

SUBSTANTIALITY OF DEFECTS VERSUS INVALIDITY OF ELECTIONS: A CRITIQUE OF SECTION 135 (1) OF THE NIGERIA'S ELECTORAL ACT 2022*

Abstract

Though there is no perfect democracy anywhere, sovereign states make efforts to advance towards the positive side of the ideal democracy. Such ideal democracy is gauged by the quality of electoral laws and the faithful application of such laws to the electoral process. Since the quality of the laws is as important as their application, a statutory provision that does not promote the advancement towards the ideal democratic status rather constitutes a clog in the wheel of the electoral process. Such provision stultifies the wish of the electorate and eventually contributes to the enthronement of persons as leaders not desired by the citizenry. This paper constitutes a critique of section 135(1) of the Electoral Act 2022. With references to foreign jurisdictions and reliance on some dissenting judgments of some Justices of the Supreme Court of Nigeria, the author recommends amendment to section 135(1) of the 2022 Act to give effect to the principles of substantial electoral legitimacy which is the hallmark of the ideal democracy.

Keywords: Election, Democracy, Electoral Laws, Nigeria

1. Introduction

An ideal democracy is anchored on, and gauged by the *legitimacy of the elections* that produced the government and *legitimacy of the government*. While the former is determined by the faithfulness or otherwise in implementing the electoral laws during the process of electing the officials of the regime the latter is assessed by ascertaining the popularity of the regime in power. Put differently, both concepts depict the actions of the electorate before the formation of government and the actions taken by government after its formation. The government at a point enacts or amends the existing electoral laws. Elections held in compliance with such electoral laws confer *electoral legitimacy* on those elected through such credible process. Electoral legitimacy may be substantive or procedural. *Substantive electoral legitimacy* manifests where the persons elected into offices are actually those desired by the electorate, while *procedural electoral legitimacy* requires that the election be conducted faithfully and pursuant to authoritatively established procedures. It presupposes that with the existence of substantive electoral legitimacy, procedural legitimacy is more or less guaranteed since those rightly elected by the people would subsequently ensure that future elections are conducted faithfully and in compliance with electoral laws and procedures. Consequently, once a regime of substantively reasonable electoral laws is in place, electoral legitimacy tends to be predominantly procedural because it is established by full and fair official compliance with authoritatively established electoral procedures.¹ All these forms of legitimacies can cumulatively be described as *democratic legitimacy*. One of the most serious challenges to democratic legitimacy is the defects arising and relating to substantive electoral legitimacy of an election. This arises where the electoral laws are faithfully followed but the laws are so poorly crafted that they tend regularly to misidentify those actually preferred by the relevant majorities and thus entitled to exercise official power. For such a complaint the law has no solution, as the challenge attacks the legal order itself. Such claims can be handled only through inherently political contestation, within the constitutional framework, over the substantive merits of the prevailing electoral laws. But where the provisions of the electoral laws on how to effectively challenge a perceived non-compliance with the electoral process is placed on an uneven pedestal; where the petitioner finds it difficult to stretch and get himself to the pedestal vis-à-vis the Electoral Monitoring body, the democracy legitimacy is compromised. Section 135(1) of the Electoral Act 2022, raised the pedestal for establishing non-compliance with the electoral process to such a high pedestal and forms the crux of the discussion in this paper.

2. Defects that Invalidate Elections

The Nigerian electoral jurisprudence considers and relies on the effect of a breach of the electoral laws or Guidelines on the outcome of elections in determining the validity of such election. If the effect is not substantial, an election cannot be voided. Section 135(1) of the Electoral Act 2022 provides as follows:

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¹ Dennis J. Thompson, *Just Elections: Creating a Fair Electoral Process in the United States*; The University of Chicago Press (2002) 185-187.

An Election shall not be liable to be invalidated by reason of non-compliance with the provisions of this Act if it appears to the Electoral Tribunal or Court that the election was conducted substantially in accordance with the principles of this Act and that the non-compliance did not affect substantially the result of the election.

The Supreme Court in its interpretative role in all successive elections has consistently given the same interpretation to equivalent sections of the Electoral Act dealing with non-compliance and substantial non-compliance with the provisions of the Act. The Courts reasoned that an election shall not be liable to be invalidated by reason of non-compliance with the provisions of the Act if it appears to the Election Tribunal or Court that the election was conducted substantially in accordance with the principles of the Act and the non-compliance did not affect substantially the result of the election.² The view of the apex court is that a Petitioner who alleges that an election has been conducted in breach of the Electoral Act has two burdens to prove: (a) That non-compliance with the Electoral Act took place; and (b) That the non-compliance substantially affected the result of the election. This statutory interpretation has been a source of concern, tension and inconsistency on the part of the courts such that some form of legislative amendment or judicial reconstruction may be required.³ The effect is that the Nigerian election law displays a high tolerance for procedural errors. The rule therefore appears to be that procedural irregularities are to be ignored unless they are so widespread as to have some realistic prospect of altering the outcome.⁴ This approach indicates that invalidation of elections as a remedy for procedural errors and irregularities is deeply disfavored in election jurisprudence.⁵ In sum, judicial approach to procedural electoral legitimacy is to uphold an election if it is 'good enough.' The controversial decisions in this area of the law are shown in two landmark cases: *Ojukwu v. Yarádua and 4 ors*⁶ and *Akeredolu v. Mimiko*.⁷ In *Ojukwu v. Yarádua (supra)*. The Supreme Court dismissed Ojukwu's appeal by a majority of 4 to 3 and held that:

By virtue of the combined provisions of sections 145(1)(b) and 146(1) of the Electoral Act, 2006⁸ a petitioner who challenges the election of a respondent on the ground of non-compliance with the provisions of the Electoral Act must plead not just the fact of the alleged non-compliance, but must go a step further to plead that the non-compliance substantially affected the result of the election. In the instant case the appellant did not plead that the alleged non-compliance with the Electoral Act 2006 substantially affected the result of the election. In the circumstances the Court of Appeal rightly struck out ground 1 of the appellant's petition. (*Buhari v. Obasanjo* (2005) 2 NWLR (part 910) 241; *Yusuf v. Obasanjo* (2005) 13 NWLR (part 756) referred to at (Ratio 7).

3. Dissenting Voices

The provisions of the electoral laws in tandem with section 135(1) of the Electoral Act 2022 had received hard knocks from Justices of the Supreme Court, though in dissenting and minority judgments. In his dissenting opinion in *Ojukwu v. Yarádua and 4 ors*, Oguntade JSC at pages 160-161 expressed concern that:

It is saddening in the extreme that section (146)(1) above, a provision which was designed to ensure that minor infractions of the Electoral Act which could not in any event be expected to have an effect on the result of an election has been elevated by our courts into a ground for accommodations of the most glaring failure to comply with the provisions of the Electoral Act.... Where a petitioner's complaint is founded on non-compliance with an essential condition precedent to the conduct of the election, this cannot and ought not to be seen as a non-compliance which did not substantially affect the result of the election. My view is that the preponderant majority of election petitions in Nigeria would fail in our courts even in the face of clear evidence of serious malpractices unless a proper and correct interpretation is given to section 146(1)

Oguntade JSC in the same case restated the allegations of the petitioner that the election was not conducted in compliance with the 1999 Constitution and contrary to sections 20 and 45 of the Electoral Act, 2006 on the

² *Buhari v Obasanjo* (2005) 13 NWLR (pt 941) 191.

³ Note the remarks of Tobi JCA (as he then was) in *Salisu Ali Bashir v. Polycarp Same and 4 ors* (1992) 4 NWLR (part 236) 495, particularly pp.506-510

⁴ Joshua A. Douglas, 'Procedural Fairness in Election Contests,' (2013).88 Ind. L. J. 1, 39.

⁵ Steven F. Huefner, 'Remedying Election Wrongs,' (2007) 44 Harv. J. Legis. 265, 284, 293

⁶ (2009) 12 NWLR (part 1154)

⁷ (2014) 1 NWLR (part 1388) 402 at 445-446

⁸ Sections 145(1)(b) and 146(1) 2006 Act are in *pari materia* or same as section 134 (1)(b) and 135(1) of the Electoral Act 2022.

following particulars: (a) Non-display of the Voter's list (b) Non-publication of the Supplementary Voters Register (c) Failure to number the Ballot Papers Serially. Oguntade JSC then held that:⁹

Sections 20 and 45 (of the Electoral Act 2006) above are the mandatory steps to be taken before the date of the election. They are imperative in their language. A petitioner who complains that these acts were not done as provided by the law is in fact saying that the election was invalidly conducted. This complaint by its very nature would not have anything to do with the result. On the other hand a person who complains about the late commencement of voting at an election or whose grouse is that sufficient ballot papers were not released for the election would rather bear the burden of showing that the non-compliance affected the result of the election. This is because by the nature of such complaint, the effect is always localized in which case it is necessary to show that such non-compliance affected the result of the election nationally. A complaint premised on the invalidity of an election is not the same with one premised on some localized concurrences in the conduct of the election.

Onnoghen JSC¹⁰ also dissented from the majority decision and held that where an election is held with proven invalid ballot papers or an invalid voters register, such non-compliance go to the root of the election and render the election null and void- without the need for the petitioner to show that the non-compliance affected the result of the election. He also maintained that if at all it has to be proved that the non-compliance did or did not affect the result substantially, it is the respondent (who stands to lose if no proof is given) who should bear the burden of such a proof once the petitioner proves non-compliance with the Electoral Act.

Onnoghen JSC held:

There is certain non-compliance that go to the root of an election in that they are absolute in the sense that once established the purported election is invalid and as such there would be no result to be substantially affected by the non-compliance. For instance where an election is conducted with an invalid voters register, can there be a result of an election to be substantially affected by the con-compliance? Obviously, none as the purported election is null and void ab initio. Secondly, voting is by ballot papers. It is the ballot papers cast in an election that are counted at the end of the election to determine the winner and the loser(s) of the election which is the result of the election. The Electoral Act 2006 makes provisions for ballot papers and determines what a valid ballot paper is. In section 45(2) of the Act, a valid ballot paper must be printed in booklet form and serialized. Where ballot papers used in an election are alleged not to be serialized or in conformity with section 45(2) of the Act, they are in law not ballot papers as they are invalid. Consequently, any election conducted with invalid ballot papers is a nullity and you cannot expect any result to come out of such any election as in law you cannot have something out of nothing, that is in accord also with common sense. Section 67(1) of the Act provides clearly that an invalid ballot paper cast at an election is not to be counted as vote. In the instant case all the ballot papers used at the election in question are alleged to be invalid by reason of non-compliance with the Act. Where then is the result of an election to be affected substantially by the non-compliance? Obviously none. That apart, I hold the view that the duty to plead and prove that the non-compliance did not affect substantially the result of the election where relevant, lies with the respondent as it would be the respondent that would lose since non-compliance of the nature of non-serialization of ballot papers erodes the foundation of the electoral process leaving the election with no result recognized by law. Thirdly, can there be valid election where it is total failure to accredit voters at an election? I hold the considered view that once a petitioner is able to prove that there was no accreditation of voters in an election, that election is invalid ab initio.

By the dicta, Oguntade and Onnoghen JJSC distinguished between defects which: (a) *a priori* invalidates the process of the election *ab initio* and (b) a defect that affects the outcome (result) of the election. The effect of the first defect is that the election stands on nothing as the premise or foundation is faulty. Though it may not be proved that such defect has any substantial effect on the outcome of the election, the election ought not to have taken place. The effect therefore is on the validity of the election and not on the result. It will be preposterous, therefore to proceed to an inquiry on whether the result of the election was substantially affected by the irregularities or wrongs, because there was no election whose result is being inquired into. The second defect is

⁹ Above (n 6) pp 162-163,

¹⁰ *ibid* pp. 175-176 para D-C

a defect which arises from a valid election i.e. the election is on a solid foundation, all the requirements for conducting an election having been satisfied, but some errors, mistake or misconduct occurs during the election which substantially affects the result of the election. In this scenario, the degree of effect of such errors, mistake or misconduct on the result can be queried to determine if it got to the stage of substantiality as to affect the outcome of the election.

The dissenting judgments of Oguntade and Onnoghen JJSC were in tandem with the erudition of Lord Denning when he interpreted section 37(1) of the People Act 1949 in *Morgan v Simpson*,¹¹ which had similar provisions with the Nigeria's section 135(1) of the Electoral Act 2022 in such a way that permits the court to nullify election either when the two burdens of proof (non-compliance simpliciter and non-compliance which substantially affects the result of the election) obtain *conjunctively* or *disjunctively* i.e., having to prove the two burdens together or separately.

The provisions of section 37(1) of the People Act 1949, which is in *pari materia* with the provision of section 48(1) of the current 1983 Act are as follows:

48 (1) No local government election shall be declared in-valid by reason of any act or omission of the returning officer or any other person in breach of his official duty in connection with the election ... if it appears to the tribunal having cognizance of the question that-

- (a) the election was so conducted as to be substantially accordance with the law as to elections ;
- and
- (b) the act or omission did not affect its result.

This provision was quoted and relied on by the Supreme Court per Niki Tobi, JSC, in *Abubakar v. Yar'Adua*¹²

Lord Denning explained that the above section 37(1) of the Peoples Act 1949 was stated in the negative and that a positive reformulation is possible. In reformulating the section positively, he said:

That section is expressed in the negative. It says when an election is not to be declared invalid. The question of law in this case is whether it should be transformed into the positive so as to show when an election is to be declared invalid. So that it would run: -A local government election shall be declared invalid (by reason of any act or omission of the returning officer or any other person in breach of his official duty in connection with the election or otherwise of the local election rules) if it appears to the tribunal having cognizance of the question that the election was not so conducted as to be substantially in accordance with the law as to elections or that the act or omission did affect the result. (My emphasis)

This was cited by Tobi, JSC, in *Abubakar v. Yar'Adua*.¹³

Lord Denning then went further to state the position of the law on the issue of substantial compliance or substantial non-compliance with the law of election. The crux of Lord Denning's holding is essentially that in certain situations *elections may be nullified without the two burdens being proved conjunctively*. He made the following legal propositions relating to local government polls conducted in the City of London areas as follows:

1. If the election was conducted so badly that it was not substantially in accordance with the law as to elections, the election is vitiated, irrespective of whether the result was affected or not. (That is shown by the Hackney case where two out of 19 polling stations were closed all day and 5,000 voters were unable to vote).
2. If the election was so conducted that it was substantially in accordance with the law as to elections, it is not vitiated by breach of the rules of mistake at the polls provided that it did not affect the result of the election. (That is shown by the Islington case where 14 ballot papers were issued after 8pm).

¹¹ [1975] 1 QB 151; [1974] 3 All ER 722; [1974] 3 WLR 517.

¹² (2008) 4 NWLR (Pt. 1078) 538).

¹³ (2008) 19 NWLR 1 SC p 166.

3. But even though the election was conducted substantially in accordance with the law as to elections, nevertheless if there was a breach of the rules of a mistake at the polls and it did affect the result, then the election is vitiated. (This is shown by Gunn Sharp case, where the mistake in not stamping 102 ballot papers did affect the result).

Lord Denning finally remarked that applying the above propositions to the case before the court, although the election was conducted substantially in accordance with the law, nevertheless the mistake in not stamping 44 ballot papers did affect the result. So the result is vitiated. Considering the propositions by Lord Denning in the *Morgan v. Simpson case*,¹⁴ we submit that the provisions of Nigeria's Section 135(1) of the Electoral Act are too restrictive and rigid in the absence of the court exercising its equitable power to avoid hardship and do justice. The existing provision of section 135(1) of Electoral Act can only be retained at the risk of encouraging greater degrees of voter apathy where elections which ought to be nullified on the grounds of violence and illegalities are upheld on the ground that the petitioner is unable to discharge the second burden of proof that the election result has been affected as a result of non-compliance.

The worries expressed by Hon. Justice Niki Tobi JCA (as he then was) in *Salisu Ali Nasheer v. Polycarp Same and ors*¹⁵ constitute further justification for the necessity to either legislatively amend section 135(1) or to judicially reconstruct the same along the lines suggested by Lord Denning as stated earlier. In *Salisu Ali Nasheer v. Polycarp Same and ors* (supra) the court interpreting the equivalent provision in section 135(1) of the Electoral Act said that "substantiality" means either 'materially' or 'essentially'. In the words of the court the word is used twice in that section to convey two different meanings which are disjunctive and should be read and treated as such. In his interpretative role, Tobi JCA (as he then was) said that in the first limb of the sub-section, an election will not be invalidated for non-compliance if it was conducted substantially in accordance with the provision of the law. In the second limb, an election will not be invalidated for non-compliance if the non-compliance did not substantially affect the result of the election. However, whereas Onnoghen JSC held, as stated above in *Ojukwu v. Yar'Adua*, that conducting an election with an invalid voters register renders the election invalid, null and void, without the need to show whether or not the non-compliance affects the result, the same Justice Onnoghen took a completely contrary position in *Akeredolu v. Mimiko*¹⁶ and held (in agreeing with the lead judgment) that in addition to proving that there was non-compliance with the Electoral Act on the ground of the use of an invalid voters register, the petitioner still had to show that the non-compliance substantially affected the result.

The judicial somersault or change of position by Onnoghen JSC generates a number of questions

1. What is the source of the sudden change of the judicial attitude?
2. Is the change of judicial attitude informed by the fact that Hon. Justice Onnoghen, JSC was overruled by the majority in *Ojukwu v. Yar'Adua*?
3. Or is the judicial somersault a product of a better appreciation of certain facts that were previously unknown? Or
4. Was it a better understanding of the law?

We submit that Hon. Justice Onnoghen JSC would have helped to deepen Nigeria's jurisprudence in electoral law if the reasons for the change of attitude were explained such that *Ojukwu v. Yar'Adua* is differentiated from *Akeredolu v. Mimiko* (Supra)

4. Conclusion and Recommendation.

The rule that an election can only be vitiated if non-compliance with the Electoral Act substantially affects the result of the election has been extended to other forms of irregularity, illegality, corrupt practices and violence. The principle of law that has been upheld in this regard is that irregularities at an election, corrupt practices, violence and other forms of illegality and criminality cannot ground nullification of an election and the victorious party cannot be held responsible unless a relationship or connection is established between the criminal acts and the consent or active participation of the winner of an election. Professor Sagay argues that this principle is misleading and grossly unfair, unjust and perverse.¹⁷ In the electoral jurisprudence of the United States of America, the Supreme Court of Arkansas prescribed an adorable standard in *Whitley v. Cranford*.¹⁸

¹⁴ Cited by Tobi, JSC, in the case of *Abubakar v. Yar'Adua* (supra)

¹⁵ (1992) 4 NWLR (part 236) 491 at 509.

¹⁶ (2014) 1 NWLR (part 1388) 402 at 445-446, para B-C

¹⁷ Sagay, I.E., *The Enforcement of Electoral Laws and Case Law of 2007 Election Petition Judgment*. Ibadan Spectrum Books Ltd 2012.

¹⁸ (2003)119 SW 3d 28.

Ronald Whitley and James Cranford opposed each other as candidates in the Democratic Preferential Primary for the position of Justice of the Peace, District 4, Hot Spring County. On Election Day, some ballots included the District 4 Justice of the Peace race, and some did not. The parties have not argued and the record does not show that the error in the ballots was discoverable and correctable at any time prior to the election. Rather, the problem with the ballots was only apparent after the election began. Ballots used at the Fenter-B polling site in the election on May 21, 2002, did not include the Justice of the Peace race. The record shows that seventy-six voters cast ballots at the Fenter-B polling site. Ballots used at the Ward 4 polling site in the election on May 21, 2002, did not include the Justice of the Peace race, however, voters brought the omission to the attention of polling officials, and the correct ballots were then used. Nonetheless, 107 voters had already cast ballots before the correction was made. The total number of voters who voted using ballots omitting the Justice of the Peace races is 183. Of votes cast using ballots including the Justice of the Peace race, 299 were cast for Whitley, and 244 ballots were cast for Cranford. Out of the votes cast in the Justice of the Peace race, Whitley received fifty-five more votes than Cranford. There were 1172 ballots cast that contained no vote in the Justice of the Peace race, which includes the 183 voters who were presented with ballots that did not include the race. When the 1172 under votes are added to the 299 votes cast for Whitley and the 244 votes cast for Cranford, the total ballots presented to voters in the Justice of the Peace race is 1715. Five hundred forty-three people cast votes in the Justice of the Peace election. Cranford filed a 'Petition to Contest Certification of Nomination and Vote and for Other Relief.' The circuit court held a hearing, and then voided the election, finding that the unintentional failure to include the Justice of the Peace race on the ballots presented to 183 voters deprived those voters of the right to participate in the election, rendered the result of the election uncertain, and defeated the requirement of a free election.

On appeal to the Supreme Court, it relied on, and predicated its judgment on issues of *doubt and uncertainty*. Some other Supreme Court decisions in that jurisdiction, instead of relying on *substantiality* of the effect of breaches of the election laws considered whether wrongful acts within the electoral process make the result of the election 'uncertain' or 'doubtful.' As far back as the 19th Century, it was held in *Patton v Coates*¹⁹ that the wrong should appear to have been clear and flagrant, and in its nature diffusive in its influences, calculated to effect more than can be traced, and sufficiently potent to render the result really uncertain. It was also held in *Patton* that:

[E]lections will not be invalidated for alleged wrongs committed unless said wrongs were such to render the result doubtful. In order to destroy the result of an election it must be shown that wrongs against the freedom of election have prevailed, not slightly and in individual cases, but generally and to the extent to rendering the result doubtful.

In other words, where the result is doubtful or uncertain, the election is void and there is no level of substantiality left to be analysed.

In the context of the above, we recommend that section 135(1) of the Electoral Act 2022 should further be amended to the effect that the court is empowered to hold that any election is vitiated or voided once non-compliance with fundamental elements of the Electoral Act, which go to the root of the election, such as corrupt practices, irregularities, violence, invalid voters' registers, invalid ballot papers are successfully proved, whether or not the result are affected.

We submit that only one burden of proof should be required; non-compliance with the Electoral Act, particularly where serious breaches of statutory and constitutional provisions are proven. Our concern is that the occurrence of certain irregularities, illegalities and violence should automatically be sufficient to nullify elections in the affected constituencies or polling units, without the need to prove that the result of the election was affected. It appears superfluous and arduous to require the petitioner to prove that the result of an election has been substantially affected where certain fundamental non-compliances have been established. That is why in our view many petitions brought on the ground of non-compliance tend to fail. The goal of perpetrators of violence tends to scare the majority of the electorate away so as to leave behind only very few people, just to justify that election has taken place. In such a situation, only the supporters of the perpetrators of violence are likely to have the guts to remain behind. An amendment of the Act along the line suggested may have a deterrence effect on promoters of violence. We further recommend an amendment of the Electoral Act that where non-compliance is alleged and it is necessary to show by evidence that the result of the election has been substantially (or not substantially) affected, the burden of proof should be on the electoral commission rather than on any of the contending parties. This is necessary because the commission is, or ought to be disinterested in who wins or loses the election. An amendment of the electoral law is recommended to provide adequate

¹⁹ (1883) 41 Ark. 111

punishment for perpetrators of election irregularities, acts of violence, illegality and corrupt practices. The law should be developed such that where the winner of an election is associated with malpractices which took place during the election, the result should be nullified.

Furthermore, the law should be developed in favour of zero tolerance for election results or election outcomes that are fraught with illegalities. Whether or not it is proved that the winner of an election has consented or participated in perpetuating irregularities during an election, the law should be developed such that the election be nullified. A development of the law in this respect is necessary because the essence of elections is not only about the contestants or candidates. It is not even about political parties. It is indeed about the fate, fortune or misfortune and future of a whole society. As *Aderemi* JSC said in a dissenting opinion in *Ojukwu v. Yar'Adua*²⁰

Let it be said that the quest for justice is insatiable when it is realized that the great phenomenon called justice is not a one-way traffic, not even a two-way traffic. I beg to say that a court of law which is also a court of justice must always ensure that justice flowing out from its sanctuary which, of course be in accordance with the laws of the land, is not only for the plaintiff (the complainant) not even only for the defendant (the person complained against) but also for the larger society whose psyche is always affected one way or the other, by any judicial pronouncement.

An electoral process cannot be said to be free, fair and credible where fraudulent combinations for illegal voting override honest votes, or where fear deters potential voters from participating in an election in the exercise of their free will. It becomes an overkill where the law additionally still overloads them with the requirement to prove that such debauchery substantially affected the result of an election which consequentially ought to be void.

²⁰ (2009) 12NWLR (part 1154) 50 at 192 para E-F