



Administrative Powers of the President of Nigeria to appoint the Chairman of the Independent National Electoral Commission (INEC): A Critical and Comparative Analysis of Appointments and Electoral Outcomes (2007-2019).

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Abstract

Since the re-emergence of democracy in 1999, INEC which is also the 5th Electoral Management Body (EMB) in Nigeria has conducted and overseen six (6) elections both at the federal and state levels respectively, with most of them considered controversial, corrupt and disputatious. However, while the bickering nature of these elections have been blamed remotely on the distorted political history tribalism, and religion, citizens and indeed scholars have ignored the primary factor of the law which accords the President the powers to choose the Chairman of the INEC, an electoral umpire required to be independent and neutral in all affairs, including the appointment of its chairman. This has resulted to instances of electoral fraud and misappropriations in the favour of the President or his cronies, hence, disrupting democratic consolidation in Nigeria. The descriptive-analytical was adopted for the study. The games theory of politics was used describing the nature and effects of such administrative power on the political system. It was discovered that the appointive powers accorded the President who is also a political player in this regard have resulted from indubitable evidences the politicization of the outcomes of the elections in favour of the President and cronies as most conspicuous in the 2007 and 2019 Presidential elections, respectively. It was recommended that such powers be withdrawn from the President and the executive through constitutional reforms and ceded to a neutral body which shall consist of one representative each from the six (6) geo-political zones and selected pressure groups.

Keywords: Administrative powers, INEC, electoral umpire, democracy, Games theory, political player.

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Introduction

For the effective and unbiased process of transfer of state power by the consent of the citizens as traditional in a liberal democracy, states have instituted neutral bodies to oversee, organize, undertake and supervise activities relating to the acquisition and transfer of such powers (Nnoli, 1986). In Nigeria, the body responsible for this is the Independent National Electoral Commission (INEC), which before 1999 had taken different nomenclatural permutations from first, The Electoral Commission of Nigeria (ECN) in 1959 to the Federal Electoral Commission (FEC) in 1960 which was later re-abbreviated FEDECO in 1978; to the National Electoral Commission of Nigeria (NECON) in 1995, and subsequently, the Independent National Electoral Commission (INEC) in 1998 by former military administrator, Gen. Abdulsalam Abubakar (INEC, 2022).

Established under Section 153 of the 1999 constitution of Nigeria, and consisting of a chairman who is also the Head of the Commission and 12 other members, the powers for the appointment of the Chairman and members is ceded to the President as provided under Section 154 (1) and (2) of the constitution which expressly avers that the president in the exercise of his power to appoint the Chairman or member shall “consult the council of state” and such appointment “shall be subject to confirmation by the senate” (Constitution of the Federal Republic of Nigeria, 1999). Though this follows the corollary of some developed climes as The United States of America (USA), the controversy bothers about the fact that such powers may be misused by power-drunk and corrupt political leaders especially countries where the rule of law is not strictly followed and respected.



While the foregoing has remained an issue of debacle amongst scholars and political players alike, it is an undeniable fact that some of the corrupt elections in Nigeria like the 2007 elections which till date is adjudged as the most corrupt election in the country is a consequence of the excesses of the administrative powers of the President to appoint the INEC Chairman (Akinduro, 2012). In a similar perspective, it has also been argued that the right of the President to appoint the Chairman of the Commission has in some cases exuded the principle of Federal Character, hence, giving the President the leeway to make selections based on the confines of his ethno-regional, tribal, and religious jurisdictions. For instance, while the appointment of the past three (3) Chairmen of the Commission has respected the principle of Federal Character in that the Presidents and Chairmen at those times hailed from different regions and ethnicities, the appointment of former Acting Chairman and present Chairman, Amina Zakari (July-November, 2015) and Professor Mahmood Yakubu (2015 – present) by President Muhammadu Buhari has been described as a blatant and barefaced misemployment of administrative powers owing to their symmetrical ethno-regional, tribal and religious affiliations. This was also believed by Nigerians and political players as a plot to hack the 2019 Presidential elections to the favour of the ruling party, the All Progressive Congress (APC), on which platform the President was elected in 2015 and re-elected in 2019 (Punchng, 2019; Quadri, 2022).

Following these administrative imbroglios, elections in Nigeria have had records of blatant politicization and control by the ruling party, representing a form of neo-command politics of the military era which was characterized by undemocratic control and exercise of power. Hence, the study analyzes critically the administrative powers of the President to appoint the Chairman of INEC, while establishing healthier alternatives as lessons from full democratic states.



Concept of administrative power(s)

Administrative power (also called administrative rights) as a political concept emanates from the concept of administrative law, which confines on the administrator the rights which he/she wields and expresses. Therefore, to understand the concept of administrative power, the concept of administrative law must be well-explored.

Like other Social Sciences and Humanities concepts, many scholars have attempted the definition of administrative law. Jennings (1959) defined administrative law as the law relating to administration, which determines the organization, powers and duties of administrative authorities. Oluyede (1988) defined it as the branch of law which vests power in administrative agencies, imposes certain requirements on the agencies in the exercise of the powers and provides remedies against wrongful administrative acts. In his thesis, Garnier (1999) centered the definition of administrative law not only on the administrative agencies but also on the relationship between the agencies with the arms of government with which these agencies share jurisdiction. Thus, he noted that administrative law is the law which governs the organization and operation of administrative agencies (including executive and independent agencies) and the relations of administrative agencies with the legislature, the executive, the judiciary, and the public.

Central to the definitions above is the flaw of concentration on and inability to specify the constituents and confines of “administrative agencies”. For instance, administrative agencies in most cases are usually understood only in terms of the agencies of the executive arm of government as pointed by Garnier (1999). In a broader perspective however, it also includes the



agencies directly linked to the legislature (example, The National Assembly Service Commission), and the judiciary (example, Federal Judicial Service Commission).

Therefore, a working and formal definition of the term which incorporates the meaning and scope of administrative agencies is provided by Bradley & Ewing (2003) who defined administrative law as that branch of public law concerned with the composition, procedures, powers, duties, rights, and liabilities of the various organs of government that are engaged in administering public policies. Consequently, administrative law does not only cover the policies or regulations made by the arms of government and indeed the constitution, but also the internal laws, regulations, and procedures developed to guide the agencies established for the pursuance of these policies and regulations.

From the corollary, administrative powers are the rights conferred on an individual, group of individuals, agency of the government, or an arm of the government by law to make and enforce (in the case of the legislature and executive, respectively) laws. However, administrative powers should be differentiated from discretionary powers. While administrative powers are provided for by the law and therefore legally binding, discretionary power exercised by administrative and legal authorities are permissive, owing to the circumspection of the authority exercising such powers. In extension, it means such authority has the right to act or not to act in a particular way (Deepali, 2020). In Nigeria for example, the court holds the unrestrained discretion of approving or denying a bail application based on fairness as guided by the rules and principles of law.



The Independent National Electoral Commission (INEC) – Transitional history, composition and functions

Transitional history

The Independent National Electoral Commission (INEC) which is the current Electoral Management Body (EMB) in Nigeria has had a checkered transitional history from 1959 till 1998. The first EMB in Nigeria was the Electoral Commission of Nigeria (ECN) which had the sole responsibility of conducting the 1959 elections. The following year, the Commission was dissolved into the Federal Electoral Commission (FEC) by Prime Minister Tafawa Balewa. The Commission conducted the post-independence federal and regional polls of 1964 and 1965, respectively (INEC, 2022)

Following the military interregnum in 1966, the FEC was dissolved by the military government of Gen. Aguiyi-Ironsi through Decree 1 and 33, respectively. It was not until 1978 when the Gen. Olusegun Obasanjo (rtd) regime instituted a new EMB, the Federal Electoral Commission (FEDECO), which also mid-wifed the 1979 elections and ushered the country into her second republic (1979-1983) under the leadership of AlhajiShehu Shagari. It also conducted the controversial 1983 election which was truncated by the 1983 coup led by Gen. Muhammadu Buhari.

Gen. Ibrahim Babangida ushered in another military government in 1985 establishing the National Electoral Commission (NEC) in 1987 which held the annulled 1993 elections that saw to the rise and fall of popular businessman and philanthropist, Chief MKO



Abiola. Subsequently in 1993 when Gen. Sani Abacha seized power, the NEC was dissolved and reinstated in 1995. It conducted the Local Government and National Assembly elections of 1996 which was voided upon the death of Gen. Abacha in 1998 (Awodipe, 2019; INEC, 2022).

When Gen. Abdulsalami Abubakar came into power in 1998, the NEC was dissolved and the INEC instituted under Decree No. 17 of 1998, which is presently an Act of the National Assembly under Section 153 of the amended 1999 constitution. The body has conducted all the elections in Nigeria since 1999 till date. The Commission is currently headed by Professor Mahmood Yakubu, from Kebbi State (INEC, 2022).

Composition of INEC

The INEC is made up of 13 members comprising the Chairman and 12 National Commissioners. The President of the Federal Republic of Nigeria appoints the Chairman and members of the Commission in consultation with the Council of State. The appointment is screened and confirmed by the Senate. The tenure of the Chairman is five (5) years and can be re-appointed for another period of five (5) years after the expiration of the first. All states of the federation also have a State Independent Electoral Commission (SIEC) which is in charge of conducting local government elections in each state. The Chairman of the SIEC is usually appointed by the state Governor subject to the approval of the state House of Assembly (INEC, 2022).



Functions of INEC

The functions of INEC are stipulated under Part I of the Third Schedule of the 1999 Constitution (as amended). They are as follows.

- I. To organize, undertake and oversee all elections to the offices of the President and Vice-President, the State Governor and Deputy Governor, Senate membership, the House of Representatives and the House Assembly of each state of the federation.
- II. The registration of political parties in accordance with the provisions of the constitution and an act of the National Assembly.
- III. To supervise the organization and activities of the political parties, including their finances.
- IV. The organization of the annual examination, auditing, and accounting of the funds and accounts of political parties who hand over reports from free invoice creator tools, and also the publication of reports on such examination and audit for the general public.
- V. The registration of persons eligible to vote as well as prepare, maintain and revise the register of voters for the purpose of any election under constitution.
- VI. To monitor political campaigns and ensure adherence to rules and regulations as provided by the constitution.



- VII. To ensure that all Electoral Commissioners, Electoral and Returning Officers take and subscribe to the oath of office prescribed by law.
- VIII. To ensure public education on all matters related to voting processes and procedures.
- IX. The delegation of powers and roles to any Resident Electoral Commissioner (Constitution of the Federal Republic of Nigeria, 1999).

Theoretical Framework: The Games Theory

The games theory is a mathematical decision-making theory widely applied in the social sciences milieu majorly Economics, Political Science, and Sociology. Though the basics of the theory had been represented in the works of Augustin Cournot, Francis Edgeworth, and Emile Borel, it was officially enunciated by John von Neumann in his paper titled *Theory of Games of Strategy* in 1928. Later in 1944, the theory was further expanded by John von Neumann and Oskar Morgenstern in their book; *Theory of Games and Economic Behaviour*(Najera, 2019).

In the political sense, the theory describes the activities of the political system as a game, which is further defined as any situation in which the choices of two or more actors are interrelated. In extension, the decision (outcome) of political actors (players) does not depend solely on the choice of the actor alone, but the prior or perceived actions of other actors in the political system, all for private or group pay-offs and gains (Zagare&Slantchev, 2009).



Likened to the game of chess where the decision of a player or group of players is dependent on the prior or calculated move or direction of the opponent, the games theory holds the following assumptions.

- I. There are two or more players/actors in the game.
- II. There are rules governing the game. They are either cooperative rules (where rules are not binding on the players and where players are able to manipulate the rules, as in the case of international charters, agreements and protocols); or non-cooperative (where rules are binding on the players and where they are unable to manipulate the rules, as in constitutions, Acts of Parliaments);
- III. Information flow in the game is either public/general (where all players are aware of their pay-offs and gains in the game) or private/specific (where at least one or few players have knowledge of their pay-offs and gains in the game);
- IV. It is a constant sum game of zero-sum and non-zero sum. It is a zero-sum game where the pay-off and gain (or loss) of a player or group of players is equivalent to the loss (or gain) of the opponent. Hence, there is only one winner, and neither gains nor losses are shared. Adversely, it is a non-zero sum game where the pay-off and gain (or loss) of a player or group of players does not necessarily result in the loss (or gain) of the opponent. Thus, the gains or losses of all players do not add up to zero, and everyone can gain or loss (the points can be shared); and
- V. Each player or group of players is interested in his/her private gains.



The assumptions of Games theory is relevant in analyzing the nature and implications of the administrative powers of the President to appoint the Chairman of INEC, which is apparently the umpire in the game of politics as concerning elections. The President being one of the players together with the opponents (members and candidates of the opposition party) are well-informed (general/public information) of the gains accruing to the President and his party if he appoints the INEC Chairman. However, they (the opponents) are unable to manipulate this decision owing to the legal backing of such decision (non-cooperative rule game). Therefore, the President makes the decision appointing whom he deems fit and who may also bend to the whims and caprices of his wishes, which in most cases is usually to the disadvantage or loss of the opponents. This may result to the zero-sum game especially in the case of Federal elections such as the Presidential Elections where evidence has shown the ruling party usually working with the INEC to rig the elections in favour of their preferred candidate. This is evident in a report by Sahara Reporters which explained that one of the major reasons for the massively rigged Presidential Elections of 2007 was the interest of former President Olusegun Obasanjo (rtd) in installing his preferred candidate, party man and crony, Alhaji Umaru Musa Yar'adua as the President of the country, through the then INEC Chairman, Professor Maurice Iwu. This and many more excesses by the Chairman birthed encumbrances and political protests calling for the sack or resignation of the



Professor Maurice Iwu who in a poll conducted by Leadership Newspapers on March 1, 2009, was described by 90% of participants as incompetent (SaharaReporters, 2009).

The powers of the President for the appointment of the Chairman of INEC: A critical analysis

First, the term “independent” in the nomenclature of the Commission places an exclusive right and autonomy on the Commission to conduct, operationalize, and coordinate her activities without undue interference by any arm of government. In extension, such body, just like the electoral commission of Germany (called The German Bundestag) which is completely independent should be able to exercise autonomy in the process leading to the emergence of the Chairman without interference by the “political players” themselves. In cases where such autonomy and independence are not guaranteed, the Chairman is likely to follow the dictates of the President, which has been operationally conspicuous in past elections in Nigeria since the offset of the Fourth Republic.

Corroborating the argument for the administrative independence of the INEC in relation to the appointment of its Chairman, Professor AttahiruJega, a former Chairman of the Commission in a lecture organized by The Aminu Kano Centre for Democratic Research noted that one of the conditions for achieving more credible elections in future is the practical institution of an autonomous INEC in terms of appointment of its chairman as well as commissioners. Extensively, he expressed that if the Commission is granted financial autonomy through its account with The Central Bank of Nigeria (CBN) which is



controlled independently by the Commission without the interference by the President or Senate, the attachment of administrative and appointive powers to the President through the Senate is of a corruptible, sketchy, and unscrupulous motive. Hence, such appointment is culpable of the dictates of ethnic, tribal, regional and even religious considerations, which could further mar the activities of the Commission, promote a poor political culture, and render democratic consolidation unachievable as apparent in Nigeria (Haruna, 2017).

Supporting the argument above are instances in Nigeria where INEC has been compromised to favour the ruling party (the President's party) which also appointed the Chairmen and members. First, in the 2019 Kogi State elections, a National Commissioner proved that Governor Yahaya Bello (a member of All Progressive Congress {APC}, which is also the President's party) had made a double-registration which was an offense against Section 24 of the Electoral Act, and which could also disqualify him from voting and standing for elections. This was defended by the Chairman of INEC and further waived by the court without detailed investigation as expected in a politically neutral judicial system. The two staffs involved in the saga were later dismissed by INEC in subsequent weeks. Second, Agbu (2016) noted that in the build-up to the 2015 elections, the INEC was manipulated to disenfranchise Nigerians through the introduction of smart card readers. He continued in stating that the silence of INEC in both Ekiti State and Osun States elections of 2018 concerning the reckless use of the police and the military in



both states to beat up both voters, judges, and elected principal officers of the state House of Assembly which were later sacked, was a show of political sympathy to the ruling APC government at the Federal level. The consequence of the foregoing was the truncation of the democratic process and installation of Adegboyega Oyetola of the APC in lieu of the peoples' popular choice, Ademola Adeleke of the People's Democratic Party (PDP) in Osun State. This is further affirmed by the turnout of the recently concluded 2022 Osun State elections which saw the latter victorious over the former in a rather joyous manner, reflecting public opinion (Makinwa, 2022). Third, the recent appointment of Professor Muhammed Lawal Bashir by the President as the Resident Electoral Commissioner (REC) for Jigawa State, who has had obvious political affiliations with the APC and also a former gubernatorial electoral aspirant in Sokoto state in the 2015 elections, is a pointer to atrocious misuse of such administrative powers (Maishanu, 2022).

In another dimensional exegesis, the indiscriminate powers of the President to appoint the Chairman of INEC in the political arena is likened to the appointment or choice of an umpire or referee by the players or footballers in a game of football. This is not only unprofessional, but corruptible, fraudulent, amoral and unacceptable by The Federation International de Football Association (FIFA) which is also the international governing body of all official footballing activity. Following the allusion, the "game of football" is the electoral process (elections), the "umpire/referee" represents the INEC, the "players"



represent the politicians (President and Senators, who are likely to contest elections after the expiration of their first term, influence election results, and who also appoint the Chairman of INEC), while the “FIFA” represents the government and the constitution. Where a player or group of players select a referee for the game (for example, the home team appointed the referee), there is a likelihood that decisions in the game will be made to favour the player, group of players or team which appointed the referee. This is pervasive in politics in Nigeria which according to the games theory is an arena of planned choices and decisions for individual and group gains at the expense of the other individual or group (zero-sum game). In such scenario, the electoral process is abused and rigged at both federal and state levels to favour the ruling party, thus placing square pegs in round holes, and resulting to poor governance through the dictates of kakistocracy, kleptocracy, and autocracy. This is also corroborated by instances in Nigeria such as the 2007 Presidential election which is adjudged as the most rigged election in the history of Nigeria. According to Awopeju (2011), the elected officials, alongside the government agencies charged with ensuring the credibility of polls (INEC and the police) reduced the elections to a fraud-niddled farce.

Supportively, the European Union expressed that the elections was “far short of basic regulations and international standards for democratic elections” (UKaid, 2008). In the same vein, Onapajo&Babalola (2020) noted that the INEC displayed evidences of partisanship in the 2019 Presidential elections through the logistical and administrative



deficiencies which resulted in the postponement of the elections six (6) hours before its commencement. Accordingly, this was aimed at diminishing the heights of public participation and expectations about the prospects of the elections. The resulting effect was the reported disenfranchisement as a result of cancellation of results in areas considered as strongholds of the opposition parties. The elections also recorded a poor voters' turnout of 35%, the lowest ever electoral turnout in Africa. Additionally and most conspicuously was the unconstitutional abuse of the administrative power for the appointment of the INEC Chairman by the President in 2015 which through series of administrative imbroglios saw to the exit of former Chairman, Professor Attahiru Jega before the expiration of his tenure and the subsequent appointment of Mrs. Aminu Zakari, an alleged niece of the President (President Muhammadu Buhari), as well as the refusal of the President to remove the Commissioners who were above 60 years from the service of the Commission. These activities lined up as undemocratic strategies by the President to gain control over regions and states in Nigeria in a bid to establishing an indirect autocracy (Vanguard, 2015).

The summary of the unfettered powers accorded the President is the constant installation of leaders against the general public opinion, resulting in the down-play of legitimate and democratic governance. This constitutes one of the reasons for Nigeria being ranked with a Democracy Index as low as 4.1/10, signifying a hybrid regime, which connotes the side-by-side existence of a flawed and authoritarian democratic system, which makes her



occupy 109th position of 167 countries ranked in the Index (World population Review, 2022).

The Way Forward: A comparative analysis

One commendable feature of highly democratic climes as Norway, Germany, Austria (with Democratic Indexes of 9.81, 8.67, and 8.16, respectively), etc., is the practical independence of their various electoral management bodies in terms of administration, appointment, and funding (World Population Review, 2022). For example, the Austrian electoral commission called the Federal Electoral Board (FEB) is an independent authority comprised of the Federal Minister of the Interior as Chairperson with laws existing to guide the relationship between the board and the Ministry of Interior (Nationalratswahl, 2019). This is one of the reasons for the revered democratic electoral status of the country.

In Africa, countries like Cape Verde, Senegal, and Guinea-Bissau operate a civil service-based electoral board where the main or core electoral functions are undertaken by the civil service but under an independent oversight supervisory body of experts, usually judges. Though this system is less political, the government or authority through this process is still capable of panel-beating the echelon of the service like the Commissioners and Secretaries to their dictates. In Benin Republic, the EMB called the *Commission Electorale Nationale Autonome* (interpreted as Autonomous National Electoral Commission, CENA) is made up of members nominated by political parties. Whatever



the defects, the CENA through this method is attributed to have sometimes conducted more independent and neutral elections than the INEC Nigeria (Jinadu, 2021).

From the Austrian experience in relation to the adoption of a better option for Nigeria, it is pertinent, first, for the constitution to be amended as regarding the age, academic qualifications, administrative experience, and achievements of the supposed candidate for appointment. Hence, the right of appointment should be shifted away from the President and a distinct board established through the approval of 2/3 majority of the senate. The board should constitute at least 6 representatives from the Senate (one from each geopolitical zones), a representative each from major pressure groups such as the Nigerian Labour Congress (NLC), The Nigerian Bar Association (NBA), The Nigerian Judicial Commission (NJC), and The Nigerian Union of Journalist (NUJ). The persons involved should be individuals without any traceable charge of political or financial corruption, and who have not been indicted or convicted for a criminal or civil offense within and outside the country. The relationship between the Senate and the electoral board should be circumscribed by a set of guidelines, however, without illegal interference in the activities of the board, except that which is ultra vires. With this, the INEC would be more neutral and objective in her activities, thereby consolidating to a greater measure Nigeria's democracy, political participation, and good governance.



Recommendations

From the critical and comparative analysis of the subject, the following specific recommendations are made.

- I. A constitutional review of the appointive powers of the President in relation to the Chairman and members of INEC should be made. Such powers should be withdrawn from the President and accorded a neutral body.
- II. The neutral body should consist of a representative from each of the six (6) geo-political zones, one representative each from the Nigerian Labour Congress (NLC), the Nigerian Bar Association (NBA), the Nigerian Judicial Commission (NJC), and the Nigerian Union of Journalists (NUJ). The representatives of the geo-political zones should be selected by Governors Forum of each of these zones.
- III. The membership of each representative should be a period of 4 years which is subject to renewal for another 4 years after the expiration of the first.
- IV. The representatives should be persons with proven and attested track record of integrity, fairness and honesty, either in private or public service. Such should not be a registered member of any political party.
- V. The body should be strictly independent with a body of laws regulating its relationship with the arms of government.
- VI. The neutral body should also be charged with the supervision of the activities of INEC pre and post-elections.



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