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An analysis of Nigeria's soft non-compliant approach to domestic and regional court orders and its implication for human rights and the rule of law

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Abstract

Enshrining executive accountability and rule of law practices have been the drive behind democratic developments and the rise of regional human rights courts across the African continent. At the national level, a concern has been the need to practise effective separation of powers in order to ensure the independence of the judiciary. At the regional level, the literature has focused mainly on the human rights mandates of regional courts and tribunals with particular emphasis on states' compliance with the decisions of these bodies. With the dominant reaction of states, most especially in instances of unfavourable regional rulings, being largely characterised by aggression and confrontation, the literature has failed to address a more recent trend of states' cooperative and compliant rhetoric, towards adverse judgments of regional courts, albeit with a predetermined position not to comply with the ruling of those courts. This chapter attempts to address these gaps in the literature by analysing the "soft" approach of non-compliance in cases that crisscross national and regional courts. In doing this, the chapter will examine two Nigerian cases (involving Sambo Dasuki and Nnamdi Kanu) where abuses of court processes and the state's disregard for court orders have seen the defendants make much-needed appeals to the regional court. The chapter examines this fledgeling interaction between national and regional courts and the implications of the "soft" approach to non-compliance in the administration of justice and the rule of law. The findings are particularly relevant in the context of previous literature that has attached importance to "respect" accorded to regional institutions in determining whether such states would comply with the decisions of those bodies.

Keywords: Nigeria, judicial compliance, rule of law, ECOWAS Court, human rights

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1 INTRODUCTION

In November 2015, shortly after being sworn in as the country's new leader, Nigeria's President Muhammadu Buhari effected the arrest of the country's erstwhile National Security Adviser, Sambo Dasuki. This came on the heels of allegations of massive corruption perpetrated under the immediate past political regime. Dasuki was charged in court and granted bail but was never released despite satisfying his bail conditions. He remained incarcerated despite five court orders for his release on bail, including one such order by the regional Economic Community of West African States (ECOWAS) Community Court of Justice (ECCJ).[1] In another similar case, the state security agencies arrested the leader of a secessionist movement, Nnamdi Kanu. Like Dasuki, Kanu, upon arraignment, was granted bail by two courts in Nigeria. However, the Nigerian government failed to release him in each instance. As in Dasuki's case, Kanu resorted to the ECCJ as a final attempt to secure his release from detention.[2]

In both of the cases above, the Nigerian government, aside from their sheer failure to enforce the courts' rulings, did not confront or show other overt forms of aggression or discourtesy towards either its national courts or the regional ECCJ. Quite on the contrary, the Nigerian government defended those cases before the respective courts and, even in the face of adverse rulings, expressed its commitment to upholding and enforcing the pronouncements of the courts. However, contrary to its compliant rhetoric, the Nigerian government embarked on what may arguably be referred to as an abuse of judicial process, through rearrests and duplicate proceedings, in an obvious attempt to subvert the rulings of the courts. This development highlights the country's reluctance to adopt a confrontational approach towards, for instance, adverse regional court rulings, in favour of rhetorical cooperation and subsequent legal machinations aimed at subverting the same rulings.

This development is crucial in the context of charting the future path of the relationship between states, on the one hand, and national or regional courts on the other. To illustrate this point, the available literature on regional judicial and quasi-judicial institutions in Africa have, over the years, placed emphasis on, *inter alia*, cooperation and respect for those institutions, as being crucial factors for determining whether states comply with the decisions of those bodies.[3] Thus, a state that accepts and "respects" the regional institution in question would more likely than not, comply with that body's decisions as opposed to one that does not accept or respect the regional institution. This position has understandably been reinforced by past occurrences whereby states have openly cited a perceived lack of authority as their reason for not complying with a regional commission or court decision. On some past occasions, as will be briefly touched upon, some states have, after an adverse ruling against them, taken extreme confrontational steps such as proceeding to initiate steps to withdraw from such bodies[4] or encouraging other states to either withdraw or restrict the mandate of the regional institution in question. Such occasional extreme steps were usually in response to unfavourable decisions against sensitive official policies or peculiar political activities of those states and may not necessarily reflect their general attitude towards the relevant regional institutions. In the Nigerian case, however, the examples below reveal a similar outcome albeit in the guise of compliance and cooperation. In other words, in respect of some politically charged cases, there is an underlying executive chicanery, aimed at evading compliance by apparently (at least in terms of rhetoric) submissive and "compliant" states. This intention becomes increasingly clear when one examines the actions of the Nigerian government to state-recognised decisions both at the national and regional levels. Recent developments, as

1 Nasir "The six times court has granted bail to Dasuki" https://www.thecable.ng/file-six-times-court-granted-bail-dasuki (accessed 04-11-2020).

2 See Okeke "Nnamdi Kanu Vs DSS: Persecution or Prosecution?" *This Day* 28 March 2016; see also *Nnamdi Kanu v Federal Republic of Nigeria* ECW/CCJ/APP/06/16.

3 See for instance, Viljoen & Louw "State Compliance with the recommendations of the African Commission on Human and Peoples' Rights, 1994 – 2004" 2006 *The American Journal of International Law* 11; Wachira & Ayinla "Twenty years of elusive enforcement of the recommendations of the African Commission on Human and Peoples' Rights: A possible remedy" 2006 *African Human Rights Law Journal* 465; Murray & Mottershaw "Mechanisms for the implementation of Decisions of the African Commission on Human and Peoples' Rights" 2014 *Human Rights Quarterly* 349; Murray & Long *The Implementation of the Findings of the African Commission on Human and Peoples' Rights* (2015) 9.

4 For instance, Rwanda withdrew its declaration allowing individual access to the African Court on Human and Peoples' Rights. See Office of Public Relations and Communications. 2016. "Clarification" http://www.minijust.gov.rw/fileadmin/Documents/Photo_News_2016/Clarification2.pdf (accessed 04-11-2020).

exemplified in the Nigerian case studies below, show the Nigerian government's jettisoning of an openly reproachful or confrontational approach in favour of a more diplomatic "acceptance" of adverse decisions, albeit with little or no intention of complying with those decisions. Rather than take confrontational actions that openly question the courts, the government adopts subtler subversionary techniques that often result in an abuse of the legal process, human rights, and the rule of law.

In the following sections, this chapter will demonstrate through the Nigerian example that, oftentimes, the political nature and sensitivity of a case or the peculiar executive stance towards an incarcerated suspect, account more for whether that state will comply with a decision to release such an accused, regardless of whether the deciding body is a national court or regional body, or whether the state recognises or respects that national or regional institution. It does this by critically outlining and evaluating the political and legal manoeuvrings of the Nigerian government aimed at subverting bail and release orders of national courts and the ECCJ in two politically-sensitive cases. The next section covers the contextual foundations of the chapter by briefly discussing past confrontational responses towards regional judicial bodies with the aim, here, being to highlight the soft compliant posturing of the Nigerian government as evidenced in the two case studies in place of the alternative confrontational response. The chapter then proceeds to set out and discuss the facts of the two case studies and, more particularly, the response of the Nigerian government to national and regional courts' decisions issued in both cases. The aim is to highlight the underlying duplicitousness of the Nigerian approach and its implications in the context of the rule of law and human rights. Particular attention is paid to the possible factors of such an approach, its effects and possible merits, to the administration of justice and the rule of law.

2 INSTANCES OF PAST AGGRESSION AND CONFRONTATION

States' dealings with regional judicial bodies have, occasionally, been characterised by confrontation and outright rejection where the states concerned have been unsatisfied with the decisions of those bodies. In the classic example of *Good v Republic of Botswana,*[5] the Botswanan government openly challenged the authority of the African Commission on Human and Peoples' Rights (the Commission) to issue binding decisions. Following a ruling in favour of the complainant, the government, through its Foreign Affairs Minister, famously replied: "We are not going to follow the recommendation made by the Commission. It does not give orders, and it is not a court. We are not going to listen to them. We will not compensate Mr Good".[6]

On the face of it, it would appear that Botswana was, in this case, only contesting the Commission's authority to issue binding orders and was not seeking to show defiance against a regional court. Whether it would have reacted differently to a similar judicial (as opposed to quasi-judicial) pronouncement remains a moot point. In another example, Rwanda withdrew its declaration under Article 34(6) of the Protocol to the African Court on Human and Peoples' Rights (African Court Protocol). Even though this was done before the court had made any finding, it conveniently came just one week before the scheduled hearing of the case of Ms Victoire Umuhoza,[7] an incarcerated opposition leader. In defence of its position, the government stated that its acceptance of individual complaints was being exploited by "convicted genocide fugitives" as a "platform for reinvention and sanitisation".[8] Regardless of the merits or otherwise of its reasons, Rwanda, by withdrawing, overtly expressed its rejection of the African Court's mandate in that regard.

While in the two instances above the states adopted unilateral responses, through rejection and withdrawal, there have also been instances of states seeking to initiate general and far-reaching restrictions on the protective mandates of some regional courts.[9] In the 2009 West African example, the Gambia, after the ECCJ's findings of torture and other human rights

5 Communication 313/05 [2010] ACHPR 106.

6 Anonymous "Botswana will not honour African Union ruling on Prof Good" *Sunday Standard News* 2 August 2010.

7 *Ingabire Victoire Umuhoza v Republic of Rwanda* Communication 003/2014.

8 Office of Public Relations and Communications. 2016. "Clarification" http://www.minijust.gov.rw/fileadmin/Documents/Photo_News_2016/Clarification2.pdf (accessed 04-11-2020).

9 See Alter, Gathii & Helfer "Backlash against International Courts in West, East and Southern Africa: Causes and Consequences" 2016 *The European Journal of International Law* 293.

abuses against it, submitted an official request to revise the Court's supplementary protocol. This move, had it been successful, would have severely limited the Court's jurisdiction[10] and rendered it unable to hear cases such as those it had reprimanded the Gambia for.

The Kenyan backlash against the regional East African Court of Justice (EACJ) was even more vociferous. Faced with what it considered to be adverse and unwelcome rulings against it, the Kenyan government proceeded on a multi-pronged approach to undermine and restrict the EACJ.[11] Firstly, the government resorted to a "behind-the-scenes" effort to kill the court – a proposal which was rejected by other member states.[12] Having failed in its initial attempt, Kenya threatened to remove the EACJ's two Kenyan judges, an attempt that also failed. Finally, the government, very much like the Gambia above, resorted to amending the EAC Treaty by, amongst others, restricting the Court's ability to hear cases from private litigants and establishing an appellate chamber. Unlike in the case of the Gambia, Kenya was able to garner the required support for these amendments.

Perhaps the most brazen display of aggression can be seen in the case of Zimbabwe against the Southern African Development Community Tribunal (SADC Tribunal) after the latter's decision in the case of *Mike Campbell (Pvt) Ltd v Republic of Zimbabwe*.[13] The SADC Tribunal had ruled that certain constitutional provisions on which Zimbabwe's land reforms were based (such as those ousting domestic courts' jurisdiction), were discriminatory and infringed on the rights to a fair hearing and protection of the law. In response, Zimbabwe rejected the Tribunal's ruling and openly challenged its authority. Zimbabwe's unsavoury tactics and approach led to a chain of events which ultimately resulted in the disbandment of the Tribunal.[14] In August 2014, the SADC Summit adopted a new protocol which removed the right of private access and allowed member states to withdraw from the Tribunal's jurisdiction by giving 12 months' notice.[15]

It is fair to argue that these are isolated cases that do not necessarily establish a trend of confrontational response by African states towards adverse decisions by regional courts and tribunals. Indeed, granted that African states do not always respond in a hostile manner, it has however been noted that states' attachment to sovereignty and "state security" on the continent remains high with several governments controlled by "extremely powerful executive arms".[16] The implication of this state of affairs would mean that such states are likely to implement unfavourable decisions, especially where those decisions require the reversal of key executive decisions or policies. As has been demonstrated, such non-compliance can come in the form of open rejection, confrontation, or even solicitations for the weakening of the regional judicial bodies concerned. The following sections will, using two Nigerian examples, examine a distinct 'soft' non-compliant approach whereby the government consistently pledges to comply with such unfavourably decisions only to employ legal manoeuvres, often resulting in the abuse of court process, aimed at thwarting compliance.

3 THE NIGERIAN "SOFT" NON-COMPLIANT APPROACH IN THE *DASUKI* AND *KANU* CASES

The above section has cursorily highlighted four separate instances of some African states openly challenging the rulings of regional courts and commissions and, in some cases, either

10 Proposals included the need to exhaust domestic remedies and for the Court to assume jurisdiction only in cases arising from international instruments ratified by the responding country.

11 See Anonymous "Kibaki rails at EAC Court as Rwanda, Burundi join up" *The East African* 4 December 2006; *Attorney General of Kenya v Anyang Nyong'o* Application No. 5, Ref. No. 1 of 2006, Ruling (EACJ, Feb. 6, 2007); Alter et al 2016 *The European Journal of International Law* 293.

12 See Anonymous "Kibaki rails at EAC Court as Rwanda, Burundi join up" *The East African* 4 December 2006; *Attorney General of Kenya v Anyang Nyong'o* Application No. 5, Ref. No. 1 of 2006, Ruling (EACJ, Feb. 6, 2007); Alter et al 2016 *The European Journal of International Law* 293.

13 (2/2007) [2008] SADCT 2.

14 Nathan "The disbanding of the SADC Tribunal: A cautionary tale" 2013 *Human Rights Quarterly* 870; Sandholtz, Bei & Caldwell "Backlash and international human rights courts" in Brysk & Stohl (eds) *Contracting Human Rights: Crisis, Accountability, and Opportunity* (2018) 159.

15 Article 33 of the 2014 Protocol to the SADC Tribunal. In December 2018, the South African Constitutional Court held that South Africa's decision to sign the Protocol thereby suspending the operations of the Tribunal was unconstitutional, unlawful, and irrational. See *Law Society of South Africa v President of the Republic of South Africa* 2019 (3) SA 30 (CC).

16 Ebobrah "Dual mandate, varied Authority: The skewed authority of the ECOWAS Community Court of Justice" 2016 (Working Paper Series No 57) *iCourts* 10.

withdrawing or taking steps to limit the protective mandates of those institutions. This section presents an overview of Nigeria's distinct 'soft' approach in two recent cases. Rather than question the national or regional court (in this case, the ECCJ), or even maintain an esteemed silence, the Nigerian government has gone on to not only accept but also pledge to abide by and enforce the rulings of, these courts.

It is important to note that the point canvassed herein is not that the Nigerian government characteristically fails to comply with final decisions of national and regional courts. Indeed, with respect to decisions of the ECCJ, the Nigerian government has been known to comply in some cases through, for instance, the prompt payment of compensation to victims.[17] The Nigerian state has even previously, and perhaps surprisingly, complied with an interim order of the ECCJ[18] directing the Nigerian Parliament to suspend the swearing-in of a national legislator.[19] However, the situation appears to be different for politically-motivated and sensitive cases involving perceived enemies of the state or government in power. In these cases, as will be demonstrated below, the government has often evinced a strong unwillingness to release such suspects notwithstanding the existence of a judicial order directing same or even the nature of the institution (whether national or regional) issuing such order. Interestingly, rather than question the courts' judgments, the Nigerian government has adopted submissive and seemingly compliant rhetoric albeit with conflicting actions. This section examines two recent case studies and seeks to explain the reasons for and impact on the rule of law of this 'soft' approach.

3 1 The case of *Sambo Dasuki*

Colonel Sambo Dasuki was the National Security Adviser of the administration that governed Nigeria between 2011 and 2015. Following the defeat of the then ruling People's Democratic Party, in the country's 2015 Presidential elections, the new President Buhari-led government imprisoned Dasuki for allegedly diverting $2.1 billion of government funds earmarked for the procurement of arms for fighting Boko Haram terrorists in the North-East of the country.[20] He was subsequently arraigned in court and charged with crimes bordering on corruption and illegal diversion of funds. On 30 August 2015, he was granted bail on self-recognition by a High Court judge in what would be one of many such judicial orders.

Dasuki was initially placed under house arrest with the government claiming that he was under investigation for other offences before being eventually rearrested. On 18 December 2015, he was granted bail yet again by another judge of the High Court. The bail conditions which included the provision of a surety with landed property worth N250 million[21] (approximately $690 000) were duly met, prompting a farcical "release" from prison. However, as soon as Dasuki was "released" by the Comptroller of Prisons, operatives of the State Security Services, rearrested him without charge, effectively thwarting the "release".[22] Sensing that the government was not willing to enforce the bail order of the domestic court, Dasuki applied to the ECCJ seeking enforcement of his human right to liberty. In October 2016, the ECCJ declared his arrest and continued detention unlawful, arbitrary, and a violation of his right to liberty.[23] The Court ordered his immediate release and directed the government to compensate him in the sum of N15 million (approximately $41 000). However, much like the

17 In *The Registered Trustees of the Socio-economic and Accountability Project (SERAP) v Nigeria* ECW/CCJ/JUD/07/10, in which the ECCJ ordered the Nigerian state to pay compensation to victims, SERAP acknowledged the prompt payment of compensation by the Nigerian government. See Ebobrah "Dual mandate, varied Authority: The skewed authority of the ECOWAS Community Court of Justice".

18 *Hon. Jerry Ugokwe v Nigeria* ECW/CCJ/JUD/03/05.

19 Adjolohoun "Giving effect to the human rights jurisprudence of the Court of Justice of the Economic Community of West African States – Compliance and Influence" (LLD thesis, University of Pretoria, 2013) cited in Ebobrah "Dual mandate, varied Authority: The skewed authority of the ECOWAS Community Court of Justice".

20 Okogba "Why FG has not released Dasuki despite ECOWAS Court ruling" *The Vanguard* 6 October 2016; David "Dasuki's Ordered release by ECOWAS court is another litmus test for Buhari's regard for the rule of law" *Ventures Africa* 5 October 2016.

21 Nasir "The six times court has granted bail to Dasuki".

22 BCO Abuja "Continued Detention: Dasuki loses at Supreme Court" *Guardian Newspaper* 3 March 2018.

23 Court ECOWAS " ECOWAS Court orders Nigeria to release former national security adviser, pay N15 million in damages for the violation of his human rights" http://www.courtecowas.org/site2012/index.php?option=com_content&view=article&id=344 (accessed 04-11-2020).

earlier orders of the national courts, the Nigerian government, without any direct affront to the ECCJ, failed to comply with the Court's decision.

On 24 January 2017, more than a year since the initial bail order, a Nigerian High Court, again, affirmed Dasuki's bail to which he as entitled since 2015 when the federal government brought criminal charges against him.[24] The Court was to issue further reaffirmations on amended charges in April 2017 and May 2018.[25] In July 2018 the presiding judge of the High Court, Justice Ijeoma Ojukwu, granted Dasuki bail in the sum of N200 million, describing his continued detention as unlawful and against the rule of law.[26] These multiple bail and release pronouncements notwithstanding, the Nigerian government has failed to release the accused until December 2019, four years after the first bail.

3 2 The case of *Nnamdi Kanu*

Nnamdi Kanu's case is similar to Dasuki's in that the government, employing similar tactics, failed to release him after two bail rulings in his favour. Like Dasuki, Kanu filed an application before the ECCJ in the hope that the regional court would pressure the Nigerian government to affect his release. However, unlike the latter, Kanu was subsequently released after a third bail ruling in his favour. Even here the argument could be made that the government only acquiesced to his release following the political tension his continued detention had created.[27]

Kanu, the leader of a secessionist movement in Nigeria, was arrested in October 2015 on charges bordering on criminal conspiracy and membership of an outlawed group. After initially holding him in secret detention for weeks, the Directorate of State Services (DSS) charged him before a magistrate court.[28] Kanu was granted bail but the DSS failed to release him even after the bail conditions had been met. Rather, the security agency applied to a Federal High Court for an *ex parte* order to detain the accused for 90 days pending investigations into "fresh allegations" that Kanu was into terrorism financing (it is important here to note the striking similarity between this and the Sambo case above).[29] In the meantime, a notice of discontinuance was brought before the Magistrates' Court that had issued the bail indicating that the DSS had concluded plans to charge Kanu before a higher court having jurisdiction to try terrorism cases.[30] It is also worth noting that the Security Services ensured that Kanu did not gain freedom in the meantime thereby rendering the Magistrates' Court's bail order pointless. After initially granting the *ex parte* application and making an order allowing the accused to be detained for 90 days, the same court, on application by the accused counsel, vacated the order and directed the DSS to release the accused. Again, the Security Services flouted this order instead going ahead to file new charges against Kanu, this time including a charge of treasonable felony which carried a life sentence.[31] Following this new charge, the Federal High Court refused Kanu's subsequent bail application opting instead for an accelerated trial. In March 2016, Kanu made an application to the ECCJ for a declaration that his arrest and continued detention was a breach of his fundamental rights.[32] Kanu was to be eventually released, two years after his initial arrest, following a successful bail application brought on health grounds.[33]

4 ASSESSING THE GOVERNMENT'S NON-CONFRONTATIONAL APPROACH

The aim of the two case studies above has been to show the recent attitude of the Nigerian government towards unfavourable bail decisions in political cases both at the domestic

24 (n 20 above).
25 (n 20 above).
26 Okakwu "Again court grants ex-NSA Dasuki bail" *Premium Times* 16 August 2018.
27 Massive protests, which ultimately turned into violent confrontations with the police, were held across the country for Kanu's release. Amnesty International reports that over 150 persons were killed in the vicious government crackdown. See Amnesty "At least 150 peaceful pro-Biafra activists killed in chilling crackdown" https://www.amnesty.org/en/latest/news/2016/11/peaceful-pro-biafra-activists-killed-in-chilling-crackdown/ (accessed 04-11-2020).
28 Iaccino "Nigeria: State 'obtains court order' to detain Biafran leader Nnamdi Kanu for next three months" *IBTimes* 20 November 2015.
29 Ibid.
30 Ibid.
31 Okeke "Nnamdi Kanu Vs DSS: Persecution or Prosecution?".
32 *Nnamdi Kanu v Federal Republic of Nigeria* ECW/CCJ/APP/06/16.
33 Akwagyiram "Nigeria releases Biafra separatist leader Kanu on bail" *Reuters* 28 April 2017.

and regional levels. Rather than seek to manipulate or confront these courts, the Nigerian government appears to acknowledge and "respect" them, while at the same time seeking ostensibly "legal" routes of flouting their orders. This section aims to analyse this soft, albeit, uncompromising approach of the Nigerian government towards bail and release orders of national and regional courts.

4 1 The Nigerian government's response to national and ECCJ decisions

The Nigerian government, as shown in the case studies above, failed to comply with several orders of national and regional courts to release both Sambo Dasuki and Nnamdi Kanu. However, unlike some of the earlier explored cases involving Botswana, the Gambia, Kenya, and Zimbabwe, this failure to comply was not accompanied by a confrontation or challenge of the judicial authority or mandate of the regional court. The existence of adverse national judgments also implies the absence of executive influence or control of the national judiciary.

Aside from its failure to comply with the courts' orders, the Nigerian government's reaction, at least rhetorically, to the adverse judgments of the courts could be described as nothing short of respectful and concessionary. Regarding the local courts, for example, Colonel Dasuki was technically "released" after perfecting his bail conditions and was only "rearrested" by another agency of the government. The country's Supreme Court drew this interesting distinction while ruling on an appeal by the complainant, Dasuki, that his trial by the Economic and Financial Crimes Commission (EFCC) be halted until it obeyed the bail order made by the court. The apex court held that Dasuki's detention was not at the instance of the EFCC, that had initially put him on trial but, rather, by the DSS which had rearrested him. In the Court's reasoning, the Comptroller of Prisons "implemented" the bail granted to Dasuki in December 2015 and had thus been "obeyed" by the EFCC. His subsequent arrest by the DSS at the prison premises had nothing to do with the EFCC and the latter could, therefore, not be held responsible for it. Accordingly, the Court ordered that the criminal trial at the lower court be continued.[34]

The Nigerian government has therefore consistently employed a strategy of not tampering with judicial independence but rather going ahead to technically "enforce" same where possible, with little practical implication to the liberty of the victim. Following the logic of the Supreme Court's ruling, Dasuki had been "released" even though he never left the prison premises. The state's employment of a different agency for his re-arrest was a means of maintaining the status quo (incarceration of the accused) while not appearing to challenge the authority of the judicial arm. A similar tactic was employed in another case involving the former Director-General of the Nigerian Maritime Administration and Safety Agency, Patrick Akpobolokemi. Despite subsisting bail orders by two courts, Akpobolokemi was rearrested by security agents outside the premises of the Federal High Court on "fresh allegations of corruption".[35]

The Nigerian government's rhetorical "cooperation" appears to be, in some measure, extended to the ECCJ. Soon after the Court's finding in favour of Dasuki, Nigeria's Attorney-General (AG) and Minister for Justice was quoted as saying:

> We will study the ruling… and one thing that I am certain of is that there is room for judicial review … one thing I can assure you is that we will comply with the order and the necessary provisions of the law as applicable …[36]

It is interesting to note the AG's reference to "room for judicial review" for a number of reasons. First, it could signal the government's non-satisfaction with the ruling and, perhaps more importantly, that the government was going to pursue its case through established legal processes. It is also strange considering that decisions of the ECCJ are not subject to "judicial review" or other forms of supervisory or appellate authority. Equally worthy of note is the oral commitment to comply with the order – a departure from the aggressive and confrontational rhetoric that has occasionally characterised non-compliant African states' reaction to adverse decisions of regional courts.

Of course, the verbal commitment, without real intent, to enforce rulings raises serious questions on the implication and impact of such an approach in the contexts of the rule of law and regional cooperation. In another instance, and very much in the period of the

34 *Colonel Mohammed Sambo Dasuki (Rtd) v Federal Republic of Nigeria* SC 617/2016.
35 Anonymous "Who has power to deny suspects bail" *The Nation* 5 January 2016.
36 Abdallah & Bamgboye "We'll comply with ECOWAS Court Ruling on Dasuki" *Daily Trust* 7 October 2016.

Dasuki imbroglio – after the President of the ECCJ had, at a public event, renewed calls for member states to comply with the Court's decision – the Nigerian representative assured the court of "the 'continued' support and cooperation of the Nigerian government".[37] It may be surmised, therefore, that the Nigerian state views its soft approach of non-compliance as being cooperative or, at the very least, not disruptive of its relationship with the Court.

In the case of national courts, it is interesting to note that the government seeks to maintain the sanctity of the courts by avoiding any apparent interference with their independence. The same can of course not be said of some of the African states in the examples above. For instance, it has been noted of the Gambia's past administration, that its ousted President, Yahya Jammeh, exercised "tight control over the country's judges".[38] African governments have also been characterised as having "extremely powerful executive arms".[39] It may therefore be safe to assert that national political systems in Africa, or at least some of them, have not yet matured to the level where even the most politically-sensitive cases are allowed to pass through the normal judicial processes without executive interference either in the form of swaying judges or, as in the Nigerian case, in the failure to enforce rulings. In its bid to preserve the apparent sanctity of the court, the Nigerian government did not want to appear to outrightly disobey the national court but rather resorted to other "legal" tactics such as filing new charges or discontinuing old cases. However, as pointed out by the ECCJ, the institution of new cases against an accused "does not disentitle him from the freedom of liberty".[40]

The adoption of a soft approach becomes therefore only a different approach that allows the executive to explore other non-confrontational alternatives allowing them to keep an accused in detention. This intention is all too clear as demonstrated in both the Dasuki and Kanu cases where, despite compliant rhetoric, the Nigerian government always took "legal" steps to keep the accused persons detained.

On the face value, it would appear that there is no merit in whether or not a state adopts a soft as opposed to confrontational approach given that the victim remains detained. This is certainly true for the victim who remains incarcerated while still expending resources in the hope of securing bail on "fresh" charges. However, there are arguable benefits for the regional human rights institutions which, unlike in the case of confrontational states, do not have their mandates questioned or restricted. In this sense, the mandates of the courts remain protected and there is no national, regional, or other tension with regard to the government's failure to comply with the ruling as seen in the examples of the Gambia, Kenya, and Zimbabwe above. Thus, rather than nurture and aggravate any form of confrontation, the Nigerian government appears to be developing a pleasant relationship with the Court and regional body as a whole.[41]

4 2 Establishing the lack of willingness to comply

It has already been shown in the above sections how the Nigerian government has avoided compliance in political cases through the adoption of a soft, "compliant" approach. However, in order to establish the country's unwillingness to comply, it may not be enough to simply show that the government has instituted new charges or adopted other "legal" means of keeping an accused person detained even after contrary national and regional court decisions. There necessarily must be other clear or complementary evidence of such unwillingness to comply. This is the case because, no matter how seemingly obvious such unwillingness to comply is, there is yet room for the argument that—given the state's compliant rhetoric and resort to legal mean—it is only pursuing the course of justice by filing fresh charges based on new investigative findings. This has of course been the Nigerian approach in the two cases examined above. In both instances, after the initial bail orders, the government has gone on to file, oftentimes, more serious charges (such as treasonable felony in Kanu's case) and justified these charges on the recent findings of ongoing investigations. This is, of course, a legitimate reason given that the trial of an accused on one charge does not preclude his

37 Nnochiri & Ojeme "Obey our judgments, ECOWAS Court tells FG, 14 others" https://www.vanguardngr.com/2017/10/obey-judgments-ecowas-court-tells-fg-14-others (accessed 04-11-2020).

38 US Department of State *Country Reports on Human Rights Practices for 2013: The Gambia: Executive Summary* (2013) cited in Alter et al 2016 *The European Journal of International Law* 296.

39 Ebobrah "Dual mandate, varied Authority: The skewed authority of the ECOWAS Community Court of Justice" 10.

40 *Colonel Mohammed Sambo Dasuki v Federal Republic of Nigeria* ECW/CCJ/APP/01/16.

41 See Nnochiri & Ojeme "Obey our judgments, ECOWAS Court tells FG, 14 others".

arraignment on another. Similarly, bail granted on a charge would not suffice for another, even more serious, offence. The allegation of non-compliance, therefore, necessitates, at least for the avoidance of doubt, further proof than continued detentions seemingly legitimised by new criminal charges.

In the Nigerian case, further evidence of the government's unwillingness to comply is seen in comments made by the Nigerian President as well as other top government aides. Thus, while the Nigerian "official" position has been one of cooperation, some remarks of high-ranking officials appear to contradict this intention. Perhaps the clearest sign of this was the comments of no less a personality than the President of Nigeria, General Muhammadu Buhari, while being questioned, during a 2015 "Presidential Media Chat", on the continued detention of Dasuki and Kanu. With regard to the former, Buhari replied:

> Technically, if you see the type of atrocities these people have committed – I'm really sorry to say this in public—against the country, [then we shouldn't give room for them to jump bail]. The former president wrote to the governor of the Central Bank [directing] him to give 40 billion naira to [the accused] … [for which he has failed to account, and you want to give him bail?] … while you have two million people in IDP [camps] half of whom do not know their parents. [What] kind of country do you want to run?[42]

The above statement, made by the President on live television, implies that he considers the case too serious to simply set the accused "free" on bail. This is evidenced by the President's reference to "atrocities", the sum of money involved, and the two million IDPs who could have been in a better position had the money being effectively utilised.

In respect of Kanu, the President remarked:

> Do you know he has two passports—one Nigerian, one British—and he came into this country without using any passport? Do you know he brought a sophisticated equipment into this country and was broadcasting for Radio Biafra … [and] you think he should be given bail to go away? There is a treasonable felony [charge] against him and I hope the court will listen to the case.[43]

President Buhari's comments above raise deep concerns for human rights, the rule of law, and separation of powers. By those statements, the President appears to infer that the accused person would not be allowed on bail given, based on the President's own evaluation, the possibility of the accused persons jumping bail. Such inference necessarily invokes the rule of law principle of *nemo judex in causa sua*, meaning that no one should be a judge in his own case—as the President appears to be denying freedom to individuals based on his judgment as to their bail-worthiness. This also engages the right to a fair trial including the principle of presumption of innocence whereby an accused is presumed innocent until proven guilty by a court or tribunal of competent jurisdiction.

In a reaction by a top government official, Senior Special Assistant to the President on Judiciary Reforms, Juliet Ibekaku-Nwagwu, in August 2018, sought to justify Dasuki's continued detention even after a fifth bail order by the court. She was quoted as saying:

> If you have to balance national security, the interest of persons and individuals, there has never been any country where you allow an individual's interest to override the national security. And until we can come to grasp with the facts that an individual sat back and allowed several human beings to be killed and slaughtered in the North-East without using the money meant for buying arms for the military …We need to come to terms that we have a national security problem in this country. And how we deal with it sometimes is to allow a presidential directive to enable us to deal with these problems. … [T]he government of Nigeria is reviewing the judicial decision [to] determine whether to go on appeal and request for [a] 'stay of execution' ... It is not a political matter. It is a security matter. I think between the judiciary and the executive, there is an on-going discussion as to whether this particular decision requires a further judicial review by way of an appeal. Let us allow the appeal process to be exhausted.[44]

The above statement, it is argued, leaves little doubt that the Nigerian government is willing to comply with the bail and release orders of the national and regional courts alike. The emphasised portion appears to suggest that this stance is as a result of a "presidential directive" to that

42 Youtube "President Muhammadu Buhari, Presidential Chat with Muhammadu Buhari" https://www.youtube.com/watch?v=byRmNw8S2M4 (accessed 04-11-2020).

43 Ibid.

44 Nwachukwu "Why Dasuki may not be released – Presidency" *Daily Post* 5 August 2018 [own emphasis].

effect. This is further buttressed by the comments of the AG of the Federation, Abubakar Malami who, despite emphasising the sanctity of the courts, remarked rhetorically in reference to Dasuki thus: "Are you saying that the right of one person is more important than that of 100,000 who lost their lives?"[45]

In its defence before the ECCJ in respect of Dasuki's application to that court, the Nigerian government argued that Dasuki's continued detention was "for his own protection" and also in the interest of national security.[46] It argued that national security superseded individual security and that the state could restrict the movement of any citizen for that person's protection. By this argument, the Nigerian government further evinced its position with regard to the continued detention of the accused. The ECCJ unsurprisingly rejected the arguments.

4 3 Reasons for Nigeria's adoption of the soft approach

Of course, an important question that needs to be resolved is whether there are any merits in adopting this 'soft' non-confrontational approach to national and regional judicial decisions and whether Nigeria has any reasons or motives behind its adoption of this approach. It has already been noted that the avoidance of a confrontational approach, has the advantage of preserving the courts' legitimacy and mandate from possible restriction. However, there are other possible benefits or motives that may influence a non-compliant state's adoption of this approach.

One possible factor is the need to be viewed, both domestically and internationally, as abiding, however remotely, by the rule of law. For instance, in a speech marking the country's Independence Day, President Buhari stressed the importance of fighting corruption within the ambit of the rule of law. It, therefore, appears that the Nigerian government has prioritised the need to be seen, albeit controversially, as operating by the rule of law. This is closely linked to the country's leading role within ECOWAS[47] as well as the part it played in the creation and preservation of the Court's protective mandate.[48] For instance, Nigeria hosts the ECCJ which is headquartered in the country's capital, Abuja. This position makes it unexemplary to adopt a confrontational approach towards the Court, even in the face of a presidential directive not to release a political suspect. It is also pertinent to note that the Nigerian government has never challenged the competence of the ECCJ to make orders nor has it ever denied its obligation to comply with those orders.[49] It is therefore difficult, given its role within ECOWAS, for Nigeria to adopt an approach as seen in Zimbabwe and the Gambia, where an unsatisfied country moves for disbandment or other weakening of the regional court or tribunal.

These possible factors notwithstanding, Nigeria's non-compliance, whether 'soft' or confrontational does not bode well for human rights and the rule of law. Even though it may be argued that the soft approach is preferable in that the court does not risk losing its protective mandate, such non-compliance still has the effect of rendering the ruling ineffective. The following section assesses the practical implications of Nigeria's 'soft' non-compliance for the rule of law and observance of human rights in the country.

5 IMPLICATIONS FOR THE RULE OF LAW

The essence of the above examination has been, not only to examine Nigeria's soft non-compliant approach to rulings of domestic and regional courts, but also to analyse its implications within the framework of the rule of law and, by extension, principles of human rights and separation of powers. In order to do this, this section embarks on a cursory examination of the three core principles of Dicey's formulation of the rule of law. These principles have

45 Okakwu "Buhari under fire for comment on rule of law, national security" *Premium Times* 28 August 2018.

46 Court ECOWAS "ECOWAS Court orders Nigeria to release former national security adviser, pay N15 million in damages for the violation of his human rights".

47 Nigeria is the regional body's biggest economy with over 77% of its total nominal GDP. See, Worldbank "World Bank Gross Domestic Product" http://databank.worldbank.org/data/download/GDP.pdf (accessed 04-11-2020).

48 Nigeria played a crucial role in the ECCJ's acquisition of a human rights protective mandate and in the preservation of this mandate when it came under attack from the Gambia. See Alter, Helfer & McAllister "A new International Human Rights Court for West Africa: The ECOWAS Community Court of Justice" 2013 *African Journal of International Law* 737.

49 Ebobrah "Dual mandate, varied Authority: The skewed authority of the ECOWAS Community Court of Justice" 18.

received judicial recognition in the Nigerian cases of *Shugaba v Minister of Internal Affairs*,[50] *Safekun v Akinyemi*,[51] and *Governor of Lagos State v Ojukwu*.[52] The aim is not to embark on a theoretical exploration of this topic but to rather, identify the simpler points of this principle, and outline how the Nigerian practice threatens the observance of the rule of law and, by extension, the protection of basic human rights.

Dicey's formulation of the rule of law is hinged on three core principles: The predominance of the law over discretion, equality before the law, and the role of the constitution as the ordinary law of the land.[53] On the first, Dicey was generally opposed to conferring discretionary powers on the State as such wider or unregulated discretion potentially posed danger to individual liberty. He opined that government based on the exercise by persons in authority of wide, arbitrary, or discretionary powers of constraint was contrary to the rule of law. Going by this principle, therefore, the seeming assumption of the powers to issue "presidential directives" even in the face of contrary court decisions does not bode well for human rights in general, and the right to liberty of political prisoners, in particular. This also ties in with Joseph Raz' formulation of the rule of law which stresses the independence of the judiciary and observance of the principles of natural justice.[54] Commenting on Nigeria's violation of these principles, Chijioke J of the ECCJ, in the case of *Dasuki v Federal Republic of Nigeria*, stated:

> Having perused the case before us, we have come to the conclusion that the re-arrest and detention of the applicant after he had been granted bail by three courts since December last year [make a mockery] of the rule of law. The executive arm should not interfere with the judiciary. Even if the applicant has committed crimes of whatever nature, the principle of innocence must be respected, and the fact that he has been charged to court does not disentitle him to the freedom of liberty. Courts must rise to their responsibilities and prevent executive lawlessness.[55]

Similarly, the Nigerian Supreme Court, in *Nigerian Army v* stated thus:

> An order of Court must be obeyed even if such an order is perverse, until such a time that the order is set aside by a competent court … a flagrant flouting of an order of the court by the executive is an invitation to anarchy.[56]

It may be further argued that the Nigerian approach of avoiding the release of suspects through the filing and commencement of new charges has added implications for the rule of law due to its unpredictability or recurrence. Krygier argues that power is exercised arbitrarily when those it affects cannot know, predict, understand, or even comply with the ways such power comes to be wielded.[57] Arbitrariness, which is all the more visible when a state refuses to comply with court judgments, is the bane of the rule of law. According to Krygier, "the value of the rule of law is immanent and generic, that is, hostility to arbitrary power is intrinsic to the ideal of the rule of law, and it is relevant across the board."[58]

Dicey's second principle, equality before the law, was demonstrated in the English case of *M v Home Office*[59] where the Home Secretary was held to be legally accountable for the actions of his department when the Court found that the minister had acted contrary to a court order. The court went a stage further to explain that a government minister may even be held to be personally liable for his own actions even if they were actions performed as part of his office. In the case studies above, and as clearly reiterated by the domestic and ECCJ judges, the Nigerian government has repeated contravened court orders against the principle of the rule of law. The continuous rearrests and filing of new charges could arguably amount to an abuse of judicial process especially where the aim of such action is merely to keep an accused incarcerated.

Dicey's third principle is to the effect that the constitution is the ordinary law of the land

50 (1981) 1 NCLR 125.
51 (1980) 5–7 SC 25.
52 (1986) 1 NWLR, pt. 18, 622.
53 Dicey *The Law of the Constitution* (2013).
54 Raz *The Rule of Law and the Separation of Powers* (2017) 77.
55 ECW/CCJ/APP/01/16.
56 (1992) 4NWLR (Pt. 235) 345.
57 Krygier "The rule of law: Pasts, presents, and two possible futures" 2016 *Annual Review of Law and Social Science* 199.
58 Krieger 2016 *Annual Review of Law and Social Science* 216.
59 [1994] 1 AC 377.

and that laws concerning the liberties of the citizen are judge-made. Doherty argues that this arm of Dicey's rule of law buttresses the failure of many written constitutions to limit abuses of power "in practice" and the contrasting approach (adopted by the English courts) where individual rights are linked to a specific remedy available in the courts.[60] This observation is important in the Nigeria context given that the country operates a written constitution that, in theory, provides for the observance of human rights, separation of powers, and the rule of law.[61] As Nwekeaku succinctly puts it, "the rule of law … may be provided in principle in a state, but in practice, it is a different ball game".[62] In the event of executive indiscretion, the court remains, as per Dicey's formulation above, the final source of recourse for the people. The apparent negation of this role, through subsequent non-compliance by the executive, is, therefore, a further pointer to the failure of the rule of law.

The low standards of the practice of the rule of law in Nigeria are backed by other research.[63] In one study, adherence to the rule of law in the country was described as "fairly poor".[64] Nigeria has also not fared well in reputable rule of law indices. For instance, the Ibrahim Index of African Governance and World Justice Project Rule of Law Index score the country 46.4% and 44% respectively in the area of rule of law.[65] Nigeria was identified by the latter as one of only thirteen "below the median" countries with declining rule of law.[66]

It is apparent, therefore, that for any improvement in this area, Nigeria needs to stop hiding behind its cloak of soft non-compliance towards more sincere and robust cooperation with national and regional courts.

6 CONCLUSION

This chapter set out to examine the subtle, as yet unexamined, "soft" approach to non-compliance by the Nigerian state with regard to decisions of the ECCJ and the country's domestic courts. Using two recent case studies, the chapter highlighted the Nigerian approach of rhetorical acceptance and commitment in place of the alternative approach of aggression, confrontation, and rejection. Such rhetorical commitments notwithstanding, the Nigerian government in the cases studied failed to comply with the rulings of the courts. The chapter demonstrated the lack of intent to comply through statements by the Nigerian President and other ministers in the government citing reasons such as national security and the possibility of the accused persons jumping bail. Such statements, coupled with duplicate court processes aimed at keeping the accused persons locked up, it was argued, clearly evinced an intention not to comply with the orders. It was suggested that the Nigerian 'soft' approach was attributable to a range of factors such as its role within ECOWAS, and the need to maintain a semblance of compliance with court orders and the rule of law. However, it was argued that its non-compliance, albeit disguised beneath a cloak of submissive rhetoric and legal machinations, was detrimental to the practice of the rule of law and human rights as guaranteed in the country's constitution. This was demonstrated by assessing the impact of the country's non-compliant approach according to the three key principles of Dicey's rule of law. Overall, it was concluded that the country, in order to abide by its domestic and regional duties of human rights and the rule of law, must jettison arbitrariness and ensure separation of powers, through effective implementation of rulings of national and regional courts.

The chapter sets the stage for further research into the possible steps that could be taken to plug existing loopholes and ensure effective implementation of national and regional court orders, especially in such cases as Nigeria's where non-compliance is masked by seemingly compliant rhetoric. Given that more attention has been paid to cases of aggressive non-compliance, it is expedient to fashion out ways of identifying and curbing subtler forms of non-compliance as demonstrated in the Nigerian examples. This is particularly important in the context of preserving human rights and upholding the rule of law.

60 Doherty *Public Law* (2018).
61 Chapters II and IV of the Constitution of the Federal Republic of Nigeria 1999.
62 Nwekeaku "The Rule of Law, Democracy and Good Governance in Nigeria" 2014 *Global Journal of Political Science and Administration* 26.
63 See Idris & Yusuf Rule of Law "Personal Safety and National Security in Nigeria" 2016 *International Journal of Arts and Sciences* 125.
64 Ibid.
65 Ibrahim Index of African Governance; World Justice Project, World Justice Project: Rule of Law Index 2017 – 2018.
66 Ibid.