



# **TAMING THE INCUMBENCY ADVANTAGE**

## **INNOVATIVE CONSTITUTIONAL DESIGNS FROM THE 'SOUTH'**

**Conversations on Innovative Constitutional Design**

**International IDEA Discussion Paper 2/2021**



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# Contents

Acknowledgements .....	iv
<b>Chapter 1</b>	
Introduction .....	2
<b>Chapter 2</b>	
Innovations to tame the incumbency advantage .....	3
Madagascar .....	3
Cabo Verde .....	4
Bangladesh .....	5
<b>Chapter 3</b>	
Potential benefits .....	7
<b>Chapter 4</b>	
Potential drawbacks .....	8
<b>Chapter 5</b>	
Conclusion .....	10
References .....	12
About the author.....	13
About International IDEA .....	14

## Chapter 1

# INTRODUCTION

**There is a common understanding, and notable evidence, that incumbent politicians have better chances of winning re-election.**

There is a common understanding, and notable evidence, that for various reasons incumbent politicians have better chances of winning re-election, notably presidents in presidential (or semi-presidential) systems and incumbent parties (or coalitions) in parliamentary systems (Maltz 2007; Ashworth et al. 2017). This advantage has been attributed to the greater name recognition and familiarity with the incumbent on the part of voters; perceived/proven leadership experience; and access to state resources, platforms and networks. To this one may add inertia, or what behavioural scientists call ‘status quo bias’ (an emotional preference arising out of mental ‘laziness’ for extant states of affairs)—best captured in the popular adage ‘better the devil you know’.

In countries where the electoral playing field is uneven, incumbency advantage is amplified through outright incumbency abuse: through a combination of electoral manipulation, economic and political patronage, and even active suppression. Constitution makers have implicitly recognized the potential for both advantage and abuse, and sought to tackle them in institutional design.

### Box 1. About this webinar series

This Discussion Paper was drafted for an International IDEA webinar on *Taming the Incumbency Advantage* (25 May 2021), the first of a series on innovative constitutional design options. It has been revised and updated to reflect contributions from webinar participants: Professor Juvenice F. Ramasy (Madagascar), Professor Ridwanul Hoque (Bangladesh) and Professor Gabriel Negretto (Latin America), among others.

The webinar series seeks to identify, discuss, profile and showcase the ‘hidden treasures’ of innovative constitutional/institutional design options—including from the Global ‘South’—with potential to help tackle emerging and recurrent challenges facing societies around the world. The goal is not to promote any specific institutional design, but rather to enrich conversations about constitutional reform processes and share comparative constitutional law and practice insights among academic and practitioners’ communities.

## Chapter 2

# INNOVATIONS TO TAME THE INCUMBENCY ADVANTAGE

There are two common constitutional approaches to taming the incumbency advantage and ensuring credible elections. Firstly, many constitutions impose term limits on presidents (and in some parliamentary systems, on prime ministers as well). By removing the incumbent from the electoral field at regular intervals, term limits foreclose some opportunities for electoral abuse stemming from the incumbent her/himself. Secondly, constitutional and legal frameworks typically provide for an autonomous electoral management body (EMB) to ensure that incumbents do not systematically manipulate elections in their favour.

A third approach, and the focus of this paper, is to require incumbents seeking re-election to resign from office ahead of elections with a view to create a level field for all electoral contenders. This approach is rare and, according to our preliminary research, is currently practiced in only two countries of the world—Cabo Verde and Madagascar. The third country covered here, Bangladesh, has abolished the system.

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### MADAGASCAR

In Madagascar, under article 46 of the Constitution, an incumbent president who seeks re-election must resign from office 60 days ahead of the election date (Madagascar 2010). The chair of the Senate takes over as interim president until the next president is elected and sworn in. (Interestingly, while the Senate chair is selected by the Senate itself, the president appoints one third of senators, therefore exercising influence in the appointment of the chair. For instance, prior to the 2018 elections, the chair of the Senate who succeeded the President was the head of the party of the President.) This rule was first adopted in 1992 as part of the transition deal supported by the Council of Christian Churches of Madagascar, which wished to constrain the

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**In Madagascar, an incumbent president who seeks re-election must resign from office 60 days ahead of the election date.**

dominance of incumbents exemplified in then authoritarian President Didier Ratsiraka.

Ratsiraka lost the first democratic elections in 1992, but returned to power in 1997 in an election following the impeachment of the first democratically elected president. He then orchestrated the abolition of the 60-day rule in 1998, but lost in a controversial election in 2002. Ratsiraka's successor won again in 2006, but was removed from power in 2009. The 2010 constitution, drafted as part of a negotiated post-coup transition (to return to electoral democracy), reinstated the rule.

Madagascar's electoral laws extend the applicability of the rule to all candidates and require any public official seeking election to the presidency to resign from her or his post ahead of elections. In the most recent 2018 presidential elections, where the rule became applicable and the incumbent resigned as required, an opposition candidate won the elections with the incumbent coming a distant third.

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**The transition to multiparty democracy in Cabo Verde was negotiated between two prominent political parties with little popular or international influence**

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## CABO VERDE

Similarly, in Cabo Verde, under the 1980 Constitution (as amended) and relevant electoral laws, no presidential candidate can hold any public office—including the presidency, nor the office of Attorney General or Chief or Vice Chief of the army—from the date of announcing their candidacy (Cabo Verde Constitution, article 118(2)). Accordingly, incumbent presidents who seek to run for re-election are automatically suspended from their office upon announcement of their candidacy, and are replaced by the president of the national assembly, or others in the succession line where the president of the assembly is also a candidate.

The transition to multiparty democracy in Cabo Verde was negotiated between two prominent political parties with little popular or international influence (Meyns 2002). Agreement on the resignation requirement was included apparently to ensure electoral credibility. The opposition won the first legislative and presidential elections; the same two parties remain dominant and have alternated in power since, at the end of the second and final presidential terms. An incumbent president is yet to lose an election (i.e., after their first term), despite the resignation requirement. Cabo Verde continues to be a model democracy in Africa. The country has experienced political stability despite on occasions having different parties controlling the legislature and executive.

Interestingly, Madagascar and Cabo Verde are two of a handful of African countries that saw opposition victories in the first elections of the early 1990s as part of 'third wave democratization' in that decade. They are also among the few countries of the region that have seen recurrent alternations of power since then.

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## BANGLADESH

In Bangladesh, the transition to democracy in the early 1990s involved opposition groups mainly organized by two parties. The opposition groups and the government agreed to establish a parliamentary system of government, and the incumbent president conceded to resign and establish a caretaker government to organize and manage the first elections (Khan 2015). The opposition Bangladesh Nationalist Party, led by Khaleda Zia, won the first elections in 1991 and formed a government. The Awami League, led by current Prime Minister Sheikh Hasina, came second, and the incumbent came in third with under 12 per cent of the votes.

The political agreement over the caretaker government was constitutionalized in 1996 (Khan 2015). This followed pressure from the Awami League and other opposition parties, whose representatives resigned en masse from parliament and organized nationwide strikes after the initial demand for this move was rejected. The Awami League government went ahead and organized elections in 1996, which the opposition boycotted, leading to the incumbent party's complete control of parliament. The Awami League finally gave in and the new parliament passed the 13th amendment to the Constitution. Under the amendment, the government would resign 60 days ahead of election day, and a caretaker government would come in led by a chief advisor appointed by the president of the country (from among recently retired Chief Justices—and traditionally the last retired chief justice) alongside other advisors who would serve as ministers. The purpose of the caretaker government was to enable and support the Election Commission to organize free and fair elections.

The opposition Awami League won the second 1996 elections. The 2001 elections were also held under a caretaker government, which the opposition Nationalist Party won. The caretaker government proved to be a crucial institution for a level electoral field. Perhaps because of its success, the ruling party in 2004 adopted the 14th amendment introducing several changes, including increasing the retirement age of Supreme Court judges. As the caretaker government is normally headed by the most recently retired Chief Justice, this reform was seen by the opposition Awami League as a manipulation to ensure a pro-government caretaker leader for the planned 2006 elections. The Chief Justice at the centre of the saga ultimately withdrew himself from the position, but the damage was done. Following an intense political crisis with popular protests and strikes, a new, military-backed caretaker government arrogated significant powers to itself, including anti-corruption. It led the country for far more than the two months allowed under the constitution, until it was ultimately forced to organize elections in December 2008, which the Awami League won.

Rather than fixing the loopholes in the 13th amendment that made the 2004 manipulation possible, the Awami League used the opportunity to dismantle the caretaker government system, first through judicial challenge and then a constitutional amendment. The Supreme Court held in 2011 that, almost

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**The purpose of the caretaker government was to enable and support the Election Commission to organize free and fair elections.**

16 years after its adoption, the 13th amendment contradicted the principle of democracy outlined in the preamble—which the Court said constituted the ‘basic structure’ of the constitution—and was therefore invalid. The court advised that the caretaker government system should continue to be operational for at least two more electoral terms. Nevertheless, the Awami League seized the opportunity and simply adopted a 15th amendment immediately abolishing the caretaker government: an institution adopted with broad political consensus was therefore ended unilaterally. The League has won each of the elections since, with opposition groups accusing the ruling party of abusing the electoral and judicial process. The main opposition Nationalist Party continues to boycott the elections and organize strikes, with the reinstalment of the caretaker government among its demands.

### Box 2. The innovative constitutional design

It is important to note that the incumbency resignation requirement exists alongside a constitutionally independent electoral commission in Bangladesh, but without term limits on the prime minister (which is uncommon in parliamentary systems—while the Bangladeshi President, which has principally ceremonial functions, is limited to a maximum of two terms, consecutive or not) (Bangladesh 2014). In Cabo Verde and Madagascar, the resignation requirement co-exists with term limits

on presidents. Interestingly, the latter two constitutions do not specifically provide for an independent electoral commission. In Madagascar, at least at the start, this innovation was adopted to make up for the absence of an independent EMB. Nevertheless, both countries have subsequently established independent electoral commissions through legislation. Accordingly, they now have all three principal mechanisms to check the incumbency advantage and potential abuse.

## Chapter 3

# POTENTIAL BENEFITS

The main consequence and potential added value of the resignation requirement is to reduce opportunities for incumbent manipulation of the electoral process. It can thus enhance (a) the confidence of opposition groups and the public in free, fair and credible elections; and, in the process, (b) enhancing chances for alternations of power. This could in turn reduce electoral tensions and violence, and enable losers' consent, which is critical for confidence in and ultimately the success and resilience of the democratic dispensation (Anderson et al. 2005). Indeed, the elections held under caretaker arrangements in all three countries were considered credible. In contrast, the main opposition party has consistently boycotted elections in Bangladesh where the caretaker arrangement has been removed. Similarly, the three elections conducted under the caretaker arrangement in Madagascar (1992, 1997 and 2018) were largely accepted, compared to the two elections held without it (2002 and 2006) which were heavily contested and destabilising.

Moreover, elections in Bangladesh and Madagascar under the caretaker government model have consistently produced alternations of power. So while comparisons with countries without the resignation requirement are difficult to make, comparison within these countries shows the potential of the caretaker government model to enhance electoral integrity, increase chances of alternation of power and consolidate a culture of democracy and constitutionalism.

## Chapter 4

# POTENTIAL DRAWBACKS

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### **The caretaker government model is not without concerns.**

However, the caretaker government model is not without concerns. First, it necessitates ‘multiple’ transitions within a short period of time—from incumbent to caretaker to winner—which could theoretically be problematic. In practice, the three case studies show that this needs not be a major challenge. In Cabo Verde and Madagascar, because the caretakers are ex-officio officials, the resignation requirement has not proven disruptive. In Bangladesh, the presidency, which continues during the caretaker government and leads its formation, was able to provide needed continuity.

Second, the caretaker government model could potentially create a political vacuum at a time where important decisions are imperative, such as in times of emergency. While this is a significant concern, caretaker governments in Cabo Verde and in Madagascar have had full powers, including emergency powers. In Bangladesh, the power of declaring states of emergencies lies with the president (with the countersignature of the prime minister). Accordingly, the presidency provides stability and continuity even if a caretaker government were to face a crisis situation, such as Covid-19.

More generally, the resignation requirement only applies when an incumbent has the right to stand for re-election; in countries with two presidential term limits, this potential vacuum can only occur once every two terms. Moreover, in most systems, elections are held several weeks, and even months, ahead of the actual date of transfer of power. This has created the phenomena of the ‘lame-duck’ presidency, with the United States as a prominent example. Accordingly, the requirement might not lead to power vacuums any more than existing arrangements for transitions, whereas it could reduce chances of incumbency abuse.

Counterintuitively, a caretaker government may, in fact, face fewer political blockades to decisive action when absolutely needed, such as in an emergency, than a ‘lame duck’ president. One of the lessons of Covid-19 is

that constitutional frameworks regulating emergencies should anticipate cases where an emergency may delay organization of elections and therefore formation of a government (International IDEA, 'Global Overview of Covid-19: Impact on elections'). Constitutional designers could consider the risk of power vacuums in deciding how far to constrain the scope of powers of the caretaker government (as with caretaker governments in parliamentary systems). In this context, scenarios to plan for would include the caretaker government taking over an ongoing emergency, as well as how a caretaker government might deal with emergencies that arise after its formation.

There is no question that these constitute critical risks. They might nevertheless be acceptable trade-offs for credible elections in particular circumstances. The resignation requirement is certainly worth investigation by constitutional designers who should, naturally, seek complementary design options to mitigate those risks. The need for innovation may be lower in 'established' democracies where trust in electoral processes is high, or where measures such as regulation of political finance and robust separation of state and party are already in place to reduce incumbency advantage.

The experience of the USA in 2020–2021 stands as a warning to even 'mature' democracies: here, the outgoing President Donald Trump sought to reverse the electoral outcome and undermine the credibility of the electoral process in the eyes of supporters and the wider public. Other countries of the Global 'North' that have been backsliding on the democracy scale, such as Hungary and Poland, show that the temptation to abuse incumbency before, during and after elections is ever-present and cannot be discounted (Holesch and Kyriazi 2020). A resignation requirement need not be conceived merely as a 'transitional' arrangement to be abandoned once democracy is 'consolidated'; rather, it can serve as a permanent signal that level electoral fields are legitimate and to be expected.

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**The resignation requirement is worth investigation by constitutional designers, alongside complementary design options to mitigate any potential downsides.**

## Chapter 5

# CONCLUSION

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**The caretaker government model could serve as a complement, rather than an alternative, to more conventional bulwarks against the incumbency advantage, such as term limits and independent EMBs.**

The idea of requiring incumbents who seek re-election to resign ahead of elections offers an intriguing option to enable credible elections, and has been experimented with in countries with parliamentary (Bangladesh), semi-presidential (Cabo Verde) and presidential (Madagascar) systems of government, demonstrating its adaptability. Nevertheless, unlike presidential (or prime ministerial) term limits and independent EMBs, the caretaker government model has not yet caught the attention of constitution makers and academics. The experiences from the three countries under discussion reveal the potential of the caretaker government model as a complement, rather than an alternative, to these more conventional bulwarks against incumbency advantage and abuse. While the adoption of a resignation requirement is clearly no panacea to the challenges of credible elections, which also depends on societal factors and a political culture that recognizes the long-term value of democratic politics. Nevertheless, it could offer an additional tool to strengthen the preconditions for these.

Despite its potential added value, because of short-term interests incumbents may be reluctant to support such an innovation, much as they tend to resist term limits and even formally independent EMBs. In most democratizing states, term limits have been adopted at moments of incumbent vulnerability and international pressure, particularly following the ‘third wave’ of democratization that climaxed in the 1990s. The resignation requirement was first reluctantly adopted in Bangladesh and Madagascar at similar moments, and incumbents in these two countries successfully abolished it once they felt no longer vulnerable. President Ratsiraka’s concession in 1991 in Madagascar while under pressure, and his abolition of the requirement upon his return to power in 1997, is a particularly apt example in this regard. Nevertheless, while dominant politicians or parties may seek and at times succeed in removing them, once adopted, resignation requirements may stick in many contexts—as term limits have done.

In Cabo Verde, by contrast, the incumbent resignation requirement was an outcome of a negotiated transition between two rival political forces, and it has rarely faced attempts at removal.

If the requirement is adopted in other places, moments of vulnerability will likely explain concessions on the part of the incumbent in countries transitioning to or consolidating democracy, while a genuinely negotiated outcome is more likely in more established democracies. Beyond this, some hegemonic incumbents may also support the resignation requirement if they can still orchestrate electoral manipulations from behind the scenes without having to take direct responsibility for it. However, whether the desire to create a semblance of fairness and credibility is sufficient incentive for a hegemon's loss of direct control is questionable. While out of palace is not necessary out of power, the impact of the formal absence of authority on the behaviour of civil servants and electoral and security officials should not be underestimated, and without sufficient pressure or commitment to democracy, incumbents may be unwilling to take the risk.

This Discussion Paper has drawn attention to a little known constitutional caretaker government model with a track record in three jurisdictions. While firm inferences are difficult to draw from a small sample size, the experiments discussed are worthy of further investigation and debate, as part of seeking context-appropriate solutions to the worldwide challenge of incumbency advantage.

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**The experiments discussed here are worthy of further investigation and debate, as part of seeking context-appropriate solutions to the worldwide challenge of incumbency advantage.**

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**Adem Abebe** (LL.D) supports transitions to peace and democracy in politically complex and fragile contexts as part of the Constitution-Building Team of International IDEA. He has convened platforms for dialogue, advised and provided technical assistance to high-level constitution and decision makers at national and international levels, and advised and trained civil society stakeholders in diverse contexts. Adem has published widely in prominent academic journals on comparative constitutional law and practice. He serves in the Advisory Board of the *International Journal of Constitutional Law* and in the Executive Committee of the *African Network of Constitutional Law*.

# About International IDEA

The International Institute for Democracy and Electoral Assistance (International IDEA) is an intergovernmental organization with the mission to advance democracy worldwide, as a universal human aspiration and enabler of sustainable development. We do this by supporting the building, strengthening and safeguarding of democratic political institutions and processes at all levels. Our vision is a world in which democratic processes, actors and institutions are inclusive and accountable and deliver sustainable development to all.

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## WHAT WE DO

In our work we focus on three main impact areas: electoral processes; constitution-building processes; and political participation and representation. The themes of gender and inclusion, conflict sensitivity and sustainable development are mainstreamed across all our areas of work.

International IDEA provides analyses of global and regional democratic trends; produces comparative knowledge on good international democratic practices; offers technical assistance and capacity-building on democratic reform to actors engaged in democratic processes; and convenes dialogue on issues relevant to the public debate on democracy and democracy building.

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## WHERE WE WORK

Our headquarters is located in Stockholm, and we have regional and country offices in Africa, the Asia-Pacific, Europe, and Latin America and the Caribbean. International IDEA is a Permanent Observer to the United Nations and is accredited to European Union institutions.

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