indep. Electoral Comm'n*, *supra* note 23, at 27 (explaining that election-readiness plan was prepared with help of Canadian expert). However, key elements of that plan were implemented far too late to be effective. For example, provincial IEC offices, which were to monitor the performance of local election officials, were not created until March, *id.* at 28, too close to the April election to be effective.

The failure of the IEC to institute its election-management plan cannot be attributed solely to the body. The transition negotiators allocated an insufficient amount of time for election preparation. See *Friedman & Stack*, *supra* note 21, at 304-05 (observing that IEC had just four months to construct institution of 300,000 employees). Additionally, the fact that many South Africans lacked any identification made preparation of a voters' roll, necessary to check fraud, impossible. See *Johnson*, *supra* note 68, at 348 (concluding that voters' roll would have eliminated many errors); see also *Interview with Judge Dennis Davis*, *supra* note 54 (calling difficulties surrounding compiling voters' roll "insurmountable"). Such impediments are unlikely to occur again. The IEC strongly argued that an election should never again be organized in such a short time period. *Indep. Electoral Comm'n*, *supra* note 23, at 84. Meanwhile the constitution mandated a voters' roll for future elections. *S. Afr. Const. (Constitution of the Republic of South Africa Act 200, 1993) sched. 4, art. VIII.*

<sup>94</sup> Election administration in a country with the size and population of South Africa necessitates using subnational units in the administration of an election. See *Murphy*, *supra* note 7, at 34 (arguing for establishment of regional election authorities). For example, Paraguay, which has a population one-eighth the size of South Africa's (5.7 million, as compared to South Africa's 43.7 million, *The World Almanac and Book of Facts* 838, 849 (2002)), uses subnational units to administer national elections. See, e.g., *id.* (detailing use of electoral boards subordinate to national Junta Electoral Central). Countries without an independent electoral commission also use subnational units to administer national elections. See *Samuel Issacharoff et al., When Elections Go Bad* 23-25 (2001) (describing states as primary locus of election activity in United States, even for national offices).

<sup>95</sup> Richard Rosenthal opines that the Kempton Park Technical Committee did not consider "in any material way" the relationship between the IEC and local governments in administering the election. *Interview with Richard Rosenthal*, *supra* note 34.



body practicable.<sup>96</sup> A future commission could use local government officials as polling officers, thus cultivating election experience within local government.<sup>97</sup>

Second, any subsequent commission needed to tackle more directly the problem of finding racially diverse personnel to administer the election.<sup>98</sup> Many of the administrative breakdowns during the transitional election can be understood as a function of racial integration without adequate training.<sup>99</sup> Such breakdowns could be viewed as forgivable "growing pains" of racial integration, but only if a mechanism for adequately training such officials for future elections is implemented. Using civil servants from the apartheid regime who ran the racially restricted pre-1994 elections to train those with no election experience might better harness existing skills.<sup>100</sup>

Thus, the experience of the IEC in 1994 argued for a future commission with streamlined responsibilities and an election-management plan capable of delivering an efficient election. Part II considers how these suggestions were incorporated into the design of the permanent Electoral Commission.

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<sup>96</sup> See Commonwealth Secretariat, *supra* note 88, at 10 (arguing for subsidiarity in all areas of future electoral body, including finances).

<sup>97</sup> See Indep. Electoral Comm'n, *supra* note 23, at 87 (asserting importance of using local government officials in election administration to create "reservoirs of skills throughout the country").

<sup>98</sup> See Murphy, *supra* note 7, at 33 (pointing out lack of election experience for most nonwhite election officials); Interview with Judge Dennis Davis, *supra* note 54 ("The sad reality of apartheid was that black people in this country had never gone through an election before . . . . So the problem that one had was where was one going to get the personnel for [an election] . . . .").

<sup>99</sup> See *supra* note 68 (discussing widespread failure to train local election personnel). At times, the IEC also sacrificed integration to avoid potentially embarrassing failures. For example, there was a grave shortage of experienced nonwhite adjudicators for appointment to dispute-resolution tribunals. See Robertson, *supra* note 31, at 55 ("If all electoral tribunals were to be staffed by people with LLBs [i.e., people with a Bachelor of Laws degree] and 20 years' experience, (they) would be, what else, white and male. That is not tenable . . . ." (quoting Dene Smuts, Democratic Party MP)). Rather than providing training for new adjudicators, or just acknowledging the depth of this problem, the Parliament quietly amended the Independent Electoral Commission Act to allow more serious disputes to be referred to an appeals panel chaired by an actual judge. See *id.* (discussing "hasty" amendment to IEC Act).

<sup>100</sup> See Interview with Richard Rosenthal, *supra* note 34 ("[T]he commission found that it desperately needed the knowledge of those specific people who had run elections before. They knew how to do it."). DHA officials with election expertise were distrusted because of their perceived NP bias. Interview with Judge Dennis Davis, *supra* note 54.

## II

## THE CONSTITUTIONAL ELECTORAL COMMISSION

The IEC Act governed only the transitional election, meaning there was no electoral commission in place after transition.<sup>101</sup> However, as Part I showed, the performance of the IEC, while far from perfect, provided a reference point from which those creating a permanent electoral commission could work. This Part turns to the constitutional Electoral Commission and examines how it was influenced by the IEC. Part II.A discusses the reasons why South Africa's constitutional drafters opted for an electoral commission and describes the legal framework for that commission. Part II.B then examines the difficulties that ambiguous constitutional and statutory text posed to the government and the EC in defining the contours of their relationship, and the Constitutional Court's attempt to resolve this dispute. Finally, Part II.C analyzes the EC's performance in the 1999 elections, identifying weak points that need to be fixed in future elections.

*A. Creating a Permanent Electoral Commission**1. Developing a Formula*

Postapartheid South Africa's decision to create a permanent electoral commission had at least five strong theoretical bases. First, the experience of other transitional democracies suggested the importance of an electoral commission to the legitimacy of election results in a nation without a strong democratic tradition.<sup>102</sup> Second, the ANC's electoral dominance<sup>103</sup> created concern among opposition parties, including the NP, about use of that power for process-lockup purposes, leading these parties to support an electoral commission as a "democracy branch" of government.<sup>104</sup> Third, even as the ANC inte-

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<sup>101</sup> See § 2 of Independent Electoral Commission Act 150 of 1993 (limiting applicability of Act to first elections). The Act covered only the transitional election to allow a democratically elected body to make the final determination on whether to use an electoral commission. See Murphy et al., *supra* note 42, at 244; see also Interview with Judge Dennis Davis, *supra* note 54 (stating that Kempton Park Technical Committee felt permanent electoral commission needed to go "through a normal Parliamentary process, where the majority could put up its hand and sa[y], 'This is what we are going to do'").

<sup>102</sup> See Commonwealth Secretariat, *supra* note 88, at 5 (noting international trend toward using electoral commissions and suggesting their appropriateness where there is no democratic tradition); see also *supra* note 8 (listing transitional democracies that have employed electoral commissions).

<sup>103</sup> The ANC controlled 252 out of 400 seats in the National Assembly (NA). Stephen Rule, *Outcome of the Election*, in *Democracy South Africa: Evaluating the 1999 Election* 107, 110 (Yvonne Muthien ed., 1999).

<sup>104</sup> See Interview with Sheila Camerer, New National Party, Member of Parliament, in Cape Town, S. Afr. (Oct. 18, 2001) (transcript on file with the *New York University Law Review*) (describing NP view that electoral commission would serve as "bastion[]" for

grated the DHA and judiciary, those who ran the apartheid state continued to play an important role in the postapartheid government,<sup>105</sup> giving even the ANC good reason to distrust government-administered elections. Fourth, given the administrative chaos that had surrounded the 1994 election, it was clear that the country needed to improve its election-management skills, and it was felt that a cadre of experts might help achieve this goal.<sup>106</sup> Finally, the time-sensitive nature of election disputes necessitated a body capable of adjudicating election disputes expeditiously.<sup>107</sup>

All the major political parties embraced the idea of an electoral commission based on a roughly similar formula:<sup>108</sup> The commission

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maintenance of . . . minority rights"); see also *supra* note 39 (discussing role of electoral commissions as "democracy branch"). While the NP and other parties that were out of power now needed an electoral commission in the way the ANC did at transition, they held far less power in a democratically elected body than the out-of-power parties had held in the transitional discussions. See Interview with Richard Rosenthal, *supra* note 34 (describing "disproportionate" influence of small parties at transition).

<sup>105</sup> See Interview with Richard Rosenthal, *supra* note 34 (explaining that postapartheid South Africa needs to use apartheid officials because of shortage of qualified, untainted officials).

<sup>106</sup> An electoral commission could use its knowledge to run professional elections through utilizing provincial and local governments, civil society, and the political parties. See Indep. Electoral Comm'n, *supra* note 23, at 87 (positing permanent electoral agency as source of expertise for local authorities for their elections); Murphy, *supra* note 7, at 26 (suggesting that "peculiar exigencies of elections" require specialized agency of experts); see also *supra* notes 94-97.

<sup>107</sup> See, e.g., Commonwealth Secretariat, *supra* note 88, at 6 (seeing need for competent institution to handle time-sensitive electoral petitions). While speed might be affected by expedited procedural rules in ordinary courts, having an adjudicative body experienced in election law cases would advance that body's learning curve and improve the quality of election jurisprudence. See Note, Exclusive Jurisdiction of the Federal Courts in Private Civil Actions, 70 Harv. L. Rev. 509, 512 (1957) (maintaining that limiting number of courts handling type of dispute will increase experience and thus competence of hearing court).

<sup>108</sup> The ANC, NP, Democratic Party, and African Christian Democratic Party all made electoral-commission proposals roughly on the model ultimately adopted, although some included powers ultimately not granted to the EC. See South African Constitutional Assembly, Theme Committee 6.1: Electoral Commission 1 (no date) (draft ANC submission) (on file with Constitutional Assembly and the *New York University Law Review*) (advocating that electoral commission administer and supervise elections); South African Constitutional Assembly, Theme Committee 6.1, at 1-2 (no date) (submission of African Christian Democratic Party) (on file with Constitutional Assembly and the *New York University Law Review*) (promoting independent electoral commission that works closely with local government); South African Constitutional Assembly, Theme Committee Six, Subtheme Committee 6.1: Election Commission 2-4 (Nat'l Party preliminary submission) (1995) (on file with Constitutional Assembly and the *New York University Law Review*) (arguing for electoral commission directly accountable to Parliament whose job it is to "control and monitor the election process"); South African Constitutional Assembly, Subtheme Committee 6.1: Independent Electoral Commission, 1-2 (1995) (Democratic Party submission) (on file with Constitutional Assembly and the *New York University Law Review*) (supporting IEC with powers of "interpreting the electoral law and adopting regulations; designating and

would be a constitutionally enshrined<sup>109</sup> independent body responsible for elections at all levels of government.<sup>110</sup> For the NP and other minority parties, a constitutionally enshrined electoral commission provided a better guarantee of fair elections than a legislatively created commission, which could be scrapped at any time.<sup>111</sup> The ANC supported the commission based on its historical commitment to institutions essential to a democratic state.<sup>112</sup>

## 2. *EC Developed: Constitutional and Legal Framework*

The 1996 constitution creates the EC as a Chapter 9 "State Institution[ ] Supporting Constitutional Democracy."<sup>113</sup> While providing a bare legal underpinning for the EC, the constitution leaves most of the details to subsequent enabling legislation.<sup>114</sup>

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training of provincial election officials; certification of candidates and registered parties . . . ; investigating and adjudicating complaints").

<sup>109</sup> Under the transitional arrangements, the newly elected legislature acted as a constitutional assembly to draft a final constitution for postapartheid South Africa. See S. Afr. Const. (Constitution Act 200, 1993) § 68(1)-(2) (designating National Assembly and Senate, sitting jointly, as constitutional assembly). While this assembly was bound by some written "constitutional principles" negotiated in transition, id. sched. 4, an electoral commission was not included in those principles. See id. sched. 4, art. VIII (calling for "representative government embracing multi-party democracy, regular elections, universal adult suffrage, a common voters' roll, and, in general, proportional representation," but making no mention of electoral commission).

<sup>110</sup> See Commonwealth Secretariat, *supra* note 88, at 9 (observing "general acceptance" of above formula for final electoral commission).

<sup>111</sup> See Interview with Sheila Camerer, *supra* note 104 ("[I]t is better to have [the EC] as one of the . . . organization[s] supporting democracy than to have an ad hoc arrangement that's in the gift of the President or the hands of the people who put legislation before the Assembly.").

<sup>112</sup> See South African Constitutional Assembly, Theme Committee 6.1: Electoral Commission 1 (no date) (draft ANC submission) (on file with Constitutional Assembly and the *New York University Law Review*) (explaining that support for commission "emanate[d] from the values and principles underpinning democratic constitutionalism"). However, the ANC also might have been motivated by recognition that a credible electoral commission would bestow legitimacy upon elections, which their popularity dictated they would win. See *infra* text accompanying note 212.

<sup>113</sup> S. Afr. Const. (Constitution Act, 1996) ch. 9, § 181(1)(f). The other Chapter 9 institutions are: 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; and the Auditor-General. § 181(1)(a)-(e). While the drafters initially favored treating each of these institutions separately, they decided to treat the six bodies together to shorten an already long document. See Interview with Sheila Camerer, *supra* note 104 (describing blanket clauses on Chapter 9 institutions' independence as method of shortening constitution). One consequence of using the chapter structure was a change in the name of the institution from IEC to EC, with "independent" left in the covering clauses. See id. (noting it would have been tautology to have "independent" repeated in institutional name).

<sup>114</sup> See S. Afr. Const. (Constitution Act, 1996) ch. 9 § 190(2) ("The Electoral Commission has the additional powers and functions prescribed by national legislation.").

The constitution does specify three important features of the EC. First, section 190 of the constitution, which defines the functions of the EC, gives the body an executive, rather than judicial, role.<sup>115</sup> Unlike the IEC, which was charged with determining whether the election was free and fair, the EC's task is defined as "ensur[ing]" and "promoting" a free and fair election,<sup>116</sup> meaning that its focus is on the implementation of national election legislation.<sup>117</sup> Second, the constitution establishes the EC as an independent institution,<sup>118</sup> which is also accountable to the National Assembly.<sup>119</sup> The constitution does not explain what it means for an independent institution to be accountable to the legislature.<sup>120</sup> Third, sections 193 to 194 of the constitution give the majority party the power to appoint<sup>121</sup> and remove<sup>122</sup> commissioners.<sup>123</sup>

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<sup>115</sup> See § 190 (listing functions as managing elections, ensuring they are free and fair, and declaring results). Section 190 also allows national legislation to prescribe "additional powers and functions." § 190(2). By limiting the EC to an administrative role, the constitution avoids the problem of overbroad powers that plagued the IEC. See *supra* note 86 and accompanying text (mentioning IEC recommendation that future commission be limited to administration).

<sup>116</sup> § 190(1)(b).

<sup>117</sup> Thuetsad & Selch, *supra* note 2, at 14. See text accompanying note 90.

<sup>118</sup> § 181(2) ("These institutions are independent, and subject only to the Constitution and the law."). The guarantee of independence is supplemented by a mandate that other organs of the state assist and protect the independence of the Chapter 9 institutions and by a prohibition on interference with the institutions' work. § 181(3)-(4). Much of the language of section 181 is identical to that of section 165, which establishes the independence of the judiciary, with the exception of the provision making the commissions accountable to the National Assembly. See §§ 165, 181(5) (stating commissions are accountable to NA).

<sup>119</sup> § 181(5). Accountability to the legislature was not an issue for the IEC because there was no freely elected legislature that could hold it accountable.

<sup>120</sup> Not surprisingly, defining these terms becomes the source of much tension between the government and EC. See discussion *infra* Part II.B.

<sup>121</sup> S. Afr. Const. (Constitution Act, 1996) ch. 9, § 193(5)(b)(ii). A committee within the Assembly, composed proportionately of members from the parties represented within the NA, nominates candidates to the NA with civil-society input allowed on recommendations. § 193(5)(a), (6).

<sup>122</sup> § 194(2)(b). Removal of commissioners is allowed only with a finding of misconduct, incapacity, or incompetence by a proportionately representative NA committee, § 194(1)(a)-(b), followed by an NA resolution calling for removal supported by a majority of MPs. § 194(1)(c). Note that the National Assembly committee can only make a finding that the commissioner should be removed upon a recommendation from the Electoral Court. § 7(3)(a)(ii) of Electoral Commission Act 51 of 1996.

<sup>123</sup> Such an appointment and removal system opens the EC to accusations that commissioners are in fact party-political appointees. See *infra* notes 179-80 and accompanying text. By contrast, in practice, the commissioners on the IEC were selected based on the consensus of all the political parties involved in the transitional negotiations. See *supra* note 49 and accompanying text.

The 1996 Electoral Commission Act<sup>124</sup> (EC Act) fleshes out the details of EC functions and structure, using the outline given in the constitution. The Act confirms that the EC is primarily an executive body,<sup>125</sup> assigning it more administrative functions than those of the IEC,<sup>126</sup> and leaving tasks such as election monitoring outside the scope of EC duties.<sup>127</sup>

The EC Act also attempts to give meaning to the constitutional guarantee of independence by creating several safeguards to protect the EC from political encroachment. The ANC attempted to use the EC Act to counter perceptions created by the constitutional appointment process that commissioners would be party-political appointees.<sup>128</sup> To that end, the Act creates a panel composed of independent actors to nominate a list of potential commissioners for consideration by the National Assembly.<sup>129</sup> It also replicates many of the limitations on commissioner behavior found in the 1993 IEC Act.<sup>130</sup>

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<sup>124</sup> Electoral Commission Act 51 of 1996.

<sup>125</sup> Unlike the IEC, see *supra* note 52, the EC did not have direct command over the police and military to enforce its orders, relying instead on government cooperation. To that end, the South African Police Services, South African National Defense Force, and the National Intelligence Agency were brought together under the guidance of a Cabinet Task Group to work closely with the EC. See Electoral Comm'n of the Republic of S. Afr., Report: National and Provincial Elections, 2 June 1999, at 63 (1999).

<sup>126</sup> The most important of these administrative tasks, outside of those already specified in the constitution, are compiling a common national voters' roll and list of registered parties, developing and promoting knowledge of electoral expertise and technology, continuously reviewing electoral legislation and making recommendations therewith, and promoting voter education. See § 5 of Electoral Commission Act 51 of 1996. As an administrative agency, the EC has the power to cast regulations, § 23(1), although unlike under the 1993 Act scheme, such regulations do not supercede conflicting parliamentary legislation.

<sup>127</sup> Election monitoring was to be left largely to the political parties and civil society. See Indep. Electoral Comm'n, *supra* note 23, at 86 (recommending civil society and political parties monitor future elections). The EC was responsible for accrediting nonparty election observers based on criteria detailed in the Electoral Act of 1998. See § 84 of Electoral Act 73 of 1998 (specifying accreditation procedure). Party agents, or party representatives accredited to observe the election, also were regulated by the Electoral Act. See §§ 58 to 59 (listing requirements for party agents).

<sup>128</sup> See *infra* notes 179-80 and accompanying text.

<sup>129</sup> See § 6(3)-(4) of Electoral Commission Act 51 of 1996 (placing on panel President of Constitutional Court, representative of Human Rights Commission, representative of Commission on Gender Equality, and Public Protector). The panel was mandated to act with "transparency and openness" in its candidate selection. § 6(5). The panel's nominees could not include anyone with "a high party-political profile" because such people were barred from serving on the commission. § 6(2)(b).

<sup>130</sup> See *supra* note 50 and accompanying text. These restrictions include prohibitions on holding political office during one's term on the EC, a post-EC eighteen-month disqualification from serving as a member of Parliament, provincial legislature, or local government, and requirements that commissioners disclose conflicts of interest. §§ 9(2)(a), 9(2)(f), 10.

As an additional safeguard the EC Act grants the Commission fiscal independence.<sup>131</sup> The Act makes the EC-appointed chief electoral officer (CEO) the institution's "accounting officer."<sup>132</sup> As an accounting officer, the CEO is responsible for accounting for all moneys received and spent by the EC, a role normally fulfilled by a government minister.<sup>133</sup> The Act also specifies that EC financial records will be audited directly by the Auditor-General, a constitutionally independent officer,<sup>134</sup> as opposed to being reviewed by a government minister.<sup>135</sup>

The EC Act, like the IEC Act before it, generally left to the Commission the task of formulating a management plan that would improve the efficiency of election administration.<sup>136</sup> The Act did give the Commission the power to utilize public administration at any level of government to conduct elections.<sup>137</sup> This grant of power, along with the experience of 1994, encouraged the EC to choose a management model based on the principle of subsidiarity.<sup>138</sup>

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<sup>131</sup> While the 1993 IEC Act did the same, fiscal independence was not a major concern during the transition. See *supra* note 54 and accompanying text.

<sup>132</sup> § 12(2)(b) of Electoral Commission Act 51 of 1996.

<sup>133</sup> See §§ 38 to 40 of Public Finance Management Act 1 of 1999 (describing responsibilities of "accounting officers"). By shifting this power to an official within the EC, the 1996 Electoral Commission Act (EC Act) assures that no government minister is financially responsible for the EC.

<sup>134</sup> S. Afr. Const. (Constitution Act, 1996) ch. 9, § 181(1)(e) (establishing Auditor-General as independent Chapter 9 institution).

<sup>135</sup> § 13(3) of Electoral Commission Act 51 of 1996. These audited records are to be presented annually to the NA. § 14(1).

<sup>136</sup> See *supra* note 93 (discussing failure of IEC Act to specify management plan).

<sup>137</sup> See § 5(p). The EC used its ability to enlist local government to appoint town clerks as local election officers (LEOs) responsible for the election in their district. Electoral Comm'n of the Republic of S. Afr., *supra* note 137, at 12-13, 25. Supervision of the LEOs was entrusted to the provincial offices. See *id.* at 25 (describing duties of provincial EC offices). Giving municipal officers responsibility for running elections in their towns gave the EC access to municipal resources, *id.*, but at the cost of using potentially partisan election officers. See *infra* notes 181-83 and accompanying text (describing partisan behavior of LEOs).

<sup>138</sup> See *supra* note 96 and accompanying text (defining subsidiarity). The head office was to be involved in policymaking and strategic management, with 441 municipal offices conducting the actual voter registration and election activities under the supervision of nine provincial head offices. See Electoral Comm'n of the Republic of S. Afr., *supra* note 137, at 12 (describing management model). Party Liaison Committees also were set up on national, provincial, and local levels. See *id.* at 50 (noting that such committees existed in "all three spheres of government"). However, the limited capacity of local government left information technology, procurement, logistics, and financial administration under centralized control. *Id.* at 12.

### *B. Independent and Accountable?*

The EC Act fleshed out the constitution's mandate that the EC would be an independent body, but it remained largely silent on what the constitution meant when it said that the EC also would be accountable to the National Assembly.<sup>139</sup> An institution both independent from the executive and accountable to the NA had no precedent in South Africa<sup>140</sup> and was antithetical to a system in which the executive dominates the legislature.<sup>141</sup> This Part traces the tension between the government and the EC over the appropriate role of the executive and the legislature in overseeing independent institutions. These difficulties ended in a suit by the NP's new incarnation, the New National Party (NNP), requesting court relief over alleged executive encroachments into EC independence. This Part also details the Constitutional Court's attempt to resolve the boundaries between legitimate government action and unconstitutional interference.

#### *1. Turf Fight: The EC, the Executive, and Money*

From the appointment of the electoral commission on July 9, 1997, the EC and the government battled over the appropriate degree of fiscal autonomy owed to an independent institution.<sup>142</sup> The DHA

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<sup>139</sup> The only provision designed to ensure EC accountability to the National Assembly was section 14(1), which mandated the EC give the National Assembly audited financial statements once per year. § 14(1). The Act did, as in 1994, create an Electoral Court empowered to review all Commission decisions and to hear appeals from EC decisions insofar as those decisions require legal interpretation. § 20. The Electoral Court is composed of five members, three of whom (including the chair) are judges. The other two, who have no specified qualifications other than South African citizenship, are appointed by the President on the recommendation of the independent Judicial Service Commission. § 19(1). The Electoral Court sits alongside national courts and has power to determine the procedural rules to be used by the ordinary courts in hearing electoral petitions. § 20(4)(a). It also can determine which courts shall have jurisdiction to hear such disputes. § 20(4)(b). It was believed that the expedited procedural rules of the Electoral Court would lead litigants with time-sensitive electoral petitions to use it. See § 20(2)(c) (specifying that appeals shall be heard, considered, and decided within three days of granting appeal).

<sup>140</sup> See Aff. of Johann Christiaan Kriegler ¶ 31, *New Nat'l Party v. Gov't of the Republic of S. Afr.*, 1999 (5) BCLR 489 (CC) ("There is, after all, no South African precedent for an agency that is dependent upon the fiscus for funding, accountable to Parliament for its activities but independently responsible under the Constitution and the law, for the management of the very selection of government.").

<sup>141</sup> In South Africa's parliamentary system, the NA elects the President. S. Afr. Const. (Constitution Act, 1996) ch. 5, § 86(1). However, NA members are prohibited from floor-crossing, or voting against the positions of their party leadership; if they do so, except in a no-confidence vote, they lose their seats. This means that, once selected, the executive can pass whatever legislation it wishes, so long as it maintains the confidence of the legislature. The result is a very strong executive and weak legislature.

<sup>142</sup> See Aff. of Johann Christiaan Kriegler ¶ 36, *New Nat'l Party* (noting DHA's attempt to exercise control over EC beginning July 1997).



and the Department of State Expenditure (DSE), which is responsible for accounting for expenditure of funds for the government, believed that the DHA was politically accountable for the EC.<sup>143</sup> Political accountability, the government argued, meant that all EC expenditures needed to be accounted for by the DHA, making the EC a subdepartment of the DHA for fiscal purposes.<sup>144</sup> Because it held this view, the DSE refused to deal directly with the EC on budget matters,<sup>145</sup> resulting in the DHA and DSE making budgetary decisions without EC leadership present. Further, the DHA denied the EC the opportunity to defend, to the National Assembly, its budget requests for the 1997-1998 fiscal year.<sup>146</sup> As a result, the EC never received a financial allocation for that year.<sup>147</sup> Moreover, the DHA and DSE claimed the EC was subject to treasury regulations that allowed the DHA to impose conditions on the EC before disbursing funds.<sup>148</sup>

EC Chairman Johann Kriegler opposed the government's view that the DHA was financially accountable for the EC on both legal and policy grounds. As a legal matter, section 12(2)(b) of the Electoral Commission Act made the EC's CEO the EC's accounting of-

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<sup>143</sup> *New Nat'l Party*, 1999 (5) BCLR at 519 (quoting DHA Director General Albert Mokoena in his letter to Chairperson of Electoral Commission, opining that "[w]hen the Electoral Commission Act, 1996, was passed through . . . Parliament, the Minister of Home Affairs was in no way relinquished of his responsibility to be politically accountable for the new Commission . . .").

<sup>144</sup> See *id.* (quoting DHA Director General Mokoena claiming EC was DHA line item).

<sup>145</sup> See *Aff. of Johann Christiaan Kriegler* ¶ 39, *New Nat'l Party* (noting Department of State Expenditure (DSE)'s refusal to deal with EC directly).

<sup>146</sup> See *id.* ¶¶ 36, 40, 60 (detailing agreement between DHA and DSE, made without EC leaders present, denying EC opportunity to defend budget requests to National Assembly).

<sup>147</sup> *Id.* ¶¶ 53-60. The EC subsisted on less than 40 million Rand (R40 million) left over from the 1994 IEC. *Id.* ¶ 60.

<sup>148</sup> See *New Nat'l Party*, 1999 (5) BCLR at 521 (commenting that Minister of Finance, in affidavit, expressed bewilderment at EC's view that it was not bound by treasury instructions). Clearly uncertain about the legality of their position, the government introduced the Independent Electoral Commission Amendment Act in October 1997, which proposed to make the Minister of Home Affairs politically accountable for the EC and the Director General of Home Affairs the accounting officer. See *Aff. of Johann Christiaan Kriegler* ¶ 44, *New Nat'l Party* (describing introduction of bill "aimed at curtailing" EC's "financial, administrative and political independence"). After top EC leaders came out publicly against the legislation, the bill was withdrawn. See *id.* ¶ 45 (claiming amendment was shelved after "implacable" EC opposition); see also Marion Edmunds, *Who's in Charge of the Next Elections?*, at <http://www.mg.co.za/mg/news/98jan2/30jan-elections.html> (Jan. 30, 1998) (no longer accessible online) (on file with the *New York University School of Law*) ("If somebody other than the chief electoral officer is the accounting officer[ ], how can the IEC have that necessary independence?") (quoting EC Chief Electoral Officer (CEO), Mandla Mchunu).

ficer,<sup>149</sup> and hence, legally responsible to the Parliament for the EC's expenditure of government funds.<sup>150</sup> As a policy matter, giving DHA the ability to place conditions on EC receipt of money gave it unacceptable control over the independent entity.<sup>151</sup>

In addition to battling the government over financial reporting protocol, Kriegler fought against what he believed were unfair budgetary allocations for the EC.<sup>152</sup> After an initial agreement between the EC (acting through the DHA) and the DSE on a budget of 965 million Rand (R965 million) (\$196 million) for 1998-1999,<sup>153</sup> the actual allocation for 1998-1999 was R600 million (\$122 million),<sup>154</sup> R365 million (\$74 million) less than promised. The government then applied pressure on the EC to reformulate its election-administration plan to reflect lower levels of funding.<sup>155</sup> The EC responded by revamping the voter-registration process, using government civil servants and military personnel as volunteer registrars in lieu of a paid staff.<sup>156</sup> The EC also scrapped almost all of its voter-education efforts,<sup>157</sup> a move that was later widely blamed for the low level of registration among first-time voters.<sup>158</sup>

When Kriegler made public these encounters between the EC and the government, the NNP moved to amend an unrelated com-

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<sup>149</sup> § 12(2)(b) of Electoral Commission Act 51 of 1996. Kriegler based his opposition in part on legal advice from senior counsel. Aff. of Johann Christiaan Kriegler ¶ 38, *New Nat'l Party*.

<sup>150</sup> See § 40(e) of Public Finance Management Act 1 of 1999 (requiring accounting officers of constitutional institutions to submit to Parliament annual financial reports).

<sup>151</sup> See Aff. of Johann Christiaan Kriegler ¶ 38, *New Nat'l Party* (citing opposition to attempts by DHA to exercise control over EC).

<sup>152</sup> See id. ¶ 65 (asserting that EC could not perform given tasks on allocated funds).

<sup>153</sup> See id. ¶ 63 (detailing EC budget discussions with government, including agreement that 1998-1999 budget "could not reasonably be reduced below" R965 million).

<sup>154</sup> See id. ¶¶ 64, 67 (noting initial allocation for 1998-1999 of R500 million, with R100 million added later).

<sup>155</sup> See id. ¶¶ 69-74 (outlining government-influenced changes to voter registration plan).

<sup>156</sup> See id. ¶¶ 69-71 (discussing compromise with government over registration plan). The result was undertrained registration officials, which led to operational shortcomings including registration equipment failure and closed registration sites. Id. ¶ 72. The EC also was forced to scale back the time allocated for registration from sixteen days spread over three months, id. ¶ 73, to nine days per province, see Electoral Comm'n of the Republic of S. Afr., supra note 137, at 32-33 (remarking that registration was done in northern provinces from November 29 to 31, 1998, in southern provinces from December 3 to 5, 1998, and in all provinces from January 29 to 31 and March 5 to 7, 1999).

<sup>157</sup> See Aff. of Johann Christiaan Kriegler ¶ 68, *New Nat'l Party* (stating that with amount of money given, EC would have to eliminate all voter education).

<sup>158</sup> See Cecilia Russell, Kriegler's Election Warning, *The Star* (Johannesburg), Jan. 28, 1999, [http://www.iol.co.za/index.php?set\\_id=1&click\\_id=79&art\\_id=arch67513be5d332d3d1b](http://www.iol.co.za/index.php?set_id=1&click_id=79&art_id=arch67513be5d332d3d1b) (relating Kriegler's conviction that lack of voter education explains low voter-registration rate among first-time voters).

plaint in the Cape Town High Court to seek declaratory relief clarifying the relationship between the EC and the government.<sup>159</sup> This complaint formed the case *New National Party v. Government of the Republic of South Africa*, in which the Constitutional Court addressed the legality of government actions.<sup>160</sup> Kriegler's affidavit in the NNP case led to more public friction with the government.<sup>161</sup> Kriegler resigned on January 26, 1999.<sup>162</sup> In an interview given days afterward, Kriegler explained his dissatisfaction with perceived government interference, claiming that the EC had come to be regarded as a "government-funded agency to run elections, like a meat control board."<sup>163</sup> The government responded by accusing Kriegler of resisting legitimate attempts to control the expenditure of government funds.<sup>164</sup>

## 2. *NNP v. Government of South Africa*

The Constitutional Court ruled on this dispute between the government and the EC in *New National Party v. Government of the Republic of South Africa*.<sup>165</sup> In this decision, the court defined what it meant for the EC to be both independent and accountable to the National Assembly, holding that the EC was constitutionally entitled to two forms of independence.<sup>166</sup>

First, the court determined that the EC was entitled to financial independence, defined as an allocation of funding by the National As-

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<sup>159</sup> See *New Nat'l Party v. Govt. of the Republic of S. Afr.*, 1999 (5) BCLR 489 (CC) 514-15 (detailing amended complaint request). Note that the EC was not a party to the suit, owing to the "party-political implications of the case." Aff. of Johann Christiaan Kriegler ¶ 4, *New Nat'l Party*.

<sup>160</sup> See Part II.B.2 *infra*. The original suit claimed the government had violated South Africans' right to vote and right to free and fair elections by declaring that bar-coded identifications would be the only form accepted at registration. *New Nat'l Party*, 1999 (5) BCLR at 497. It also alleged that the government had interfered with EC independence by ignoring Commission advice to accept all legal identifications at registration. *Id.* at 510.

<sup>161</sup> A series of letters were exchanged between Kriegler and then Deputy President Thabo Mbeki, in which Kriegler asserted that EC independence had been compromised; Mbeki denied the charge. Bitter Kriegler-Mbeki Letters Made Public, *The Star* (Johannesburg), Jan. 29, 1999, [http://www.iol.co.za/index.php?set\\_id=1&click\\_id=13&art\\_id=arch4493be5d3159e01e](http://www.iol.co.za/index.php?set_id=1&click_id=13&art_id=arch4493be5d3159e01e).

<sup>162</sup> Tom Lodge & David Pottie, *Going, Going, Gone*, in *South African Election Update: November 1998-June 1999*, *supra* note 2, at 65, 65.

<sup>163</sup> See Russell, *supra* note 158 (quoting Kriegler). In the interview, Kriegler also stated his hope that his resignation would spark all election stakeholders to consider the reasons behind his resignation. *Id.*

<sup>164</sup> Kader Asmal, then Minister of Water Affairs and Forestry, described the DSE's insistence that the EC be subjected to Treasury Instruction K5 as "simply part of a rigorous process to safeguard public funds." Asmal, *supra* note 15. He added that the issue "has nothing to do with independence" and "everything to do with elementary accounting." *Id.*

<sup>165</sup> 1999 (5) BCLR 489 (CC).

<sup>166</sup> *Id.* at 524.

sembly based on its rational consideration of what is required by the EC, in light of other national interests.<sup>167</sup> As the EC was accountable to the NA itself, it should have been allowed to defend its budget requests in front of the NA without executive interference.<sup>168</sup>

Second, the court held that the EC also must be given administrative independence, which required it to have control over matters directly connected with the functions given to it by the constitution and the EC Act.<sup>169</sup> Accordingly, while the EC can enlist the executive's help in fulfilling its functions, the executive cannot direct the EC's actions, as it had in forcing the EC to alter its plans for registration and voter education.<sup>170</sup>

Given these constitutional directives, administrative practices that undermined EC independence would have to be changed.<sup>171</sup> The court held that treasury regulations that would give the DHA power to impose conditions on EC receipt of money fell into this category, as such rules unconstitutionally undermine financial and administrative independence.<sup>172</sup>

Despite these government encroachments on EC independence, the court concluded that the independence of Chapter 9 institutions was not in jeopardy. If the EC, rather than the NNP, had sought declaratory relief, the court, as guardian of EC independence, would

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<sup>167</sup> *Id.*

<sup>168</sup> *Id.* Thus, the refusal of the DSE or the DHA to allow the EC to speak at budgetary hearings was not in line with constitutional minimums. *Cf. id.* at 525 (concluding that DHA, DSE, and Minister of Finance "failed to appreciate the true import of the requirements of the Constitution and the Electoral Commission Act," which provide that EC is "accountable to the National Assembly and not the executive, and that all other organs of State must assist and protect it to ensure its independence and effectiveness").

<sup>169</sup> *Id.* at 524-25.

<sup>170</sup> *Id.* at 525 (holding that executive may not tell EC "how to conduct registration, whom to employ, and so on"); see also *supra* notes 156-58 and accompanying text (describing how executive interference changed EC's management plan).

<sup>171</sup> *Id.* at 518 (deciding that constitutional requirement of independence requires shelving conflicting regulations).

<sup>172</sup> *Id.* at 521-22. Judge Langa also offered a statutory basis for his determination that the EC is not a line-function of the DHA for accounting purposes. By definition, such a designation would apply only if the EC's accounting officer were the Director-General of Home Affairs, but the Electoral Commission Act makes clear this is not so. *Id.* at 521. The independence holding is essential to the decision because of the power vested in the Minister of Finance to change the accounting officer of a constitutional institution in "exceptional circumstances." See § 36(3) of Public Finance Management Act 1 of 1999. While the Act theoretically might empower the Finance Minister to replace the EC's CEO as accounting officer with an official from the DHA, such a move would be precluded on impairment of independence grounds.

have granted it.<sup>173</sup> However, the court ruled that the NNP, as an opposition party, lacked standing to pursue this constitutional claim.<sup>174</sup>

### *C. 1999 Elections: Improvements with Shortcomings*

The second postapartheid South African election was held on June 2, 1999, and by all accounts it was better organized than the transitional election. Exit polls showed that eighty-four percent of voters believed the 1999 elections were better arranged than those in 1994, with just under ten percent believing the opposite.<sup>175</sup> Likewise, opposition parties viewed the second elections as an improvement on the first.<sup>176</sup>

Improvement from the administrative breakdowns and fudged vote counts of 1994 did not mean that the 1999 elections were problem free. Two major problems pervaded the election process. First, opposition parties and their supporters accused the EC of systematic bias towards the ANC at all levels of the Commission. Second, the EC failed to implement its management plan adequately to devolve decisionmaking authority to the most local level possible, resulting in insufficient training and supervision of local officials and organizational inflexibility.

At the national level, the NNP in particular accused the EC of ruling for opposition parties on election disputes only when not doing

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<sup>173</sup> *New Nat'l Party*, 1999 (5) BCLR at 525; see also Dirk Kotzé, *From Transition to Consolidation: The 1999 South African General Election*, 39 Afr. Q. 40, 45 (1999) (arguing that judicial review of election disputes is important new principle established in South Africa). The court's view of itself as guardian of EC independence may not be surprising, given the identical constitutional language protecting the independence of the judiciary and Chapter 9 institutions. As section 165, establishing judiciary independence, and section 181, doing the same for Chapter 9 institutions, are worded nearly identically, interpretation of the independence guarantee of section 181 is likely to determine the breadth of the court's own independence.

<sup>174</sup> *New Nat'l Party*, 1999 (5) BCLR at 526 (ruling that standing rules need not be relaxed in absence of evidence that EC cannot assert its own rights).

<sup>175</sup> Michael O'Donovan, *Election Day Exit Poll*, in *Democracy South Africa: Evaluating the 1999 Election*, supra note 103, at 33, 41. Six percent of those surveyed did not know whether there was a difference between the two elections, while one percent found no difference. *Id.* It is worth considering, however, that exit polls by their definition exclude those most disenchanted with the election process—people who did not vote—and as a result tend to err on the side of positive judgment about an election. *Id.* at 41-42.

<sup>176</sup> The Democratic Party, which emerged as the largest opposition party, asserted that the 1999 elections were more free and fair than the transitional elections. Richard Humphries, *Assessing the 1999 Election Machinery: Views of Political Parties and Other Stakeholders*, in *Democracy South Africa: Evaluating the 1999 Election*, supra note 103, at 65, 68. One New National Party (NNP) official said there was little evidence of systematic vote-rigging in the 1999 election, in contrast to the 1994 contest, in which the NNP estimated that three million fraudulent votes had been cast. *Id.*

so would clearly run afoul of the constitution.<sup>177</sup> Opposition leaders argued that this national ANC bias stemmed from two causes. First, they claimed that the government pressured the Commission into favoring the ANC, pointing to government actions chastised by the Constitutional Court in the *New National Party* decision as evidence.<sup>178</sup> Second, opposition leaders argued that the ANC's constitutional power to appoint and remove commissioners had resulted in party-line appointments to the EC,<sup>179</sup> turning the commissioners into untrustworthy party-political figures.<sup>180</sup>

At the local level, opposition parties (and to a lesser extent, the ANC) charged that the local election officers (LEOs) hired by the EC were biased towards their respective political parties.<sup>181</sup> They based these claims on the use of local government officials as LEOs. Town councils elected on a partisan basis hired local government officials, usually because of shared political allegiances.<sup>182</sup> Because the ANC controls most town councils, most local officials were ANC supporters, creating a perceived tilt towards the ANC among LEOs.<sup>183</sup>

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<sup>177</sup> See Interview with Sheila Camerer, *supra* note 104 (commenting that commissioners "don't take decisions to favor the opposition parties unless they are absolutely forced to by the need to maintain a standard that is required by the Bill of Rights").

<sup>178</sup> The Azanian People's Organization (AZAPO), a left-wing opposition party, repeated Judge Kriegler's criticism that the involvement of the DHA and DSE in the budget allocation process undermined EC independence. See Humphries, *supra* note 176, at 69 (noting AZAPO criticism of DSE involvement in funding EC). Opposition members also expressed alarm at the DHA's perception that it was politically responsible for the EC. See Interview with Sheila Camerer, *supra* note 104 (rebuffing Minister of Home Affairs M. Buthelezi as "quite wrong" in his perception that EC was line-function of DHA).

<sup>179</sup> See Humphries, *supra* note 176, at 69 (quoting Pan African Congress belief that commissioners were "'party-political appointees under the guise of government appointees'" (no internal citation given)); Interview with Sheila Camerer, *supra* note 104 ("[N]obody gets appointed to [Chapter 9] jobs if they are not party supporters."); see also Jeremy Sarkin, *Innovations in the Interim and 1996 South African Constitutions*, Int'l Commission of Jurists Rev., June 1998, at 57, 76 (lamenting Chapter 9 appointment process as "disappointing" and insufficient to "safeguard against political appointments").

<sup>180</sup> AZAPO in particular questioned whether the EC as currently formulated could be trusted to take an independent and critical approach to election management. See Humphries, *supra* note 176, at 69 (remarking on AZAPO's advocacy of more independent financing for EC and AZAPO's claim that EC sought volunteers from ANC-aligned organizations).

<sup>181</sup> *Id.* As evidence of bias, opposition leaders pointed to many of these officials fraternizing with agents from their party on election day. See Meshack Khosa, *Voting in Action: Focus Group and Workshop Findings, in Democracy South Africa: Evaluating the 1999 Election*, *supra* note 103, at 83, 96 (noting local EC officials ate with party agents, creating impression they worked with that party). They also noted that one LEO allowed ANC supporters to place party stickers on queuing voters. Humphries, *supra* note 176, at 70.

<sup>182</sup> See Humphries, *supra* note 176, at 69 (explaining that because ANC controls majority of town councils, majority of LEOs were from ANC).

<sup>183</sup> See *id.* Similar concerns were voiced by AZAPO and the Freedom Alliance. *Id.* at 69.

Not surprisingly, the ANC was far less suspicious of EC motives, attributing EC deficiencies to a tight time frame rather than systemic bias.<sup>184</sup> This divide between the ANC and opposition parties as to the extent to which the EC maintained political independence was replicated among supporters of the various parties. A 1999 survey found that fifty-eight percent of whites, forty-seven percent of Indians, and thirty-five percent of "coloureds" (the South African term for mixed race) said they did not trust the EC, compared to just sixteen percent of blacks.<sup>185</sup> In a country where race is a close proxy for partisan allegiance,<sup>186</sup> such results suggest strong opposition concern about EC performance not shared by those victorious in the election.<sup>187</sup>

In addition to real- or perceived-bias problems, some of the administrative difficulties that plagued the 1994 election were still present. The EC had attempted to reduce election inefficiencies through implementation of a management plan based on the principle of subsidiarity, using provincial officers to supervise local officials.<sup>188</sup> In practice, however, it retained an extremely top-down management approach.<sup>189</sup> One consequence of centralized decisionmaking was that the EC did not empower provincial officers sufficiently to allow them

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<sup>184</sup> Id. at 68.

<sup>185</sup> See Linda Ensor, Whites, Indians Distrust Electoral Institutions, *Bus. Day* (Johannesburg), May 7, 1999, at 5.

<sup>186</sup> See ANC Narrowly Misses Two-Thirds Majority in South African Vote, at <http://www.cnn.com/WORLD/africa/9906/07/safrica.election/> (June 7, 1999) ("Unfortunately racial politics are still rife in South Africa. The ANC has too few whites and the Democratic Party has too few blacks.") (quoting Democratic Party Chairman Douglas Gibson).

<sup>187</sup> A March 1999 survey found that sixty-three percent of voters overall trusted the EC, compared to fifteen percent who distrusted the institution, and seventeen percent who were ambivalent. Johan Olivier, *The Independent Electoral Commission (IEC): The Quest for Free and Fair Elections*, in *Democracy South Africa: Evaluating the 1999 Election*, supra note 103, at 21, 30. The same survey found that seventy percent of voters believed the EC was neutral, while sixteen percent believed it favored a particular political party. Fourteen percent of respondents were unsure as to whether the EC was neutral. Id. at 30-31. Such results may confirm the theory that ANC supporters believe the EC is independent, while opposition supporters are less certain, as the percentage of those trusting the EC reflects the level of ANC support in the population. See Rule, supra note 103, at 110 (reporting that ANC received sixty-six percent of vote in 1999 election). But see O'Donovan, supra note 175, at 36 (noting exit poll where ninety-six percent believed that election on whole "was conducted freely and fairly").

<sup>188</sup> See Electoral Comm'n of the Republic of S. Afr., supra note 137, at 12 (asserting that role of provincial officers was to supervise local officials); see also supra note 138 (detailing management plan).

<sup>189</sup> See Humphries, supra note 176, at 70 (citing criticism from civil-society group that EC was too "top-down").

to take an effective supervisory role.<sup>190</sup> Not surprisingly, poorly trained LEOs remained the biggest source of election breakdowns.<sup>191</sup>

The failure to implement adequately the EC's management plan had two other troubling consequences. First, because local and provincial officials did not have the power to adapt national decisions to local conditions, the national election model was inflexible.<sup>192</sup> As a result, the EC could not utilize sufficiently those provincial civil-society organizations that lacked national counterparts, such as the Electoral Code of Conduct Observer (ECCO) Commission,<sup>193</sup> because they were not accounted for in the national plan.<sup>194</sup> Second, using a top-down management approach required good communication between different levels of the EC so that decisions made at the top could be implemented effectively at the local level. However, the national EC frequently failed to communicate decisions to provincial and local bodies, resulting in inconsistent action across provinces.<sup>195</sup>

Thus, the EC, while performing better than the IEC, still had serious problems with government interference, opposition perceptions of

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<sup>190</sup> See *id.* at 72-73 (discussing problems created by lack of provincial LEO discretion). Confusion about the responsibilities of officials at different levels of government generally impeded implementation of EC directives. See *id.* at 72 (highlighting conviction of EC official in Durban that roles of officials at different levels had been defined poorly).

<sup>191</sup> For example, at polling sites in the Northern Province and KwaZulu-Natal, polling officials allegedly failed to seal ballot boxes, removing a major safeguard against voter tampering. See *id.* at 70 (recounting reports by officials of one party that in KwaZulu-Natal ballot boxes were not sealed as required).

<sup>192</sup> Electoral Code of Conduct Observer Comm'n, Final Report 1999, at 25 (1999). In one example of inflexibility, the provincial branches of the EC could not change the structure or planned meeting times of Conflict Management Committees (CMCs), groups designed to solve conflicts between political parties outside formal channels, to accommodate local civil-society groups. See *id.* (describing Electoral Code of Conduct Observer (ECCO) impression that CMC structure was predetermined, with no real room for regional input); Humphries, *supra* note 176, at 70 (noting KwaZulu-Natal civil-society group could not attend CMC meetings).

<sup>193</sup> The ECCO Commission was a civil-society organization in KwaZulu-Natal Province set up by the Provincial Leadership Forum to monitor the implementation of the national electoral code of conduct in a province plagued by political violence. Electoral Code of Conduct Observer Comm'n, *supra* note 192, at 5.

<sup>194</sup> See *id.* at 25 (suggesting reason ECCO was not integrated fully in EC plan was because only Western Cape and KwaZulu-Natal had provincial election monitors, and EC plan was designed for majority of provinces). No mechanism was created to report back to provincial civil-society organizations on the results of their work. See *id.* at 25 (stating that at time of report, ECCO still did not know which complaints that it referred to CMCs had been mediated successfully).

<sup>195</sup> See Humphries, *supra* note 176, at 70 (quoting member of left-wing opposition group, whose views represented views of group generally, as saying "the left hand of the IEC did not seem to know what the right hand was doing" and noting black opposition party complaint that decisions taken at national level were not well-communicated to party's provincial officials (no internal citation given)).



bias, and election inefficiencies. The next Part will explore some suggestions for how these problems can be addressed in the next election.

### III

#### THE EC IN 2002 AND BEYOND

The last Part revealed two problems plaguing the EC that must be remedied for any future elections. First, as the experience in 1994 demonstrated, administrative breakdowns can be as corrosive to the credibility of election results as bias in election management.<sup>196</sup> While there were fewer technical glitches in the 1999 election, the continued failure to adequately train and supervise election personnel leaves open the possibility that election inefficiencies will cloud future elections.<sup>197</sup> Second, to the extent that the EC's constitutional mandate to administer free and fair elections requires institutional independence,<sup>198</sup> the growing opposition perception that the EC is biased towards the ANC must be counteracted.<sup>199</sup> The opposition perceived EC bias at both the national and local levels, and reforms must be targeted at ameliorating both perceptions. This Part suggests reforms, at both the national and local levels, designed to safeguard the EC's independence and to improve election efficiency.

#### A. National Level

At the national level, opposition criticism focused on efforts by the government to influence the EC improperly and the status of commissioners as de facto political appointees.<sup>200</sup> As to the former, the opposition must acknowledge that at least some of the executive's missteps corrected by the judiciary in *New National Party* stemmed from the government's misunderstanding of its role in the oversight of independent institutions.<sup>201</sup> With time, the executive will grow more comfortable working with an institution that has "no . . . precedent" in South Africa.<sup>202</sup> If the government continues to pressure the EC, the

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<sup>196</sup> See *supra* text accompanying note 93.

<sup>197</sup> See *supra* notes 188-91 and accompanying text.

<sup>198</sup> See *supra* note 14.

<sup>199</sup> Consider that even if ANC supporters seem likely to view any ANC victory as legitimate, the loss of a similar perception among opposition supporters can result in their withdrawal from the political process, slowing democratic consolidation. See Linz & Stepan, *supra* note 1, at 6 (emphasizing importance to democratic consolidation of "strong majority of public" committed to political processes).

<sup>200</sup> See *supra* notes 178-80 and accompanying text.

<sup>201</sup> See *supra* note 140 (noting lack of precedent for institution such as EC).

<sup>202</sup> See *Aff. of Johann Christiaan Kriegler* ¶ 31, *New Nat'l Party v. Gov't of the Republic of S. Afr.*, 1999 (5) BCLR 489 (CC) (arguing that misunderstandings over government's role were function of "uniqueness and novelty" of IEC position—both accountable to and independent from NA).

Constitutional Court's proclaimed willingness to act against government overreaching<sup>203</sup> should reassure opposition leaders that disputes will be resolved in line with constitutional minimums.

This solution is not complete for two reasons. First, because only the EC has standing to challenge government actions, court intervention is limited to cases where the EC brings the government to court.<sup>204</sup> Given the political consequences of an EC action against the government, such actions will be infrequent, meaning most government-EC clashes will occur and be resolved outside of the court's supervision.<sup>205</sup> Second, even when the court does act, the damage to EC independence and effectiveness may be done before the court can intervene.<sup>206</sup> One potential solution is that the EC issue a public report when it feels the government is impairing its ability to deliver free and fair elections.<sup>207</sup> Such a report could be issued before government action has adverse consequences on EC performance and would be less radical than court action.

Still, commissioners only would issue such a report if they were willing to confront the party that appointed them. Opposition leaders are unlikely to have confidence that commissioners will take such a step as long as they perceive the commissioners to be political appointees.<sup>208</sup> Raising the threshold of National Assembly support required for appointment and removal of commissioners from simple majority to the sixty-percent level required for some other independent institutions,<sup>209</sup> or to the seventy-five-percent level proposed by many of the political parties during the Constitutional Assembly,<sup>210</sup> would help

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<sup>203</sup> See *supra* note 172 and accompanying text.

<sup>204</sup> See *supra* note 174 and accompanying text.

<sup>205</sup> For example, in spite of the severe incursions into EC independence prior to the 1999 elections, the NNP, not the EC, brought suit against the government. See discussion *supra* Part II.B.2. Given that commissioners are *de facto* majority-party political appointees, they may be reluctant to challenge the actions of the government. See *supra* note 180 and accompanying text; see also Lodge & Pottie, *supra* note 162, at 67 (observing that one reason for Krieger resignation was failure of fellow commissioners to support him in battles with government).

<sup>206</sup> By the time the court acted in *New National Party*, the EC had already been forced to change its voter education and registration plans to suit the executive's demands. See *supra* notes 156-58 and accompanying text.

<sup>207</sup> The EC Act gives the EC the power to issue such a report. § 14(4) of Electoral Commission Act 51 of 1996. The political fallout to the ANC from such a report hopefully would restrain the executive from attempting to influence the EC.

<sup>208</sup> This skepticism may be well placed. For example, most of the EC was unwilling to support Chairman Krieger in his battles with the ANC government over institutional independence. See *supra* note 205.

<sup>209</sup> See S. Afr. Const. (Constitution Act, 1996) ch. 9, § 193(5)(b)(i) (requiring sixty-percent threshold for appointment of Auditor-General and Public Protector).

<sup>210</sup> See South African Constitutional Assembly, Theme Committee 6.1: Electoral Commission 1 (no date) (draft ANC submission) (on file with Constitutional Assembly and the

combat this perception. A higher threshold would require cross-party support for commissioners, ensuring greater opposition membership on the EC.

Such a change to the appointment process presupposes a willingness by parties to compromise first on constitutional change and then on the selection of commissioners.<sup>211</sup> These compromises may be less difficult than they may appear. For the ANC, whose victory at the polls is guaranteed by the high level of support the party enjoys among the people, fully safeguarding EC independence is politically positive.<sup>212</sup> Increasing opposition membership on the EC will eliminate an avenue of opposition criticism of election results. Opposition leaders who support a higher threshold have signaled their recognition that even under such a system, no commissioner opposed by the ANC would be selected.<sup>213</sup>

Ameliorating election inefficiencies, while largely attributable to the incompetence of local officials, will also require national action in the form of aggressively implementing a management plan based on the principle of subsidiarity.<sup>214</sup> Such a plan should empower provincial officials sufficiently to allow them to supervise LEOs effectively.<sup>215</sup> Provincial empowerment is also critical in order to permit regional variations in the national election-management plan, which would allow the EC to take better advantage of provincial or regional civil-society organizations, like the ECCO, that have been underutilized in the past.<sup>216</sup> Implementing this type of plan requires an improvement in communication between levels of the EC,<sup>217</sup> encouraging the exchange of ideas necessary for successful devolution of decisionmaking authority.

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*New York University Law Review*); South African Constitutional Assembly, Theme Committee Six, Subtheme Committee 6.1: Election Commission 1 (Nat'l Party preliminary submission) (1995) (on file with Constitutional Assembly and the *New York University Law Review*).

<sup>211</sup> An amendment of the South African Constitution requires a two-thirds vote in the National Assembly, S. Afr. Const. (Constitution Act, 1996) ch. 4, § 74(3)(a), which cannot be attained without ANC support.

<sup>212</sup> Cf. Interview with Sheila Camerer, *supra* note 104, (expressing her surprise that ANC does not view EC independence as political plus). Political-process-lockup theory, however, suggests that the ANC's incentive to undermine the EC was the maintenance of its electoral advantage, an incentive that remains today. See *supra* note 36.

<sup>213</sup> See Interview with Sheila Camerer, *supra* note 104 (accepting that even under higher-threshold model, no commission candidate opposed by ANC could be appointed).

<sup>214</sup> See *supra* notes 93, 93, 138, 188-91 and accompanying text (discussing efforts by IEC and then EC to implement such plan).

<sup>215</sup> See *supra* note 190 and accompanying text (noting failure of provincial officers to supervise LEOs adequately in 1999).

<sup>216</sup> See *supra* note 192-94 and accompanying text.

<sup>217</sup> See *supra* note 195 (addressing communication difficulties in 1999).

### *B. Reforms at the Local Level*

At the local level, both the ANC and the opposition have criticized the partisanship of local government officials who serve as LEOs.<sup>218</sup> Some experts have suggested that the best way to ameliorate this problem is to return election administration to the government, reconfiguring the EC as a monitoring body.<sup>219</sup> Advocates of such a change can claim two advantages. First, since local government officials cannot be replaced as LEOs and given the shortage of people with adequate managerial and administrative skill in many municipalities, the administration of elections will have partisan elements.<sup>220</sup> Therefore, these commentators suggest the EC should recognize this fact and include election management within the normal duties of local government employees.<sup>221</sup> This reallocation of duties would free the EC to serve as a watchdog body, whose central competence would be rooting out bias,<sup>222</sup> with the DHA left to supervise directly local officials. Second, once the EC was freed from the responsibility of administering elections, it could focus on voter education, electoral research, prosecution of electoral violations in the courts, and ultimately certifying the election as free and fair, some of which the EC has shortchanged in the past.<sup>223</sup>

Such a reassignment of duties would run into severe problems. Certification of an election as free and fair, separate from adjudication of claims brought by stakeholders, faces the difficulty that there would be no accepted international or South African standards defining "free and fair."<sup>224</sup> This problem led the IEC to recommend that a

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<sup>218</sup> See *supra* note 181 and accompanying text.

<sup>219</sup> See Tom Lodge, *What Sort of IEC Can We Afford?*, in *South African Election Update: November 1998-June 1999*, *supra* note 2, at 68, 69 (arguing for election administration to be relocated to government with EC as monitoring body); Interview with Judge Dennis Davis, *supra* note 54 (same).

<sup>220</sup> See Lodge, *supra* note 219, at 68-69 (remarking that employing town officials is not to save money, but because no other alternative exists).

<sup>221</sup> See *id.* at 69.

<sup>222</sup> See Interview with Judge Dennis Davis, *supra* note 54 (arguing EC's primary ability is as a "monitoring body"). Judge Davis, member of the Kempton Park Technical Committee, which drafted the 1993 IEC Act, asserts that such an EC would enforce its monitoring duties through its power to deny certification of an election as free and fair. *Id.*

<sup>223</sup> For example, post-election analysis widely blamed the EC for not doing a better job at voter education. See Yvonne Muthien & Meshack Khosa, *Conclusion: Exercising Democratic Citizenship Through Voting: Policy Implications*, in *Democracy South Africa: Evaluating the 1999 Election*, *supra* note 103, at 129, 131-32 (suggesting better-funded voter education should be central to EC tasks); David Pottie, *The IEC Takes Stock*, in *South African Election Update: November 1998-June 1999*, *supra* note 2, at 323, 323 (opining that late promulgation of regulations undermined voter education effort).

<sup>224</sup> See *supra* notes 88-89 and accompanying text.

future commission not take such a role.<sup>225</sup> Even if some such standards could be devised, however, it seems unlikely that the DHA would be able to serve as any check at all on LEO partisan behavior. The line between the state and the party of government has been blurred by a series of one-party dominated governments, making it unlikely that DHA officials could separate their role as state actors from their partisan obligations.<sup>226</sup>

Improvement in the training of LEOs may prove the best way to turn local government officials into professional administrators; increased skill levels will result in reduced inefficiencies.<sup>227</sup> Improving training requires several steps. First, a national training forum should be established to ensure uniform standards in staff training.<sup>228</sup> Second, creation of an election guide or manual as a repository of election expertise would assist in such efforts. Since elections are held only once in five years, such a manual could compensate for officials lost through personnel changes. Third, training must include performance evaluations to weed out bad performers. For such evaluations to work, the LEOs must be paid by the EC, allowing the EC to hold local officials accountable.<sup>229</sup>

## CONCLUSION

A critical evaluation of South Africa's experience with electoral commissions can provide guidance to the country moving forward, as

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<sup>225</sup> *Id.*

<sup>226</sup> Some commentators have maintained that the ANC deliberately has blurred the line between state and party by making political appointments to the civil service, independent state bodies, and local government. See Hermann Giliomee et al., *Dominant Party Rule, Opposition Parties and Minorities in South Africa*, in *Opposition and Democracy in South Africa* 161, 172 (Roger Southall ed., 2001) (outlining ANC political appointments to independent statutory bodies and local government administration). These party figures are bound by the ANC doctrine of democratic centralism, which dictates that all party members, no matter where they serve, remain under the direction of the central party leadership. *Id.* Accordingly, some argue, real decisionmaking authority in state institutions lies with the ANC party leadership. See *id.* at 173 (commenting on blurred distinction between party and state); see also Murphy, *supra* note 7, at 25 (observing blurred line between party and government in apartheid South Africa, in view of disenfranchised majority).

<sup>227</sup> See *supra* notes 68-70, 191 and accompanying text (discussing problems arising from lack of skilled local officials).

<sup>228</sup> See Pottie, *supra* note 223, at 324 (detailing post-election suggestions for improvement of EC staff).

<sup>229</sup> This was the management model Kriegler sought to employ before interference from the executive. The EC planned to use registration as "dress rehearsals" for the election to allow EC to gauge staff performance, eliminate weak performers, and strengthen the skills of those who performed well, in the hope of ultimately improving administrative efficiency. *Aff. of Johann Christiaan Kriegler* ¶ 74, *New Nat'l Party v. Gov't of the Republic of S. Afr.*, 1999 (5) BCLR 489 (CC).

well as to other transitional democracies, on how best to structure their election administration. An easy inference to draw from the fact that postapartheid elections have produced winners considered legitimate by all segments of society is that this was due to the credible management of the electoral process by South Africa's electoral commissions. However, the reality is that the relatively low expectations of a population happy to be free of apartheid have led the people to forgive large-scale process failures.

That forbearance is already waning among minority voters<sup>230</sup> and cannot be expected to last forever even among black voters. The central challenge for the Electoral Commission will be to meet rising expectations. This Note has argued that to do so, the EC must address opposition perceptions that it is biased towards the ruling party before those perceptions begin to undermine the credibility of ANC victories. In addition to safeguarding independence, the EC also must improve its competency in administering elections to minimize the risk of future large-scale breakdowns creating a crisis of confidence in election results. Instituting such reforms will be essential if the EC is to continue to play an important role in legitimizing election results and furthering democratic consolidation.

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<sup>230</sup> See *supra* note 185 and accompanying text.