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DOCTRINE OF SUBSTANTIAL COMPLIANCE: AN ENEMY OF THE PETITIONER & THE ELECTORATES IN A FAILED ELECTION

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Abstract
According to the Election Statutes – Electoral Acts - 2002 - 2010 and reinstated by Electoral Act 2022, an election shall not be liable to be invalidated by reason of non-compliances... if it appears to the Election Tribunal or Court that the election was conducted substantially in accordance with the principle of this Act and that the non-compliance did not affect substantially the result of the election. The doctrine of substantial compliance is an attempt by electoral legislation to save elections that have become in modern day Nigeria not only very expensive but brutally a warfare, from being nullified even when there is no strict compliance with the legal requirements, hence, a slight irregularity will not render an election void if the election had been conducted substantially "in accordance with the enabling law". The historical cum common law position reinstated that the non-observance of the rules or forms which is to render the election invalid, must be so great as to amount to conducting of the election in a manner contrary to the principle of an election by ballot and must be so great as to satisfy the tribunal that it did affect or must have affected the majority of the votes or the result of the election. The researchers through the doctrinal methodology found that the doctrine have become in its judicial application an enemy to both the petitioner and the electorates in a failed election in the sense that it makes a mockery of the electoral system and election as the Electoral Management Body hides under it to commit all manner of atrocities. Moreover, it creates room for a lot of corrupt practices during elections by the political parties, party agents and INEC staff among others. We concluded nonetheless that inspite of all the adumbrated vices, the doctrine have indeed saved Nigerians from imbroglio and disintegration, hence we recommend its sustainability with Solomonic Wisdom by the jurists.

KEY WORDS: Substantial**,** Compliance, Enemy, Petitioner, Election/Electorates.

Introduction
It is trite that human beings are fallible and are therefore bound to make mistakes. It is also trite that there are mistakes that occasion from the system, that is, the technology materials and instrument used towards achieving a goal. In electoral process, such materials, technologies and instruments could result from Voters Register, Direct Data Capture Machines (DDC), Computer Machine and Information Communication Technology (ITC) etc. Thus, errors are bound to occur when elections are conducted; there can never be one hundred percent (100%) compliance with the relevant electoral laws.

Consequently, electoral legislation try to save elections from being cancelled or nullified even when there is no strict compliance with the legal requirements and this is why, Ogbu,[1] agrees with the case of *Gambo v INEC*[2], where it was held by the Court of Appeal that a "slight irregularity will not render an election void if the election has been conducted substantially" in accordance with the enabling law: The question of validity of an election objected to on grounds of irregularity or even mal- practices or non-compliance with the provisions of the electoral legislation is therefore, one of degree. According to Nnodum[3], electoral statutes normally envisage that there could be acts which though indicate non- compliance with the law, yet are not so fundamentally incongruous with the spirit of the law and may not substantially affect the result of the election.

[1]Ogbu O. N., The Doctrine of Substantial Compliance in Election Petitions in Nigeria: The Imperative of Judicial Approach, July, (2010), (Vol. 6, No. 1), *Nigeria Bar Journal*, 29.
[2] (1993) 1 NWLR (Pt. 267), 94
[3]Nnodum J.T.U., *Election Petition: Law and Practice*, Lagos, James Alice Service Ltd, 1996, 187

Common Law Position/ Rules

The common law position on the doctrine of substantial compliance was articulated by Lord Coleridge in *Woodward v Sarsons*[4], where my Lord said: "As to the first (i.e. as to what is the true statement of the rule under which an election may be avoided by the common law parliament), we are of opinion that the true statement is that an election is to be declared void by the common law applicable to parliamentary elections if it was so conducted that the tribunal which is asked to avoid it is satisfied, as a matter of fact, either that there was no real elections (sic) at all, or that the election was not really conducted under the subsisting electoral laws. As to the first the tribunal should be so satisfied i e that there was no real election by the constituency at all, if it were proved to its satisfaction that the constituency had not in fact had a fair and free opportunity of electing the candidate which the majority might prefer".

In *Nwole v. Iwuagwu*,[5] the Supreme Court lucidly stated as follows:

> Non-compliance may result not only from the degree of, but also from the nature of a complaint and the question in every case is whether or not in view of the findings, the Constituency as such was allowed to elect its representative

Lord Coleridge in further considering whether the election was void by virtue of a breach of the Ballot Act stated that: the non- observance of the rules or forms which is to render the election invalid, must be so great as to amount to conducting of the election in a manner contrary to the principle of an election by ballot, and must be so great as to satisfy the tribunal that it did affect or might have affected the majority of the voters, or in other words, the result of the election.[6]

Lord Denning, M.R in reviewing a past legislation and judicially interpreting the provision of (S. 37) (1) of the Representation of the People Act 1949[7] which provides as follows:

> No local government election shall be declared invalid by reason of an act or omission of the returning officer or any other person in breach of his official duty in connection with election or otherwise of the local election rules if it appears to the tribunal having cognizance of the question that election was so conducted as to be substantially in accordance with the law as to elections and that the act or omission did not affect the result, as stated in Morgan v Simpson.[8]

The following propositions of law which became known as the rule in *Morgan v Simpson* are:

(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. This is shown by the case of Hackney case[9], 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 a breach of the rules or a mistake at the polls provided

[4]101 L.R.C.P. 733 at 743.
[5] (2004) 15 NWLR (Pt815),
[6]101 L.R.C., 733 at 751
[7]Ogbu O. N., opcit, 31
[8](1975) 1 Q.B. 151 cited in Ogbu O. N., Opcit, 31
[9]20 M and H 77

that it did not affect the result of the election. This is shown in the Islington case[10], where 14 ballot papers were issued after 8p.m.

(3) But even though the election was so conducted substantially in accordance with the law as to election nevertheless, if there was a breach of the rules or a mistake at the polls- and it did affect the results of the election, then the election is vitiated. This is shown in *Gunn v Sharpe*[11] where the mistake in not stamping 102 ballot papers did affect the result.

The Nigerian Position

In Nigeria, since the beginning of the Third Republic, our courts have endeavored to be consistent in the application of the doctrine of substantial compliance. The doctrine has a statutory flavor under *sections* 135, 146 and 139 of the Electoral Acts 2002, 2006 and 2010 as well as *Section* 135(1) of the Electoral Act 2022 (as amended) respectively. The usual provision reads: "an election shall not be invalidated by reason of non-compliance with the provisions of this Act if it appears to the Election 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"[12].

It must be noted that in some legislations, the expression used was "principle" instead of "substantially in accordance with". The history of the expression has been traced to *section* 13 of the English Parliamentary and Municipal Election Act, 1872. In 1949, *section* 37 of the Representation of the People Act dropped the word "principle" and simply used the word substantially' in accordance with the law. This was how Niki, Tobi, JSC (as he then was) stated the history in the case of *Buhari v INEC and 4 Ors*.[13]

In an attempt to ordinarily and graphically explain the import of the doctrine Salami, JCA, (as he then was) in an answer to one of the allegations made by Omisore that almost 60% of the votes in Osun State were nullified and that should have been sufficient basis to order a re-run, stated as follows:

> That cannot be correct. It is there in the Electoral Act! It was made by the National Assembly and assented to by the President. That if there is no substantial compliance, the election should be nullified. Substantial compliance is that they looked at the 30 local governments in the state and 20 of them were intact. I cannot therefore see how 20 upon 30 can be more than 60%. It was only 10 local governments that were found to be tainted. They didn't nullify all the local governments. They nullified polling booth by polling booth and ward by ward. In some of the local governments, the votes were counted along with other local governments, and they challenged a number of votes in some polling booths. If they found more than 50% votes bad, that particular polling booth was forfeited and the votes cast on that booth voided, otherwise the result from that booth was upheld.[14]

In *Buhari v Obasanjo*[15], the election to the offices of the President and Vice President of the Federal Republic of Nigeria was conducted nationwide by the 3rd respondent (INEC) on

[10]17 TLR 210

[11](1974) QB 808 at, 162

[12]See *sections* 135, 146 and of Electoral Acts 2002, 2006 and 2010 (As Amended) and *Section* 135 (1) of the Electoral Act, 2022

[13]*Buhari V. INEC and Ors* (2008) 19 NWLR (Pt. 1120), 246 @ 358

[14]Salami I. A., 'We Are Not On Anyone's Payroll" *THISDAY*, Tuesday, Jan 25, (2011)

[15](2005) 13 NWLR (Pt. 941), 1.

19thApril, 2003. The 1st appellant and another person, now deceased, contested as the candidates of the All Nigerian Peoples Party (ANPP), while the 1St and 2F respondent contested as the candidates of the Peoples' Democratic Party (PDP). At the end of the election, the 1stand 2ndrespondents were returned as duly elected as President and Vice Presidents respectively. The 1stand 2ndappellants were aggrieved with the return of the 1stand 2ndrespondents and they filed a petition at the Court of Appeal in its jurisdiction as the Presidential Election Tribunal. They sought, *interalia*, the following reliefs:

a) An order of the court that the election is invalid for reasons of non-compliance with substantial sections of the electoral Act 2002.
b) An order of the court that election is invalid for reasons of corrupt practices.

In its judgment, the Court of Appeal found that the voters cast their votes without voters cards contrary to the provision of the Electoral Act, 2002. Consequently, it held that the provisions of exhibit "0", which allowed them to do so was ultra vires the power vested in the 3rd respondent by the Electoral Act, 2002 and void because of its inconsistency with the Act. It found from evidence adduced that there were acts of electoral malpractice, violence and intimidation as averred by the appellant's but held that the non-joinder of the 3 respondent's electoral officials and the military and police technical officers who perpetrated the acts of violence and intimidation was fatal to the paragraphs of the petition in which the allegations were made and to the Appellant's case.

Again, in 2007, the principle of substantial compliance was to rear its head in the presidential election petition filed by the presidential candidate of the All Nigeria Peoples Party (ANPP), General Muhammadu Buhari, against Alhaji UmaruYar'Adua and Dr. Goodluck Jonathan as President and Vice President. In *Buhari v Yar'Adua* (*supra*) the Supreme Court had observed that the vastness of Nigeria and the many diversities of tribes, cultures, sociology, anthropology coupled with the usual aggressiveness of Nigerians, arising from the do-or-die behaviour in politics will inevitably produce problems for the electoral process. Niki Tobi, JSC pointed out in his lead judgment that courts will naturally do nothing unless the problems in any election are of such compelling magnitude as to substantially set aside the result of the election. In dismissing Muhammadu Buhari's appeal, the Supreme Court said "the courts of law do not give judgments according to public opinion or to reflect public opinion unless such opinion represents or presents the state of the law"[16] insisting that the Petitioner/Appellant had failed to prove his case as required by section 146(1) of the Electoral Act, 2006.

According to the Supreme Court, this section does not state the reasons for invalidating an election but clearly provides for circumstances in which an election might not be invalidated, even after it had been established that there was non-compliance in the conduct of the elections. The Supreme Court explained that for a petitioner to succeed, he must prove that all alleged non- compliance with the provisions of the Electoral Act were (1) substantial, and (2) had affected the result of the election substantially. Alhaji Umaru Yar' Adua of the Peoples Democratic Party (PDP) scored 24,784,227 votes while Muhammadu Buhari of the All Nigeria Peoples Party, (ANPP) scored 6,607,408[17] votes in the contested 2007 presidential election.

Muhammadu Buhari had alleged that the 2007 presidential election was not conducted in substantial compliance with Electoral Act 2006 and that the substantial non-compliance had affected the result of the election substantially. He cited several instances of non-compliance, including the alleged la1e arrival and distribution of election materials in some states of the federation and the alleged production of loose ballot papers, contrary to the provision of the Electoral Act, 2006 that ballot paper be arranged serially and bound for audit purposes. General Buhari also said that the non-serialization of the ballot papers made it easy for the Independent

[16]Substantial Compliance and Public Opinion; *Op. cit*, 28
[17]Substantial Compliance and Public opinion; *Op. cit*, 29

National Electoral Commission (INEC) and the Presidential and Vice Presidential candidates of the Peoples Democratic Party (PDP) to connive and to allot votes arbitrarily to the PDP candidates, for which reason the PDP candidates were declared winners of the 2007 presidential election.

General Buhari had also alleged that Alhaji Umaru Musa Yar' Adua and Dr. Goodluck Jonathan were not competent to contest an election to the presidency of the Federal Republic of Nigeria by virtue of section 137(1) (1) of the Constitution of the Federal Republic of Nigeria. Section 137 (1) (1) of the 1999 Constitution[18] provides:

> A person shall not be qualified for election to the office of President if he has been indicted for embezzlement or fraud by a Judicial Commission of Inquiry or a Tribunal set up under the Tribunals of Inquiry Act, a Tribunal of Inquiry Law or any other law by the Federal or State Government which indictment has been accepted by the Federal Government or State Government respectively.

General Buhari had claimed that the two candidates had been indicted by an Abia State Judicial Commission of Inquiry and the Abia State government had subsequently issued a white paper indicting them. In reaching its decision, the Supreme Court analyzed several written evidence in respect of the alleged irregularities observed in Rivers, Anambra, Abia and Nassarawa States by witnesses for Muhammadu Buhari, and held that because such evidence did not contain only facts within the knowledge of the witnesses or from information which they believed to be true, but contained objections, prayers and legal arguments, which violated provisions of the Evidence Act. They were rightly excluded. The Supreme Court also pointed out that since witnesses were not experts in election or electoral matters, the witnesses had no legal competence to comment on the documents. The witnesses who gave written evidence were two traders, a farmer and a businessman.

The Supreme Court wondered why General Buhari did not ask his party agents, who were supposed to be at each polling station throughout the country to come to court and testify since they must have seen all that had taken place. According to the Court, 'an agent'[19] is the representative of the candidate in the polling station. He sees all the activities. He hears every talk in the station. He also sees all actions and inactions in the station, so that any evidence given by a person who was not present at the polling units or polling booth is certainly "a hearsay". No ANPP agents testified before the court (Court of Appeal and Supreme Court). The Supreme Court again maintained that since non serialization and bundling of the ballot paper affected the elections, it was no reason for the court to nullify the election.

On the issue of indictment by the Abia State government, the Supreme Court stated that Abia State was not a competent authority to indict officers who were servants in governments other then the Abia State government, It explained that the relevant law only allowed state governments to conduct investigations within their jurisdiction and since PDP candidates held office as governors, the Abia State government cannot indict them; as such the indictment was of no effect as to the competence of Umaru Musa Yar' Adua and Goodluck Jonathan to contest the 2007 presidential election. None of the issues submitted by General Buhari as grounds for nullifying President Umaru Musa Yar' Adua's election succeeded at appeal. According to the Supreme Court, General Buhari did not lead evidence to show how substantial the alleged irregularities were and how substantially they had affected the outcome of the said election.

There were two dissenting judgments in favour of the appellant, canceling the presidential election for non-compliance with the provisions of the Electoral Act 2006; however, the

[18]*Section* 137(1)(1) of the 1999 Constitution (As Amended)

[19]Substantial Compliance and Public Opinion; *Op. cit*, 30

majority judgments stated that the appellant had failed to prove his case. They stated that where a petitioner contests the legality or lawfulness of votes cast in an election and the subsequent result, he must tender in evidence all the necessary documents and call witnesses to testify to the illegality or unlawfulness of the votes cast and also prove that the illegality or unlawfulness substantially affected the result of the election.

Again, in the case of *Atiku v Yar' Adua and 5 Ors*[20], the doctrine of substantial compliance was invoked. Atiku Abubakar, presidential candidate of the Action Congress (AC), whose petition was joined with that of General Buhari at the Court of Appeal, had sought to ask Prof. Maurice lwu questions that were to enhance the success of their petition. The Court of Appeal said no. It held that all the 51 questions were not relevant. Atiku Abubakar appealed this ruling, during the pendency of the petition at the court of Appeal, the Supreme Court said most of the 51 questions were relevant and since they were within the knowledge of the INEC Chairman (Prof. Iwu), he should answer them. He did. The petition failed at the Court of Appeal and subsequently at the Supreme Court. The fact of the case remains that the presidential election was held in Nigeria on 21stApril, 2007. The election was contested by candidates from 25 political parties. The 1st and 2nd appellants contested as candidates of the Action Congress (AC). The 1st and 2 respondents contested the election as candidates of the 3rd respondents, the Peoples Democratic Party. The Chief Returning Officer of the 4th respondent returned the 1st and 2 respondents as elected.

The Appellants were dissatisfied with the return of the 1st and 2nd Respondents; consequently, the Appellants filed an election petition challenging the said election. The grounds of the petition were as follows: that (a) the 1st petitioner was validly nominated by the 3rd petitioner but was unlawfully excluded from the election;

In the alternative that:

(b) The election was invalid for reason of corrupt practices;
(c) The election was invalid for reasons of non-compliance with the provisions of the Electoral Act, 2006, and
(d) The 1st respondent was not duly elected by majority of lawful votes cast at the April 215t 2007 presidential election.

The Court of Appeal struck out the alternative grounds in the petition and dealt only with the issue of exclusion and at the end dismissed the petition upon the finding that the petitioner was not excluded from the election.

The appeal to Supreme Court was dismissed by a majority of 6-1, with Oguntade, JSC, dissenting. In delivering the leading judgment, his Lordship Aloysius lyorgyer Kastsina-Alu, (J.S.C. as he then was) who delivered the lead judgment, dwelt on the issue of non-compliance as he found it sufficient to dispose of the appeal on the ground that the petitioners did not prove that they were excluded from the election as pleaded by them in the alternative. His Lordship, Niki, Tobi, JSC (as he then was) dwelt extensively on the issue of non-compliance by given a detailed analysis of the decision in *Morgan v Simpson*, as cited by the Appellant's counsel.

He referred to the statement of Stephenson, L.J at page 31 of that case which stated that:

> If substantial breaches of the law are, as I think enough to invalidate an election, though they did not affect its result, it follows that contrary to the opinion of the divisional court, trivial breaches which affect the result must also be enough". Niki Tobi, stated that the "first leg of the statement in respect of breaches not affecting the result is not our law as it is contrary to section 146 (1) of the Electoral Act, 2006. It could be English law; but certainly not Nigerian law, and so it is out.

[20](2008) 19 NWLR (Pt. 1120), 1.

His lordship continued and quoted the dictum in *Morgan v Simpson* cited by the Appellant's counsel which stated "any breach of the local election rules which affects the result of an election is by itself enough to compel the tribunal to declare the election void" and agreed that, this is the position in our law as it speaks the language of section 146(1) of the Electoral Act". Majority of Nigerian Courts and jurists have been delivering judgment in line with strict conformity to the provisions of *section* 146(1) Electoral Act, 2006 (now *section* 135 of the Electoral Act 2022) which His Lordship, Niki, Tobi, said in *Abubakar v Yar' Adua* is "a friend of the Respondent, a real friend which the respondent finds most useful at the greatest hour of need". This interpretation to some extent has shielded elections lacking in integrity from nullification and is conversely an enemy of a petitioner and the public.[21] Moreso, it does not follow the interpretations of the English Court of Appeal in *Morgan v. Simpson*.

How the Doctrine of Substantial Compliance has been an enemy of the Petitioner and the Electorates in a Failed Election

1) It makes mockery of the electoral system and elections election in Nigeria as INEC hides under it to commit all kinds of atrocities knowing that the Courts will uphold the illegalities under in line with doctrine of substantial compliance.
2) It leads or gives room to a lot of corrupt practices during elections by political parties, their agents as well as the staff of INEC.
3) It places an onerous or cumbersome burden or task on the Petitioner in election petition cases.
4) It encourages and aids the Election Petition Tribunals and the Appellate Courts to occasion miscarriage of justice on Petitioners notwithstanding the fact that the Petition may have a cogent and compelling petition. Several instances abound where Election Petition Tribunals and the Appellate Courts have admitted that the INEC performers abysmally poor and did not comply with the Electoral Act in the conduct of the election in question yet they turn around and erroneously hold that the non-compliance was not enough to vitiate the election.

See the unreported case of: ABUBAKAR SADIQUE BABA & ANOR V. INEC & 2 ORS in EPT/BA/GOV/02/2023 where the Tribunal Held as follows:

> "....we indeed notice some few blank spaces in some of the forms ie EC25B, EC40A, EC40B, EC40C.... be that as it may, we do not agree that failure to fill these forms or fill them improperly suffices as a ground to invalidate election...."

The above decision of the Tribunal with the greatest respect to them is wrong in that *Section* 73(2) of the Electoral Act 2022 clearly provides that an election conducted at a polling unit without the prior recording in the forms prescribed by the commission of the quantity, serial numbers and other particulars of results sheets, ballot papers and other sensitive electoral materials made available by the Commission for the conduct of the election shall be INVALID. It is our considered view that section 73(2) of the Electoral 2022 did not give or provide the tribunal with the discretion to agree or disagree with the effect of its non-compliance in that the word used there is mandatory and not discretional

5.) Lastly, often times, the provision does not allow the constituency to strictly and truly elect its representative.

[21]Ogbu O. N., *Op. cit*, 29

Recommendations

Elections have been over the years conducted in the United Kingdom and other Commonwealth countries where the common laws were introduced into our polity, yet there are parity in election petitions/ litigations. This we observed was as a result of the wisdom of the jurists as proper ventilator of the petitions by lawyers who are not guided by any form of personal, primordial, partisan and tribal prejudices or biases. The diligent and honest ventilation of our electoral cases would serve as a guide to the Jurists who would then apply the Wisdom of Solomon to render judgments in our Electoral Cases, thus saving the country from further electoral expenses, time and disintegration through warfare.

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