



Managing the Power of Incumbency



The Commonwealth
Electoral Network

GUIDES ON GOOD ELECTORAL PRACTICES

Managing the Power of Incumbency



The Commonwealth

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1. Key Principles for Managing the Power of Incumbency

If an election is to be credible, it must be genuinely competitive and there must be a fair competition between political contestants, with no undue influence imposed on voters, the EMB or political contestants. The incumbent political power and state institutions must ensure that they do not misuse their respective official positions for political or electoral gain. State institutions must be neutral in all aspects of the electoral process and, notably, must ensure that there is no misuse of state resources for the undue benefit of a political contestant. The EMB must be able to manage the process in an impartial manner, with the executive—especially the incumbent—applying no undue influence.

A clear legal framework needs to establish the rules for the conduct of the election, including clear regulations for the behaviour of public officials, offices and institutions. Codes of conduct can also be helpful in reinforcing such regulations, including for the media, the police and civil servants.

Ultimately, an incumbent should exhibit the political will to uphold the law and should act with the utmost integrity at all times. Misuse of the power of incumbency is, however, one of the most common challenges to the integrity of the electoral process that can be observed in various parts of the world. Such misuse can severely impact on the integrity of an election, undermining confidence in the outcome. It is therefore important that any such problems are addressed—or, ideally, avoided.

These best practices can be helpful in trying to prevent such problems emerging or to limit their effect, and can be summarised by the following key principles:

- **Accountable**
- **Equality**
- **Fair**
- **Genuine**
- **Non-corrupt**
- **Political will**
- **Transparent**

2. Background: Incumbency and the Electoral Environment

For an election to be credible and to have integrity, it must be a genuinely competitive process and a fair competition between political contestants—what is often referred to as a 'level playing field'. In terms of managing the power of incumbency, this presents some challenges for the legal framework and for the work of the EMB, which must ensure that the incumbent political power does not enjoy undue advantage either by virtue of what is acknowledged as the natural advantage of incumbency or by means of the incumbent (that is, the incumbent head of state or government or the incumbent political party) misusing its position or public resources.

The attempt to improperly influence voters is not limited to incumbents, of course, but the resources and potential opportunities enjoyed by an incumbent in this regard mean that its behaviour warrants special attention.

There are some natural advantages to incumbency, including the enjoyment of a generally higher profile by virtue of having been the office holder. However, the essence of a credible and fair election is that the will of the electors must be respected, that the electoral process must be fair, that there should not be corruption and that those in office need to be held accountable in a transparent manner. It can be the case that, in some instances, an incumbent party and/or candidate may seek to use its position in power for unfair, or even illegal, advantage to secure re-election.

In short, the choice of who shall govern is the choice of the people and not of the government, and this choice should not be undermined or subverted by improper influence.

The misuse of the power of incumbency can be evident in a number of key areas. An incumbent may, for example, seek to unduly delay the holding of an election or may seek to amend a limitation on term, should such a limitation exist. Other critical ways in which the problem may manifest include:

- political interference in the work of the EMB,¹ for example in the appointment and/or removal from office of electoral commissioners, or in the operations and management of election administration;
- biased coverage of the incumbent by the state media, with excessive and positive coverage of the incumbent in comparison with negligible, or highly negative, coverage of the opposition;
- an incumbent's misuse of public vehicles, premises, personnel and funds in campaigning, which can include applying undue pressure on state employees and the misappropriation of public funds, or the police and/or local authorities displaying favouritism towards the incumbent by granting permission for campaign events, while refusing to allow campaign events by the opposition or otherwise interfering in their campaigns;
- failure to disclose campaign financing and/or the use of inducements to vote (which, while not unique to an incumbent, will usually be weighted heavily towards the incumbent, which is likely to have access to more resources), and which could include the illegal use of public funds as part of the campaign, and the distribution of goods and services by the state on behalf of the incumbent's campaign; and

1 See CEN, <Report of the Working Group: Managing the Power of Incumbency- Some Basic Principles 31 October 01 November 2012>, Independence of Election Management Bodies, London: Commonwealth Secretariat, for a detailed overview of this subject.

- attempting to pass new electoral rules that the incumbent may deem to be favourable to its campaign, for example with regard to restrictions or limitations on freedom of expression, association and assembly.

Such practices, while clearly not evident in all cases or necessarily to the same extent, can have a significant effect on the campaign environment and can create a marked imbalance of power. Clearly, some of these practices are also symptomatic of corruption, which will also need to be addressed.

Another instance in which the misuse of incumbency can be observed is when party primaries are held in particular regions/constituencies that strongly favour the incumbent(s). In a sense, the primary will effectively determine who will be elected and thus the lack of integrity of the primary will impact negatively on the integrity of the election itself. If a candidate in a primary has behaved disreputably, then the public's perception of all representatives of that party—even when elected—will be tainted by that experience.

In all of these regards, it is the EMB that is effectively responsible for ensuring that rights are upheld during the election process, supporting its credibility and legitimacy, and playing a critical role in managing the parties' conduct during the election campaign, as well as the administrative procedures. In some instances, EMBs are also tasked with administering party primaries, which can be a challenging task.

3. Good Practices

The following good practices can be helpful when seeking to avoid misuse of the power of incumbency or to avoid that power being of such magnitude that it precludes a genuinely fair electoral process. Not all of these practices fall within the remit of an EMB; others can be implemented only by the legal framework, while some require adjustments to the political will and behaviour of the ruling and opposition parties.

3.1 Constitutional and legal safeguards

Accountable
Fair
Genuine
Political will

- The notion that elective public office is not for life and that today's opposition can be tomorrow's government, and vice versa, can be a healthy attribute in determining the behaviour of electoral contestants and public officials. Limits on the number of times that an executive head of state or government may serve, entrenched in the constitution and to be overturned only by a 'supermajority',² can help to provide an important safeguard against the abuse of incumbency and can also help to protect the periodic nature of elections.
- Opportunities for arbitrary rule should be severely restricted. The incumbent should be unable to resort to the use of arbitrary powers, except in very limited circumstances—for example following a catastrophic natural disaster or during times of war—and under stringent conditions. During a state of emergency, or the exercise of similar extraordinary powers, the constitution needs to provide guarantees for the political rights and freedoms of citizens.
- The EMB must be independent. An impartial, competent and accountable EMB, operating independently of government control and not subject to undue influence from other national or foreign interests, is necessary to constrain potential abuses on the part of the incumbent.

2 For example, a requirement that such a far-reaching constitutional change can be made only with the support of more than two-thirds of parliament may help to protect against manipulation or abuse of this provision.

3.2 Neutrality of state institutions

- The neutrality and professionalism of the public service must be respected and not compromised. Civil servants should act with complete impartiality, in accordance with prevailing required conduct for public officials, and must avoid any activity that might call into question that impartiality or otherwise undermine the openness and credibility of the electoral process.
- The neutrality of the security and intelligence services must be respected and not compromised. The army and the police should be above the political fray, especially during an election period, and the incumbent should not use them to further its own interests. Also, while special security arrangements may understandably be required for the head of state or government, adequate security arrangements should also be offered to other candidates, if required.
- An EMB should also have its own internal rules and codes of conduct to ensure that a culture of integrity and neutrality is embedded throughout the electoral cycle. This will, in turn, help to protect an EMB from any improper practices such as an incumbent attempting to impose political force, because staff will be less susceptible or inclined to act in a partisan manner.

Equality
Fair
Genuine
Political will
Transparent

3.3 Use of state resources

- State and party resources are separate, and state assets or resources must be protected from improper use. Public resources should not be used for party advantage. The incumbent should not use government resources for electioneering except to the extent that other parties are also able to do so. Arrangements should be put in place to ensure parity in the use of public facilities, for example the use of meeting rooms and public money to fund advertisements.
- Official facilities should not be mobilised in support of electioneering. Ministries and the private offices of the head of state or government and ministers should not be used as an

Accountable
Equality
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adjunct to the party campaign machinery. The public service should provide detailed guidelines to all civil servants on what demands ministers may be able to place on them in regard to their political activities.

- It can be helpful if there are clear regulations regarding the use of public resources in an election, such as the use of public premises for campaign events, etc. This will help to avoid misunderstandings and perceptions of bias. Further, it should be explicitly acknowledged that abuse of state funds during an election is an act of corruption.
- While codes of conduct are not necessarily binding, hence are a second-best option in comparison with legislation and regulation, they can be helpful in framing the conduct of a campaign. Codes governing political parties and campaigning (see next), governing media coverage of the campaign, governing the role of public officials during an election, and governing the behaviour and role of the police during an election, among others, can help to clarify and highlight what is expected of the incumbent, the opposition and others during the electoral process.

3.4 Conduct and regulation of the election campaign

- All parties and candidates should be treated fairly in an election. Political competition needs to take place within certain agreed rules, which may be reflected in an electoral code of conduct. Such codes, which should apply to both the incumbent and the opposition political parties, may be annexed to regulations, or their substance may be covered in those sections of any statute dealing with corrupt practices. The code or related regulations should provide detailed guidelines for the activities of the incumbent, as well as those aspiring to public office, during the electoral process, and it needs to be both enforceable and enforced.
- In the event that an election date is not fixed by law, it should be set in a manner that avoids giving any one contestant an unfair advantage. To that end, the incumbent should consult with the EMB on not only the practicability, but also the suitability of the date, before making an announcement. It is important too to note that the period ahead of that date must be sufficient to allow the EMB to provide guidance to electoral administrators and to campaigners, and to allow all parties to get their messages out to voters.
- As far as possible, there should be a level playing field for an election. Party and campaign funding should therefore be regulated. The guiding principles in this regard are transparency and accountability. Political parties fulfil an important function, and need money to fund their operations and election campaigns. The rules governing where parties get their money and how they spend it should be designed to enhance trust and participation, and to guard against undue influence. It is important to ensure effective disclosure of party and campaign financing. Where public funding is available, it should be designed to strengthen multi-party democracy and also to encourage financial support for political parties from the public, rather than simply to entrench incumbency.

Accountable
Equality
Fair
Non-corrupt
Transparent

- Even where state financing is available, parties look for funding from other sources, including local and foreign commercial and other interests, which bring with them the danger of undue influence. It is most important to ensure effective disclosure of party and campaign financing.
- Government policy and new spending commitments should not be announced during the election period. The incumbent has the whole of its period in office during which to announce government policies and spending commitments; once an election campaign has started, the public profile of government should shrink. Government officials should not normally announce new policies nor, more importantly, should they make new spending commitments during an election campaign.

3.5 Media coverage of the election

Equality •
Fair

- State-controlled media should be non-partisan and neutral as a matter of course. The state broadcaster can wield a powerful influence during election campaigns and the incumbent must not misuse state-owned media to secure partisan coverage of political news or free publicity.
- The EMB, in consultation with all stakeholders, may develop codes of conduct relating to media coverage, and must then ensure that media coverage is carefully monitored and the rules respected.
- Monitoring a media campaign can be helpful in increasing understanding of the tone and balance of coverage—most notably, by state-owned media. In some instances, an EMB may undertake this monitoring as a tool to help it to enforce a media code of conduct, where applicable.
- Media should not be harassed. It is essential that the incumbent should not abuse its powers so as to limit or unnecessarily restrict the activities of any commercially owned media during elections. At the same time, the commercial media—including social media—has a responsibility to respect

and abide by any media code of conduct, and by the principles of professional, responsible and balanced journalism. The use of criminal legislation and criminal libel laws against media is, however, not appropriate during an election campaign.

- Governments should have in place legislation and practices that facilitate access to information for media and the public alike. This enhances transparency and accountability, and increases confidence.

3.6 Integrity of the electoral process

- All stakeholders—particularly public elected officials—must demonstrate respect for the electoral institutions. It is important to ensure that the head of state or government, ministers and other senior officials do not use their positions to try to exert undue influence on those responsible for conducting elections. The incumbent (and other contesting parties) should fully respect the results of genuine and credible elections.
- Election observation initiatives should be encouraged. A credible initiative of this type can help to build confidence and credibility in the overall electoral process, and is an indicator of a commitment to transparency.
- The unfettered presence of observers who are committed to abiding by national regulations and respecting international standards makes it much easier to ensure that the result of an election is respected by all parties.

*Accountable
Genuine
Political will
Transparent*

4. Commonwealth and Other International Instruments for Democratic Elections

The various rights, obligations and practices associated with the conduct of electoral processes are recognised in a series of Commonwealth and other international agreements and instruments.³ These provide not only that such rights and practices should be respected in law, but also that they should be respected in practice and without discrimination.

The following relevant provisions form the framework of principles, rights and obligations that make for a credible election—with special reference to the requirement that an electoral process must be genuinely competitive and conducted impartially.

4.1 Commonwealth Charter (2012)

Principle I, Democracy:

We recognise the inalienable right of individuals to participate in democratic processes, in particular through free and fair elections in shaping the society in which they live. Governments, political parties and civil society are responsible for upholding and promoting democratic culture and practices and are accountable to the public in this regard ...

[...]

3 There are also various regional commitments and instruments relevant to Commonwealth members, such as the African Charter on Human and Peoples' Rights, the American Convention on Human Rights, and the Copenhagen Commitments of the Organization for Security and Co-operation in Europe (OSCE), among many others. However, such regional instruments invariably reflect the obligations reflected in international instruments and so, for brevity only, the key provisions are reproduced in this pamphlet.

Principle II, Human Rights:

We are committed to the Universal Declaration of Human Rights and other relevant human rights covenants and international instruments. We are committed to equality and respect for the protection and promotion of civil, political, economic, social and cultural rights, including the right to development, for all without discrimination on any grounds as the foundations of peaceful, just and stable societies. We note that these rights are universal, indivisible, interdependent and interrelated and cannot be implemented selectively.

We are implacably opposed to all forms of discrimination, whether rooted in gender, race, colour, creed, political belief or other grounds.

Principle VII, Rule of Law:

We believe in the rule of law as an essential protection for the people of the Commonwealth and as an assurance of limited and accountable government. In particular we support an independent, impartial, honest and competent judiciary and recognise that an independent, effective and competent legal system is integral to upholding the rule of law, engendering public confidence and dispensing justice.

Principle VIII, Good Governance:

We reiterate our commitment to promote good governance through the rule of law, to ensure transparency and accountability and to root out, both at national and international levels, systemic and systematic corruption.



4.2 United Nations Declaration of Human Rights (1948)

Article 21:

1. *Everyone has the right to take part in the government of his [sic] country, directly or through freely chosen representatives.*
2. *Everyone has the right of equal access to public service in his [sic] country.*
3. *The will of the people shall be the basis of the authority of government; this will shall [sic] be expressed in periodic and genuine elections which shall be by universal and equal suffrage and shall be held by secret vote or equivalent free voting procedures.*

4.3 International Covenant on Civil and Political Rights (1966)

Article 25:

Every citizen shall have the right and the opportunity, without any of the distinctions mentioned in article 2 and without unreasonable restrictions:

- a. *To take part in the conduct of public affairs, directly or through freely chosen representatives;*
- b. *To vote and to be elected at genuine period 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;*

[...]

4.4 UN Committee on Human Rights, General Comment 25 (1996)

This General Comment on Article 25 of the International Covenant on Civil and Political Rights ('The right to participate in public affairs, voting rights and the right of equal access to public service') includes the following paragraphs.

12. *Freedom of expression, assembly and association are essential conditions for the effective exercise of the right to vote and must be fully protected ...*
19. *... elections must be conducted fairly and freely on a periodic basis within a framework of laws guaranteeing the effective exercise of voting rights. Persons entitled to vote must be free to vote for any candidate for election and for or against any proposal submitted to referendum or plebiscite, and free to support or to oppose government, without undue influence or coercion of any kind which may distort or inhibit the free expression of the elector's will. Voters should be able to form opinions independently, free of violence or threat of violence, compulsion, inducement or manipulative interference of any kind. Reasonable limitations on campaign expenditure may be justified where this is necessary*

to ensure that the free choice of voters is not undermined or the democratic process distorted by the disproportionate expenditure on behalf of any candidate or party. The results of genuine elections should be respected and implemented.

In an addendum to the General Comment, the following paragraphs appear.

9. *... Genuine periodic elections ... are essential to ensure the accountability of representatives for the exercise of the legislative or executive powers vested in them. Such elections must be held at intervals which are not unduly long and which ensure that the authority of government continues to be based on the free expression of the will of electors ...*

25. *In order to ensure the full enjoyment of rights protected by article 25, the free communication of information and ideas about public and political issues between citizens, candidates and elected representatives is essential. This implies a free press and other media able to comment on public issues without censorship or restraint and to inform public opinion. It requires the full enjoyment and respect for the rights guaranteed in articles 19, 21 and 22 of the Covenant, including freedom to engage in political activity individually or through political parties and other organizations, freedom to debate public affairs, to hold peaceful demonstrations and meetings, to criticize and oppose, to publish political material, to campaign for election and to advertise political ideas'.*

4.5 International Convention on the Elimination of Racial Discrimination (1966)

Article 5:

... States Parties undertake to prohibit and to eliminate racial discrimination in all its forms and to guarantee the right of everyone, without distinction as to race, colour, or national or ethnic origin, to equality before the law, notably in the enjoyment of the following rights:

[...]

- c. *Political rights, in particular the right to participate in elections—to vote and to stand for election—on the basis of universal and equal suffrage, to take part in the Government as well as in the conduct of public affairs at any level and to have equal access to public service;*

[...]

4.6 UN Convention on the Elimination of all Forms of Discrimination against Women (1979)

Article 7:

States Parties shall take all appropriate measures to eliminate discrimination against women in the political and public life of the country and, in particular, shall ensure to women, on equal terms with men, the right:

- a. *To vote in all elections and public referenda and to be eligible for elections to all publicly elected bodies;*

[...]



5. The Commonwealth Electoral Network

Reflecting the Commonwealth's commitment to the inalienable right of individuals to participate by means of free and democratic political processes in shaping the society in which they live, the Commonwealth Electoral Network (CEN) aims to ensure that elections within the 53 member countries of the Commonwealth community are fair, credible and transparent, by helping election management bodies (EMBs) to share, and to implement, best practices. The conduct of credible elections is critical, as the Global Commission on Elections, Democracy and Security has emphasised:

When the electorate believes that elections have been free and fair, they can be a powerful catalyst for better governance, greater security and human development. But in the absence of credible elections, citizens have no recourse to peaceful political change. The risk of conflict increases while corruption, intimidation, and fraud go unchecked, rotting the entire political system slowly from within.⁴

The CEN was set up in 2010 to establish a 'gold standard' in election management in Commonwealth member countries. The CEN promotes good practice in managing elections, facilitates peer-to-peer exchanges of experience and knowledge, and fosters a community of Commonwealth EMBs.

The Commonwealth Heads of Government recognised and endorsed the value of the CEN when they stated, in the 2009 Trinidad and Tobago Affirmation of Commonwealth Values and Principles:

[W]e endorse the proposed Commonwealth Network of National Election Management Bodies, which would facilitate experience sharing and serve to create support mechanisms, promote good practices and

4 Global Commission on Elections, Democracy and Security, 2012, Deepening Democracy: A Strategy for Improving the Integrity of Elections Worldwide, Stockholm: IDEA, p. 3.

*facilitate opportunities for peer support across the Commonwealth, thus enhancing member countries' capacity to hold credible elections which enjoy the confidence of the people.*⁵

Under the auspices of the CEN, EMBs from across the Commonwealth gather at biennial conferences to discuss and identify best practices, to address common challenges and to further enhance peer relations.

As well as biennial conferences, the CEN has established working groups on a broad range of electoral matters, with the aim of enhancing exposure to best practices and sharing innovative techniques. Working groups have been held on vote counting and tabulation processes, voter education, campaign finance, new media, the independence of EMBs, managing the power of incumbency⁶ and voter registration, among other issues. The CEN working group programme provides a structured avenue for peer-to-peer experience-sharing. Working group meetings draw together subject-matter experts from a geographically representative cross-section of CEN members for in-depth discussions on specific issues. The aim of these meetings is to identify guiding principles and good practices on issues of relevance to all CEN members.

A Commonwealth Junior Election Professionals (JEP) initiative is training young electoral professionals. Regional workshops have been held in Africa, Asia, the Pacific and the Caribbean. In the long run, this direct assistance stands to benefit not only junior officials, but also other permanent employees, as well as temporary election officials brought in to work at polling stations and other facilities ahead of election days. It does so by means of the sharing of best practices among all electoral commission employees.

5 Commonwealth Heads of Government, 2009, Trinidad and Tobago Affirmation of Commonwealth Values and Principles, available online at <http://thecommonwealth.org/history-of-the-commonwealth/trinidad-and-tobago-affirmation-commonwealth-values-and-principles> [accessed 4 August 2016], para. 11.

6 The CEN Working Group on Managing the Power of Incumbency was held in Cape Town, South Africa, in October/November 2012.

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