I. Introduction
Democratic governments are defined as being accountable to the electorate. But that might not be sufficient for a well functioning democracy; they must also be subject to restraint and oversight by other public agencies: the idea of checks and balances.\(^1\) It is not enough that citizens control the state (vertical accountability). The state organs must also mutually control themselves (horizontal accountability).\(^2\) But even that might not be enough. A further accountability dimension for governments has become ever more important: the international one. In the context of elections that means mainly election monitoring by international observer missions.

Electoral Management Bodies (EMBs)\(^3\) are usually not at the forefront of the discussion on democracy, but – as I intend to show – can become crucial as an institution when talking about democracy in the sense of free and fair elections. Whereas independent central banks or audit courts control special issue areas of politics, electoral commissions control the moment of the set-up of government – the election; a crucial moment as the *de facto* accountability of governments depends on it. Unfair elections or electoral set-ups destroy the roots of

\(^1\) Early on (Madison 1788).

\(^2\) On notion vertical and horizontal notions of accountability, see (Diamond/Plattner/Schedler 1999). Whereas vertical accountability refers to the control of government through mass media, civil society and citizens, horizontal accountability refers to the capacity of state institutions to check abuses by other public agencies and branches of government.

\(^3\) Those agencies take different names, have a variety of shapes and sizes, with a wide range of titles to match, which include ‘Election Commission’, ‘Department of Elections’, ‘Electoral Council’, ‘Election Unit’, or ‘Electoral Board’ or ‘electoral management body’ (EMB). See (International Institute for Democracy and Electoral Assistance 2006), p. 5.
accountability. If the re-election constraint on politicians is the most powerful mechanism for re-alignment of the citizens-principal with the politicians-agents interests, the moment of re-election is also the most sensitive moment as potential conflict of interests of the agent is at its peak: on the one hand she has stand for re-election in order to get legitimacy by holding free and fair elections, on the other hand, there is a strong incentive to rig elections. Elections are a necessary condition but may not be sufficient for making governments accountable. Nevertheless, this necessary condition for accountability has often been somehow neglected. Accountability of governments and parliaments through a check on the electoral process can be – and have been - viewed upon from different angles but there has been no connecting discussion and to my knowledge never a cross-country empirical testing. This paper is meant bring together different strands of literature and built a conceptual framework for testing the effectiveness of the institutional set-up of EMBs and international observer missions on levels of democracy. The detailed legal data is currently collected for most of the countries.

One strand of (mainly economic) literature is concerned with the delegation of powers on certain issue areas to either the international level or to independent agencies within a nation-state in order to mitigate commitment problems of the government. Whereas the discussion on the proliferation of independent administrative agencies (IAAs) on certain issue areas, such as central banks, audit courts, anti-trust bodies, anti-corruption commissions and other economic regulatory agencies has been proliferating, the institutional set-up of electoral commissions or EMBs has been neglected, though EMBs are one kind of IAAs. Especially the economic literature has not used that variable as an exogenous one to explain levels of democracy.

Rational choice political science literature which has also been also influential for the economic literature on IAAs, has advanced the idea that a stable democracy depends on a self-enforcing equilibrium. The fundamental question asked by this literature concerns democratic stability. Why should an incumbent party or government that has lost an election accept its loss instead of subverting the democratic process in order to retain power? The answer is that sustaining democracy requires it to be self-enforcing: it must be in the interest of the incumbents to accept their loss. That is only the case if today’s losers find that the expected gain from accepting the loss exceeds those from subverting the election. Though institutions play a role in the pay-offs, the crucial variable is the citizens’ consensus to react

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4 Here, different conceptions, namely thin and thick notions of democracy come to the fore, see for the former (Dahl 1971). In this paper, that discussion is not of relevance as EMBs and their role in securing legitimate elections are in any case part of every thin and thick notion of democracy.

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6 Seminal (Weingast 1997) who reveals through game theoretic analysis the approach taken in (Przeworski 1991). This approach will also be followed here.

7 (Weingast 1997), p. 255.
against the incumbents if they attempt to rig an election. That, in turn, is a function of overcoming a coordination dilemma within the citizenry which depends much on the de facto underlying structures of a jurisdiction, including distribution of wealth, religious, linguistic and ethnic fractionalization, etc. Though institutions matter in that frame, EMBs get no special attention, especially not the institutional details.

Another strand of political science literature has been preoccupied with EMBs but rather in a qualitative manner or with very few countries being compared. Large scale panel studies are inexistent to my knowledge. Especially NGOs and IGOs concerned with democracy and human rights, as, e.g. the UN, the EU, and the OSCE have been collecting detailed information on the electoral process and the institutional set-up of EMBs as well as on single elections but lack theoretical background; certainly from a rational-choice perspective as well as empirical testing.

With regard to IAAs, conflicting goals – democracy/legitimacy on the one hand and interest-free independent regulation on the other hand – are frequently discussed. With regard to electoral commissions, those goals are not conflicting as their primary raison d’être is to enhance democracy. That would ideally mean that they should be as independent as possible from the government. Nevertheless, independence from government does not mean unaccountability. Independence and accountability may conflict and institutional solutions have to be found for this conflict. Furthermore, there are some special characteristics of EMBs which do not allow an easy comparison to IAAs in the sphere of economic regulation. Usually IAAs have a defined and narrow task tailored to avoid certain well known conflicts of interest or the problems involved with time inconsistent preferences. Once the relevant problem is identified, one finds quite similar institutional provisions in different countries (e.g. central bank independence which varies only minimally from an institutional point of view as their task is usually narrowly defined). EMBs do not lend themselves so easily to institutional comparison as their set-up and their competences for the electoral process vary considerably. Furthermore, the effect of legal variables often can cut both ways, depending on the political underlying circumstances in the respective country. In spite of those difficulties in analyzing EMBs compared to other IAAs, an attempt will be made for systematic analysis,

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9 Similarly, (Mozaffar/Schedler 2002), p. 6: „neglected variable“; (Pastor 1999a), p. 2 „Scholars have sifted through dozens of variables to try to identify the causes and the consequences of democracy, but one variable that has been missing is electoral administration.“
10 The ACE Project is a common undertaking of NGOS and IGOs and provides ample information and advice on elections. Especially IDEA is very active in publications.
11 With regard to independence and accountability of the judiciary, (Voigt 2008) argues that they are complementary and not competing as often argued.
taking up the most important legal variables. The reader is asked to keep in mind that there are many more (legal) dimensions, necessarily left out of this analysis.

The main argument of this paper is that the institutional set-up of EMBs, i.e. their independence from government, is one important variable influencing the level of democracy in a country as it might alter the game for the incumbents tempted to rig an election. Furthermore, EMBs might help to overcome the coordination problem of citizens, mainly due to informational policy. This article will first outline relevant legal variables of IAAs in the abstract while connecting the discussion to a more legal comparatist approach of EMBs which highlights the institutional diversity of EMBs. This allows me to show, first, that independence is not a binary variable but is to be found on a continuum and, second, that means of accountability exist (II.). In the next chapter, some testable hypotheses as to which set-up will enhance democracy most will be generated (III.). The third, international dimension of election monitoring is discussed in the following chapter (IV). The last chapter concludes (V.).

II. Outline of the Institutional Set-Up of IAAs and EMBs

No consented extensive and clear-cut definition of IAAs exists and the same applies for the independence of EMBs. Usually, the main criterion for calling an agency independent is the freedom from direct authority exercised by the executive branch, but the degree of independence varies substantially between different (kind of) IAAs. IAAs as well as EMBs have differing legal structures but the legal structure alone allows only an incomplete evaluation of the independence of an agency. Rather, drawing a distinction between independent and non-independent administrative agencies and EMBs respectively is a multi-dimensional task which allows only for a classification on a continuum, the most important variables being the possibility of governmental instructions, the position of the head of the IAA, as well as the scope of competences of the EMB in our case. One may for this purpose distinguish institutional, personal, financial and functional independence. Furthermore, accountability of EMBs through judicial review is shortly discussed. The reader is asked to keep in mind that there is a broad variety of EMBs which do not lend themselves to an unequivocal legal mapping as the legal variables interact in manifold ways. Also, sometimes there is more than one body dealing with electoral tasks.

12 For a more thorough discussion on different types of IAAs, see (Aaken 2005). See for this distinction referring to central banks, (Dutzler 2002), p. 496 with further references. See also (Arnone/Laurens/Segalotto/Sommer 2007), p. 6 et seq. for the assessment of autonomous central banks. For independent courts, see (Salzberger 1993), p. 352 who distinguishes substantive and structural independence. This article focuses on structural independence, that is, the institutional arrangements which enable the existence of substantive independence.
1. Institutional Independence

The International Institute for Democracy and Electoral Assistance (IDEA) distinguishes three basic models of setting up EMBs: the independent, the governmental and the mixed or semi-autonomous models, basing the classification mainly on the legal set-up. The crucial criteria for distinguishing an independent from a governmental model are the legal set-up as well as the non-accountability to the executive branch, though the EMB may be accountable to the legislature, the judiciary, or the head of state. Institutional independence refers mainly to the legal form taken by the agency. Legal independence allows an IAA to sue and to be sued. Usually, if the body is legally independent from the government, it excludes the right of instructions by the ministry. The governmental model is characterized by the fact that there is no independent body but the electoral tasks are fulfilled by the ministries, usually the Ministry of Interior. This model highlights that much of the electoral process consists of classical administrative tasks. On the national level, there is usually no special personnel other than the usual civil servants answerable to a cabinet minister. The governmental model includes the right of instruction by the government. Those instructions can either concern the formulation of by-laws and general instructions or also specific instructions, which in turn may allow only for questions of legality or also questions of expediency. Under the mixed model, the policy functions (which may be law-making) are separated from the administrative or implementing function. Whereas the policy functions follow the independent model, the administrative functions follows the governmental model. Under this model, elections are organized by the component governmental EMB, with some level of oversight provided by the component independent EMB. In some cases, the independent part of the EMB is little more than a formalized observation operation, although this version is dying out, having been abandoned for example in Senegal. In other cases, the component independent EMB has a role to supervise and verify the implementation of electoral events by the component governmental EMB. Furthermore, there may be even more agencies involved, e.g. a

13 In total, 119 countries have chosen this model of EMBs, e.g. Armenia, Australia, Bosnia and Herzegovina, Burkina Faso, Canada, Costa Rica, Estonia, Georgia, India, Indonesia, Liberia, Mauritius, Nigeria, Poland, South Africa, Thailand and Uruguay. (International Institute for Democracy and Electoral Assistance 2006), p. 304, Annex A counts 214 countries and territories.

14 (International Institute for Democracy and Electoral Assistance 2006), p. 7. Denmark, New Zealand, Singapore, Switzerland, Tunisia, the UK (for elections but not referendums) and the United States follow this model. In Sweden, Switzerland, the UK and the United States, elections are implemented by local authorities. In Sweden and Switzerland, the central EMB assumes a policy coordinating role.

15 (International Institute for Democracy and Electoral Assistance 2006), p. 8. It is used in France, Japan, Spain and many former French colonies, especially in West Africa, for example Mali, Senegal and Togo.
Constitutional Council engaged in the tabulation and declaration of results. More than in the „pure“ models, the variables may lend themselves even less for classification as policy competences, budgetary and personal independence are intermingled. This creates a problem not only for academics but also seems to lead to frictions during elections as competences are unclear.

2. Personal Independence
Governmental EMBs have no personal independence as members of the EMB are part of the government. But for non-governmental EMBs, the extent of personal independence becomes crucial. Personal independence refers to the way the highest members of the body are appointed, their status and whether and under what circumstances they can be removed. Here, one finds the usual safeguards variables: are appointments for one time only or may there be re-appointment, how are the heads protected against arbitrary removal, do they have the usual immunity of judges, etc. Usually, members of an independent EMB cannot serve in the executive branch at the same time. Furthermore, members of an EMB can either be experts or they can be partisan. They can be nominated by the electorate through an open procedure or they may be nominated by parties or governmental, judicial or legislative organs.

3. Financial Independence
Financial independence refers to the ability of own accounts (usually in combination with legal independence), as well as the question of who decides on the budget. A legally independent body usually also has its own budget, whereas an EMB which forms part of the government usually gets its funds out of the general budget e.g. of the ministry of interior, subject to allocative decisions by the government. The budget falls under the budget of the ministry or local administrations. If the budget of an IAA (or EMB) is decided by government and not by parliament, that makes it easier to push IAAs in the desired direction with a predictable result on its de facto independence. The question of who allocates the budget thus may become crucial for de facto independence. Furthermore, only if there is a sufficient budget to carry out the tasks allocated to the EMB, can one talk of de facto independence. Some EMBs have the possibility of accepting funds also from international organizations or NGOs – a possibility making them more independent from the incumbent government.

4. Functional independence

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16 (International Institute for Democracy and Electoral Assistance 2006), P. 8.
Functional independence embraces the question if the agency is able to set and specify its own goals for IAAs (in the economic sphere). This criterion is usually used for central banks but in our context the competences of an EMB are more important. Those competences can be defined as rule-making, rule-application and rule-adjudication competences and may thus vary broadly. Can the EMB e.g. take decisions on the passive right to vote, does it have competence for the alignment of electoral districts etc. or other laws regulating an election. IDEA defines as their core or essential tasks the determination who is eligible to vote; receiving and validating the nominations of electoral participants (for elections, political parties and/or candidates); conducting polling; counting and tabulating the votes. Additionally, EMBs may have other tasks allocated such as the conduct of voter registration, boundary delimitation, voter education and information, media monitoring and electoral dispute resolution. One might view the core tasks as predominantly administrative or technical tasks but that would be an underestimation of the potential to manipulate elections. Guayana, e.g., still registered the deceased dictator on the voters list.

Depending on the competences allocated to an EMB, the other variables on independence become more important. If, e.g., the EMB can decide on the boundaries of electoral districts (rule-making), this requires a more independent EMB than if the competences are confined to voter registration (rule-application). Independent EMBs usually fulfill implementation tasks as well as policy tasks.

5. Accountability of EMBs

Accountability can take on many forms: it may be asked to whom (government, parliament, courts, the electorate, parties) an actor is accountable and for what kind of issues and information. Here, I will concentrate on the accountability through court review as this kind of accountability infringes least on independence. Therefore, another important variable is the possibility of judicial review of decisions taken by the EMB. There are several possibilities: either there is no possibility of review whatsoever of any decision taken, there is only internal review, or there is judicial review. In all cases, much depends on who is allowed to lodge a complaint. Standing can be restricted to candidates, parties, or some organ of the state. On the other hand, it could be extended to all citizens eligible to vote. The standing provisions for either a complaint at the EMB or a court have a gate-keeping function that

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18 (Dutzler 2002).
19 (International Institute for Democracy and Electoral Assistance 2006), p. 5 et seq.
21 Accountability does not necessarily mean accountability to the government. Rather, an EMB may be accountable to courts only. Then, independence of courts become important.
might well make a difference on accountability grounds. This implies that the factual degree of accountability of the EMB depends on the independence of the courts. Indeed, even if there were a *de facto* independent EMB which might be overturned by a court, all depends on the latter’s *de jure* and *de facto* independence. Thus, if the judicial system is biased and ineffective, it may actually subvert progress achieved in the impartial and professional administration of elections.\textsuperscript{22}

Generally speaking, one can place EMBs in a framework of powers, which is illustrated by the following figure:

\textsuperscript{22} See (Eisenstadt 2002) for electoral courts as well as (Feld/Voigt 2003) for normal courts.
EMBs within the network of state powers (Fig. 1)
IDEA’s international 2006 survey of electoral management in 214 countries and territories worldwide showed that 55% followed the Independent Model, 26% the Governmental Model and 15% the Mixed Model.\(^{23}\) The first puzzling quick overlook on the set-up of EMBs finds that EMBs in developed countries and democracies are usually dependent or form part of the government respectively. Out of the 30 OECD countries, only 6 have an independent EMB, whereas 8 have chosen the mixed model and 16 have the governmental model.\(^{24}\) While IAAs, e.g. independent central banks, have been the invention of the developed countries to be exported to other countries later on, there appears to be no such trend-setting in the sphere of EMBs. A second look might give an explanation: elections are not only a highly politicized exercise but also a formidable administrative task. Countries which have a tradition of a reliable and neutral bureaucracy dealing with core tasks such as voter registration might not need any independent EMB but can leave those tasks e.g. with the Ministry of Interior under the supervision of their courts.\(^{25}\) Separating the political from the technical is a difficult task and at the forefront for making an election trustworthy. If elections are one mode of “institutionalizing uncertainty”\(^ {26}\), that is, there must be uncertainty on who gets elected, this substantive uncertainty has to be coupled with procedural and administrative legitimacy and certainty in order to have a free and fair election. This “defines the central task of electoral governance: organizing electoral uncertainty by providing institutional certainty.”\(^ {27}\) We therefore find a different pattern compared to other IAAs in the economic regulation sphere. There, the main rationale for making agencies independent is the time inconsistency problem of politicians as well as potential conflict of interests (e.g. in audit courts, and data protection officers). In EMBs we find a further rationale: transparency on the division between deliberate electoral fraud and mere inept administration of it. Independent EMBs are less needed in countries where the administration is trusted, neutral and efficient. In established democracies, elections tend to be routine events, usually producing well accepted results, even if there is only a narrow margin. A completely flawless election does not always take place; there will always be a margin of error, inaccuracies in counting, or incomplete voter registers. As long as these errors occur randomly and do not determine the electoral result, trust in the electoral procedure will not suffer. This is not meant to imply that administrative problems in developed countries do not exist and that trust in the fairness of the system may not be

\(^{23}\) The remaining 4 per cent corresponds to countries that do not hold national-level elections.

\(^{24}\) Those categorizations follow the IDEA categorization.

\(^{25}\) Cf. (Mozaffar/Schedler 2002), p. 15.


\(^{27}\) (Mozaffar/Schedler 2002), p. 11.
shattered, especially if outcomes are tight\textsuperscript{28} but the scale of administrative potential for fraud is usually smaller in established democracies with free media and trusted administrations. Thus, the informational problem for the citizenry to know whether there has been electoral fraud or not is smaller in countries with a trusted administration and/or free media. If this informational hurdle is one hurdle for the coordination dilemma of citizens to punish politicians rigging an election, trust-generating independent EMBs are a helpful device for stabilizing a democracy.

III. Does the Set-Up Influence the Level of Democracy? Some Hypotheses

The level of democracy has been attributed to many factors, from economic development to colonial history and institutional variables.\textsuperscript{29} Nevertheless, the institutional variable of the set-up of EMBs has been neglected and has never, to my knowledge, been tested on a broad cross-country data set, although data is available on the level of democracy as well as a rough textured indicator of IDEA on the independence of EMBs. In my view, that latter indicator needs to be looked at more carefully which necessitates a careful legal comparatist analysis in order to find the interactions of legal variables described above; as usual, the devil is in the details. The following hypotheses will draw a framework for later empirical testing.

1. What level of democracy?

The first difficulty in generating testable hypotheses is already the dependent variable. Though one may agree that the level of democracy can be (partially) defined by the necessary condition of free and fair elections, it is by no means clear when an election is free and fair. The dictum that an election is usually in a bimodal term (sometimes a qualification is added as “substantially free and fair”). It is thus a fuzzy concept with multi-dimensional elements: an election can, e.g., be fair on the administration but problematic on how the electoral districts are drawn, leaving the seats largely uncontested (“gerrymandering”). The first possibility is an objective measurement by looking at the process of the election and possible irregularities. This would call for a check-list of the steps (in a time sequence of election management).\textsuperscript{30} For a comprehensive empirical analysis that poses huge problems as first, data may not be available on all countries and elections; second, check-lists leave open the

\textsuperscript{28} Though, e.g. the US presidential elections might not have been so contested in 2000, if the Florida vote count would have functioned better.

\textsuperscript{29} See (Lijphart 1999) and (Lipset 1959) and for a survey on economic development and democracy (Sunde 2006).

\textsuperscript{30} (Elklit/Reynolds 2002), table 1 (p. 92 et seqq.).
question how to weigh the points on the list and how to aggregate them.\textsuperscript{31} An alternative is to use a subjective approach where various actors may be relevant. Pastor suggests that a flawed election is „one in which some or all of the major political parties refuse to participate in the election or reject the results“.\textsuperscript{32} Another approach is to rely on the dictum of international election observers (which may have different dicta on the same election). A third, more comprehensive subjective approach would be to question all those affected and participating, similar to the Transparency International approach for measuring corruption. In elections, citizens, grass root activists, international observers and (opposition) parties would need to be questioned by opinion polling. That would require a yet not existing “Electoral Integrity Perception Index“.\textsuperscript{33} A further alternative is to account for changes in government. Even „if the proof of the pudding is in the eating, the proof of democracy is in the alternation of government“\textsuperscript{34}, that would be a very crude measure as it may well happen that governments stay legitimately in power for longer periods of time. Newer approaches try to combine the measurement. An elaborated framework for studying election quality, looking at process as well as outcome has been proposed by Elklit/Reynolds in 2005,\textsuperscript{35} but there is no overall assessment usable as a date set. The advantage of their proposition that it takes stock only of the necessary condition of democracy, the election, but leaves out other factors in the assessment of democracy, such as education or press freedom (though those may also be important for free elections). That would allow for more precise estimations. Although these conceptional problems are by no means solved, for an empirical study, it seems thus permissible to use the level of democracy variables by the “Freedom House Index” or the Polity IV Project.\textsuperscript{36}

2. Independent Variables
Taking the classification of IDEA in independent, governmental and mixed models seems too superficial to generate reliable results though they give a first overview on institutional models found. Furthermore, often, the relevant variables interact, e.g. budgetary independence and institutional independence. Therefore, the following hypotheses distinguish between the different modes of independence as outlined above and discuss possible interaction effects.

\textsuperscript{32} (Pastor 1999a), p. 15.
\textsuperscript{33} (Mozaffar/Schedler 2002), p.19.
\textsuperscript{34} (Mozaffar/Schedler 2002), p. 20.
\textsuperscript{35} (Elklit/Reynolds 2005).
\textsuperscript{36} For a discussion on the measurement of democracy, see (Munck/Verkuilen 2002).
a. Functional Independence

Functional independence defines the competences an EMB has; or differently put the level of
degregation to the IAA. Looking at it through a principal-agent framework, it might be that the
principal, the government or the legislator, constraints the EMB through detailed regulation
by writing almost “complete contracts” 37. The discretion of EMB would therefore be
curtailed. As described above, the power conferred can vary broadly: it may be restricted to
purely administrative functions such as setting up the voter registry or vote counting, thus
only leaving space for law application (which in turn might be controlled or not by either
courts or the government). But the delegation might also be much broader: it may entail law-
making functions and also adjudicatory functions. Though usually the basic framework of the
electoral system, as proportional v. majoritarian system as well as the size of electoral districts
is predetermined by the legislative, it might be that the EMB has the task of drawing district
boundaries, as e.g. in Germany, but it might also be that this task is left to the legislator with
potential conflicts of interest, as in the US.

Hypothesis 1a: The more tasks which involve potential conflict of interests of legislators or
government are outsourced to an EMB, the fairer the electoral process will be, given that the
EMB is personally, financially and institutionally independent.

Law application, that is, administrative and technical tasks become more important if the
general level of good governance is not high. Many rather technical steps in the electoral
process can then be easily misused by politicians to rig elections. Outsourcing the technical
and administrative tasks to an EMB and taking it out of the normal executive hierarchy can
contribute to a more professional conduct of elections as well as heightened trust in the
electoral process, especially if the EMB is permanent and composed of experts. Thus, it is to
be expected that countries with high administrative effectiveness 38 and neutrality leave the
technical tasks to their ordinary administration.

Hypothesis 1b: If the general level of administrative capability and neutrality is low, the
outsourcing of those tasks to an independent EMB will make the election fairer.

Hypothesis 1c: The better the general level of administrative capability and neutrality (good
governance), the fairer the electoral process will be.

A review of the EMB’s decisions might be done by courts or by the EMB itself. When it
comes to adjudicatory functions of an EMB, independence and accountability may be at

37 See (Mozaffar/Schedler 2002), p. 17.
38 Kaufmann et al. indicators on government effectiveness, cf. (Kaufmann/Kraay/Mastruzzi 2006).
counter trends. An EMB may also have adjudicatory functions or those functions may be exercised by an either specialized court (as in Mexico) or by the general courts, usually the highest courts in the country, such as a supreme court. Clearly, this allows for cross-checking of decisions of the EMB and thus augments an EMB’s accountability. But one needs to look carefully at the competences an EMB has and which ones of those are open to adjudicatory control. If the EMB has e.g. the competence to disqualify candidates, thus infringing on individual rights (passive or active voting rights), an internal review mechanism alone might be insufficient, as individual rights may be at stake, thus requiring review by an independent court. If an EMB has purely administrative tasks, it might be more acceptable to have only an internal review mechanism. Nevertheless, if e.g. the voters registration list is rigged, opposition parties or other state organs could or could not have the possibility of having standing to review the list. Standing rights have a gate-keeping function for the accountability of EMBs: the broader the standing right, the higher the accountability. If the courts are independent, an external review is desirable as this would augment the accountability. This argument applies to law application as well as law making competences of EMBs. If courts are not independent and judicial review is allowed, than the independence of EMBs might be a de facto farce as the government may take influence through the courts and thus be able to reverse any decision made by an independent EMB. Thus, court control can cut both ways:

Hypothesis 1d: The broader the scope of judicial review of the decisions of the EMB, the higher the probability of fair elections iff the courts are de facto independent.

b. Institutional independence

Institutional independence is often seen to be at the forefront for defining independence. It refers to the legal set-up and the right of the government to issue instructions to the EMBs. Clearly, if an EMB is part of the government, the minister has the right to issue instructions. But the reverse does not necessarily hold true. Though usually, the set-up of an independent legal entity also guarantees that the executive may not issue instructions to the EMB. That would be the common frame for an IAA. But it may well be that in spite of an institutional separate set-up, the government retains the right to issue instructions. Those may be general instructions or specific ones and they may be allowed only for parts of the competences of the EMB (e.g. only the technical part) or also on the more politicized part. Specific instructions in any case makes an EMB dependent on the government as also purely technical matters allow for rigging elections. If the EMB forms part of government, internal instructions are the norm. But even if the EMB is institutionally independent, there might be a right of instruction of the
minister. If no external instructions may be given, EMBs are usually called formally independent. This variable is widely seen as the crucial variable for determining if the EMB is part of the executive power or independent.

**Hypothesis 2a:** An institutionally independent EMB will lead to a higher probability of fair elections.

**Hypothesis 2b:** If the legal system provides for the possibility that members of the executive can give direct orders to the EMB, the probability of unfair election is higher than otherwise, other variables being equal.

A growing number of countries are incorporating fundamental electoral provisions in their constitutions, often including the type, composition and responsibilities of the EMB. Countries like Bangladesh, Costa Rica, Fiji, Ghana, India, Indonesia and Uruguay set up their respective EMBs as constitutional bodies. This makes it more difficult to alter the status and other constitutionally defined elements of the EMB. Therefore, a government would find it more difficult to change provisions in order to influence the election. That, though, holds only if the independence is guaranteed in the constitution as otherwise, it might become more difficult for the opposition to negotiate an independent EMB for the next elections. The constitutional set-up of an EMB conforms to the game theoretic approach of Weingast, as it guarantees the incumbent also better that he may win the election in another round, thus shifting the pay-offs from rigging an election.

**Hypothesis 2c:** If the EMB is set up as an independent body by the constitution, the higher the probability that the election will be fair.

Furthermore, a permanent EMB will be able to deliver better results. If an EMB is created ad hoc for each election (temporary EMBs), not only could it be stuffed with members close to the incumbent government, but also expertise may be missing and thus undue influence may be more easily taken by the incumbent government. The EMB also would be more at the mercy of the normal administrative network which is more likely to be influenced by the government. Usually, IAAs also develop some kind of internal independence, know-how and logic if they are permanent, as, e.g. courts often do. Thus, it is hypothesized that:

**Hypothesis 2d:** A permanent EMB will increase the likelihood of a fair election.

b. **Personal Independence**
Usually, the EMB is constituted of several persons. It might or might not have a president. If it has a president, his/her position will be a major factor determining the personal independence. If the EMB is not hierarchically structured, the position of all members is relevant. Furthermore, recruitment for an EMB may be multi-party based or expert based.\textsuperscript{39} Some countries require expertise in electoral issues or legal expertise as well as non-partisanship and exclude members which hold executive or other posts. The latter might thus give a higher degree of personal independence. Both models have advantages and disadvantages and much depends on the former political system. If the opposition wants control over the electoral process and should be included in order to participate, a multi-party based EMB may generate more trust. Thus, not impartiality is the idea but equal representation. This may be especially important in transition countries.

*Hypothesis 3a*: Expert EMBs will increase the probability of fair elections unless the election is taking place in a transition-to-democracy phase.

In the governmental model, the EMBs staff is part of the executive, usually civil servants and form part of a ministry. Some countries, as Austria and Czech Republic, though appoint members within the executive branch. Three aspects will be distinguished if the EMB is institutionally independent, when determining the personal independence of the EMB from the executive and the legislature, namely (i) term length (ii) renewability, (iii) appointing organ and (iv) removal procedure. Life tenure and appointment by others than politicians will guarantee the greatest personal independence, while appointment by politicians for a renewable term generates the lowest independence, as it can be expected to motivate EMBs to cater to the interests of the organ that has the power to re-elect them. Appointment for a non-renewable fixed term will generate more personal independence than appointment for a renewable term. Independence of the EMB will also depend on the term-length and its congruence with the length of the electoral cycle. If the (head of the) EMB term length is only for one election, renewable before each next one, that would impede personal independence.

*Hypothesis 3b*: Life-long tenure will increase the independence of the (head of the) EMB, which should increase the probability of a fair election.

Three basic modes of appointing of the (head of the) EMB can be distinguished.\textsuperscript{40} Those modes are found either “pure” or mixed. Also, nomination may sometimes be done by another branch of government or the populace than the appointment. Whereas the competence on

\textsuperscript{39} (International Institute for Democracy and Electoral Assistance 2006), p. 88 et seqq.

\textsuperscript{40} Those procedures are usually determined by the electoral laws.
nomination generates a gate-keeping function, it will nevertheless be neglected here as the final say is in the appointment procedure. They are ordered from the mode, which generates the lowest degree of personal independence to the mode, which is hypothesized to generate the highest level of personal independence:

(i) Appointment by members of executive;  
(ii) Election by the legislature or its subset;  
(iii) Appointment by members of the judiciary.

(i) Appointment by members of the executive, which is constituted by the party in power, is probably the less common system of appointment for an independent EMB. It would be expected to lead to a high probability of misusing the EMB in the electoral process. This is especially the case if the government is unlikely to change frequently (as is the case in, for example, Japan, or in non-democratic regimes).

(ii) The consequences of having the (head of the) EMB appointed by the legislature depends on the political institutions of a country. In parliamentary systems with plurality voting (such as the British), it would not seem to make much of a difference if it is the executive or the legislature that appoints. Both cases generate low personal independence. In contrast, in systems with proportional representation and/or presidential systems, it might very well make a difference, and appointment by the legislature will significantly lower the probability of the EMB being misused in the electoral process. In addition, appointment by the legislature is usually more transparent than by the executive and can entail public debate, which can be seen as an obstacle for the appointment of persons who are expected to be too loyal to the appointing government. Furthermore, the majority of parliament by which a member of the EMB is chosen may be crucial; a two-thirds majority, e.g., would give effective veto-power to minority parties.

(iii) Appointment by a body of judges is expected to lead to a high degree of independence from the executive. It will lead to comparatively more independence than appointment by the executive or the legislature, if the judiciary is independent.

Hypothesis 3c: Appointment by the judiciary, given that it is independent, will generate more independence from the parties in power. Appointment by the executive will lead to least independence.

41 Formal appointment by e.g. the head of state, will not be counted as this is usually a pure formality.
43 As e.g. in Mexico, Nigeria, Uruguay and Yemen.
44 In Costa Rica, e.g., the Supreme Court of Justice unilaterally appoints the members of the EMB by a two-thirds majority.
Removal from office is another important factor in the determination of the personal independence. If the (head of the) EMB may be removed at will by the executive, the incentive to resist political pressure will be reduced. The position of the (head of the) EMB varies; some countries allocate them the same protection as to supreme or constitutional court judges against removal. Some countries have explicit provisions for the removal of office, e.g. the need for a two-thirds majority of parliament (as e.g. in Albania), but a lot do not. Some countries also grant immunity to the (head of the) EMB shielding them against criminal procedures as they do for high-level judges.

_Hypothesis 3d: Protection against arbitral removal and immunity form prosecution will enhance the personal independence of the (head of the) EMB and lead to a higher likelihood of fair elections._

d. Financial independence

Starving an EMB of money to fulfill its tasks, no matter how independent it is de iure, will heavily influence its de facto independence. Most countries have chosen to have parliament determining the budget of the EMB instead of the president or the prime minister. In seven countries, the president determines the budget: Argentina, Chile, Ecuador, Mali, Micronesia, Panama, Paraguay. In 4 countries, it is the prime minister (Cambodia, Mauritius, Puerto Rico, Tonga). A national government department or some other organ within the national government chooses the budget in 26 countries. In 92 countries, the budget is determined by the legislator. Whether that contributes to the independence of the EMB, depends on how many parties are represented in parliament. Nevertheless, it may safely be assumed that parliament will be more representative than the executive and therefore that the budget will not be used for partisan purposes. Budgetary independence is thus one measure which may be an indicator of de facto independence.

_Hypothesis 4a: If the budget of the EMB is determined by parliament, the higher the probability that the election will be fair._

IV. International Election Monitoring: A Third Form of Accountability

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46 Belgium, Bosnia and Herzegovina, Bulgaria, Burkina Faso, Central African Republic, Congo (Brazzaville), Czech Republic, Dominica, French Polynesia, Guyana, India, Italy, Japan, Madagascar, Marshall Islands, Mexico, Nepal, New Caledonia, Portugal, Saint Vincent and the Grenadines, Tuvalu, Wallis and Futuna.
Outsourcing tasks to the international or supranational level in order to make commitments credible is by no means restricted to elections.\textsuperscript{47} NGOs and IGOs can even become a functional surrogate for domestic institutions which are not (yet) established or up to their task (e.g. outsourcing issues to international organizations and courts in human rights issues, environmental issues, trade and investment). In contrast, as elections are thought to be a pure internal matter, a matter of domestic sovereignty, the boundary between the national and the international sphere is more tightly drawn in electoral issues than, e.g. in economic matters. No international right to democratic governance can safely be deemed recognized yet.\textsuperscript{48} Nevertheless, an erudition of domestic sovereignty can be observed. International election observation has become an ever bigger “business” since the end of the cold war as democracy has spread around the world, starting with the invitation of international observers of the Noriega government of Nicaragua in 1989.\textsuperscript{49} International monitoring sits at the intersection of the “right” of the people to democratic governance on the one hand and sovereignty rights of states on the other hand. Technically speaking though, if we do not talk about cases where the United Nations or some other power administer territories (as e.g. in Kosovo), there is no infringement of sovereignty as states need to invite international observers. Otherwise, observers usually do not go into the country as they cannot be assured of being able to fulfill their task which is very much a cooperative effort between the government, the national EMB, civil society actors and the observers.

The legal basis for this is usually a Memorandum of Understanding (MoUs), thus a non-legally binding instrument. Those MoUs contain the basic rights and duties of the election observers and usually guarantee them free access to all relevant material and places.\textsuperscript{50} In order for an international election observation mission to effectively and credibly conduct its work basic conditions must be met. An international election observation mission therefore should

\textsuperscript{47} See, e.g., (Voigt/Ebeling/Blume 2007) on the Judicial committee of the Privy Council.
\textsuperscript{48} For a detailed discussion, see (Franck 1992). There are voices though, which deem the right to democratic governance a human right.
\textsuperscript{49} (Pastor 1999b), p. 125 classifies Nicaragua as the first observer mission similar to those conducted now. The United Nations first called upon to observe elections in 1947 on the Korean peninsula. Through the era of trusteeship and decolonization, the United Nations supervised and observed plebiscites, referenda and elections worldwide even before the end of the cold war. UN-monitored elections were key elements of the transitions to peace in places such as Namibia, Cambodia, and Central America and in helping bring about the end to apartheid. Today, the United Nations rarely fields its own observers. This task is more commonly carried out by regional organizations and international NGOs, frequently in conjunction with national groups. The CSZE, the EU, the Carter Center (US) as well as many other actors are involved, usually cumulatively in one place.
\textsuperscript{50} E.g. the MoU between the EU and Ethiopia for the elections of 2005, Art. 4: „The Parties agree that members of the European Union Observer Mission shall enjoy freedom of movement without prior notification throughout the country and shall have free access to all polling stations, counting/tabulation/aggregation centres, the media, political parties, candidates, voters and civil society representatives. 2. The Parties also agree that European Union election observers shall have access to all election officials and relevant information until the completion of the election process.”
not be organized unless the country holding the election guarantees certain rights to the observers. The observers guarantee to behave according to the codes of Conduct for Election Observers. International election observation is believed to have the potential to enhance the integrity of election processes, by deterring and exposing irregularities and fraud and by providing recommendations for improving electoral processes. The latter is especially important for transitional countries. It is also thought to promote public confidence, as warranted, promote electoral participation and mitigate the potential for election-related conflict. Thus, by inviting international observers, a government „buys“ expertise and credibility. But it might also invite the observers in order not to lose its reputation ex ante (as e.g. Russia experienced when not granting the observers of the OSCE (Office for Democratic Institutions and Human Rights; ODIHR) free access to the parliamentary elections in autumn 2007). The dictum of an international mission that the election has not been free and fair might either stir internal unrest, provoke reactions by the international community, e.g. by cutting development aid, by denying trade preferences or by generating unfavorable reputational effects. Nevertheless, those sanctioning reactions by the international community might not be realized if the country has any other geo-political importance, as e.g. Egypt or Ethiopia.

The influence of international election observers has not been empirically tested, in spite of the huge efforts and budget put into it. The effect on the perceived level of democracy can cut two ways: either by the technical advice given to the country (thus making the administrative tasks of the election more trustworthy) or by sanctioning the incumbent government through indirect means and thus altering the pay-off of the government for rigging elections. Given that there is no direct legal mechanism for sanctioning an unfair election, two hypotheses can be tested for a de facto effect:

**Hypothesis 5a:** Countries with a weak technical system of election administration will have fairer elections if there are election observers.

**Hypothesis 5b:** Countries with a high level of development aid will have fairer elections if there are election observers.

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51 (United Nations 2005).
52 Russia first tried to limit the number of observers by saying it would accept only 70 (while 400 observed the 2003 Duma elections in Russia). Second, it delayed the issuance of visas to the observers. After two weeks of Russian foot-dragging on visas, ODIHR said it would not send observers to monitor the election campaign because “entry visas have continuously been denied”. Eventually, ODIHR pulled out of monitoring the elections entirely, because it could not follow standard practice of observing the elections in Russia for one or two months.
V. Conclusion and Outlook

Drawing on different stances of literature, this paper constitutes a first step towards analyzing the incentives – and the ensuing effects – generated by alternative institutional arrangements concerning the set-up of EMBs. If free and fair elections are a necessary condition of democracy and if the fairness and freeness of an election depends also on the institutional organization of the electoral process, the set-up of EMBs can be assumed to have an effect on the level of democracy. Within the framework of constitutional political economy, that is a well accepted assumption but it has never been tested empirically using detailed institutional data. This paper remains for now at a conceptual stage and the empirical work concerning EMBs remains to be done. Whereas there is detailed work on EMBs by NGOs such as IDEA which draw a detailed picture, there has been no more than anecdotal evidence on the effects of the institutional set-up of EMBs and international observer missions on the level of democracy. This is even more astonishing as international observer missions have become very important all over the world and their dicta are widely reported in the press.

A further interesting research question is to take EMBs not as an exogenous variable but an as an endogenous one. This research question would then focus not that much on the stability of a democracy, given the set-up of EMBs but rather on the questions of first-time elections when the electoral framework is set-up for transition countries. Under what circumstances do countries set up independent EMBs with a variety of competences? As identified only anecdotally, the less established a democracy and the lower the administrative effectiveness of a country, the higher the probability that it delegates administrative electoral tasks to an independent EMB. But there might be many more influencing variables, yet to be explored.
Literature


