A Comparative Legal Analysis of Human Rights Norms and Institutions in Nigeria and Canada, With a Particular Focus on the Issue of Unlawful Arrest and Detention

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ABSTRACT

Since the establishment of the National Human Rights Commission ("NHRC") of Nigeria, high expectations that the commission will ensure effective protection of human rights have dwindled due to pervasive human rights violations. Of great concern is that the security agencies in Nigeria, particularly the police who are empowered under the law to ensure obedience to law and order, often engage in unlawful arrest and detention. This thesis offers a comparative legal analysis of human rights norms and institutions in Nigeria and Canada, with a particular focus on the issue of unlawful arrest and detention. It argues that NHRCs have been unable to effectively address unlawful arrests and detentions by the police in Nigeria, and that Nigeria can borrow from Canada's human rights system to improve her human rights institutions and practices, especially with regard to arrest and detention. It also offers recommendations from the lessons drawn from Canada's human rights system.

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Introduction

Since the establishment of the National Human Rights Commission ("NHRC") of Nigeria, high expectations that the commission will ensure effective protection of human rights have dwindled due to pervasive human rights violations. Of great concern is that the security agencies in Nigeria, particularly the police who are empowered under the law to ensure obedience to law and order, often engage in unlawful arrest and detention. This thesis offers a comparative legal analysis of human rights norms and institutions in Nigeria and Canada, with a particular focus on the issue of unlawful arrest and detention. It argues that NHRCs have been unable to effectively address unlawful arrests and detentions by the police in Nigeria, and that Nigeria can borrow from Canada's human rights system to improve her human rights institutions and practices, especially with regard to arrest and detention. The thesis considers some of the factors that have encouraged this practice by the police in Nigeria and examines a number of cases of unlawful arrests and detentions. It also offers recommendations from the lessons drawn from Canada's human rights system.

The establishment of the United Nations (UN) laid the foundations for the promotion and protection of human rights. The primacy of human rights and fundamental freedoms in the UN is expressed in the Preamble to the UN Charter.[1] The core concern for human rights is further demonstrated by the Universal Declaration of Human Rights[2] (UDHR) and other major hu-

[1] *Charter of the United Nations*, 26 June 1945, arts 1(3), 13 (1)(b), 55(c) and 62(2). (UN Charter)

[2] *Universal Declaration of Human Rights*, UNGA Res. 217(III), UN GAOR, 3rd Sess, Supp. NO. 13 at 71, UN Doc. A/810 (1948), adopted by vote 48-0, with 8 abstentions. (UDHR)

man rights instruments.[3] The campaign for human rights has also encouraged different regions to champion human rights. Africa as a region has not been left behind. The Organization of African Unity ("OAU" now referred to as African Union "AU"),[4] a regional body in Africa also joined the campaign for human rights and specifically demonstrated it in 1981 through the negotiation, drafting and ratification of the African Charter on Human and Peoples' Rights.[5] There was also an upsurge of several human rights movements, particularly in the 1980s and 1990s. The reason, among other things, is because the governments of most new independent states of Africa were overwhelmed with inexperience in governance and particularly bedevilled with successive military coups. The resulting pervasive human rights violations of these juntas thus heightened international pressure and the general campaign for human rights. During this era, the need to counter human rights abuses topped the agenda of most regional and international human rights conferences.

The major concern has been how to translate these human rights values into concrete action. Many international human rights scholars argue that human rights are promoted and protected more effectively through national human rights institutions than through international institutions. For instance, Donnelly states that "the struggle for human rights will be won or lost at the national level."[6] Similarly, Okafor and Agbakwa strongly believe that international

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[3] See, e.g., *International Covenant on Economic, Social and Cultural Rights* (ICESCR), 1966, 993 UNTS 3; *International Covenant on Civil and Political Rights* (ICCPR), 1966, 999 UNTS 171.

[4] The Organization of African Unity ("OAU") was changed to the African Union ("AU") in 2001 and shall in this thesis be referred to as such.

[5] See the *African Charter on Human and Peoples' Rights*, 27 June 1981, OAU Doc. CAB/LEG/67/3, 21 I.L.M. 58 (1982), entered into force 21 October, 1986 (African Human Rights Charter).

[6] Jack Donnelly, "Post-Cold War Reflections on the Study of International Human Rights" in Joel H. Rosenthal, ed, 2nd ed, *Ethics and International Affairs: A Reader* (Washington D C: Georgetown University Press, 1999) 263. While

human rights institutions are not the “primary sites for the struggles for human rights.”[7] Furthermore, they argue that,

> “[t]his realization has in turn exposed the critical necessity for the deployment at the national level of various kinds of resources for the promotion and protection of human rights. One of the resources that could be so deployed is a national institution for the promotion and protection of human rights.”[8]

Such views have also found expression in international treaties and the work of international organizations. Article 26 of the 1981 African Human Rights Charter enjoins states parties to establish and improve appropriate national institutions that will be entrusted with the task of promoting and protecting the human rights that are provided elsewhere in the Charter.[9] Paragraph 19 of a UN handbook on national human rights institutions also states that “it has … become increasingly apparent that the effective enjoyment of human rights calls for the establishment of national infrastructures for their promotion and protection.”[10]

In view of this provision and the pressures from both international organizations and organized human rights movements, several African states established national human rights

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the above statement is correct, it could be argued that the struggle for human rights will be won more effectively at the provincial level (as in Canada) or the state level (as in Nigeria) than at the national level.

[7] Obiora C. Okafor & Shedrack C. Agbakwa, "On Legalism, Popular Agency and the "Voices of Suffering": The Nigerian National Human Rights Commission in Context" (2002) 24 Hum Rts Q 662. (Okafor and Agbakwa).

[8] *Ibid* at 663.

[9] African Human Rights Charter, s*upra* note 5, art 26.

[10] Centre for Human Rights Geneva, National Human Rights Institutions: A Handbook on the Establishment and Strengthening of National Institutions for the Promotion and Protection of Human Rights, A Professional Training Series No. 4 (United Nations: New York and Geneva 1995) (UN Handbook). This UN Handbook, the fourth publication in the Professional Training Series launched by United Nations Centre for Human Rights in 1994, is a set of guidelines designed by the UN Centre for Human Rights to assist governments and bodies involved in developing and strengthening national human rights institutions. These guidelines elaborate the Paris principles so aptly that it has become a very important reference tool in any discourse relating to human rights institutions.

institutions (NHRIs). Thus, in 1995, Nigeria, like some other states in Africa, established a NHRC with the statutory mandate to promote and protect human rights in Nigeria. Following the establishment of national human rights institutions in most African states and the increased global interest in the promotion and protection of human rights, there were high expectations that the struggle against pervasive human rights violations would produce significant results in Africa. These high expectations have since nose-dived in Africa, especially in Nigeria, as a result of recurring human rights violations and particularly cases of unlawful arrests and detentions by the police.

The Nigerian Police Force (NPF) is the government body charged to maintain law and order in Nigeria. The Police Act of Nigeria states the duties of the Nigerian police as follows:

> "The police shall be employed for the prevention and detection of crime, the apprehension of offenders, the preservation of law and order, the protection of life and property and the due enforcement of all laws and regulations with which they are directly charged, and shall perform such military duties within or outside Nigeria as may be required of them by, or under the authority of [this] or any other Act."[11]

The police play a very important role in the smooth administration of states. Ideally, the police ensure peace and order and consequently the effective operation of every facet of the state. Alemika and Chukwuma observe that "the primary role of police is policing – securing compliance with existing laws and conformity with precepts of social order."[12] The duties of the police

[11] *Police Act*, 1967, Law of Federation of Nigeria, Cap P19, s 4.

[12] Etannibi E.O. Alemika & Innocent C. Chukwuma, "Analysis of Police and Policing in Nigeria: A desk study on the role of policing as a barrier to change or driver of change in Nigeria" (2004) at 2. A document prepared for the De-

are enormous and require daily interaction with the general public. However, the Nigerian police tend to abuse the powers conferred upon them in order to maintain law and order effectively.[13] Abuse of police powers has become so pervasive that there is general outcry and resentment against the police by members of the public. Mwalimu observes that there is a negative perception of the police by the general Nigerian public as a result of constant abuse and violation of human rights.[14] Given widespread condemnations of the police by several human rights scholars,[15] one would think that such abuse of powers would have abated. Regrettably, the practice appears to have become an institutionalized culture among the Nigerian police. While decrying police violation of human rights in Nigeria, Dada-Ojo laments that the police "are laws unto themselves, maiming, killing and detaining people with impunity."[16] Today, people are not only skeptical about the ability of the police to protect them and their properties but also loathe the police as agents of dehumanization. In the course of legal practice I have witnessed many cases of pervasive human rights violation by the Nigerian police including un-

partment for International Development. Online: www.clean.org/policing.driverofchange.pdf Accessed on 29 December, 2014.

[13] See (1) Nigeria Police Watch, "How we were arrested, detained and tortured by the officers of NPF for discussing Nigeria - LIB" (4 March 2014), Online: http://www.nigeriapolicewatch.com/2014/03/how-we-were-arrested-detained-and-tortured-by-officers-of-the-npf-for-discussing-nigeria-lib/, accessed on Jan 9, 2015. (2) Amnesty International, " Document - Nigeria: Torture In Nigeria: In Summary: Stop Torture Country Briefing" AFR 44/005/2014, (13 May 2014), Online: http://www.amnesty.org/en/library/asset/AFR44/005/2014/en/88a3b56d-2953-43c7-bafa-e54e656aaa07/afr440052014en.html, accessed Jan 9, 2015. (3) Nigeria Police Watch, "Cases of harassment, Extortion and killing of Commercial Motorcyclists over refusal to offer bribe still rampant across the Country" (3 March 2014), Online: http://www.nigeriapolicewatch.com/2014/03/cases-of-police-harrassment-extortion-and-killing-of-commercial-motorcyclist-over-refusal-to-offer-bribe-still-rampant-across-the-country/, accessed Jan 9, 2015

[14] Charles Mwalimu, "Police and Human Rights Practices in Nigeria: A Primer Case Study toward Complete Enjoyment of Fundamental Human Rights in Sub-Saharan Africa" (1991) 5 Emory Intl Rev 515 at 533.

[15] Among the scholars that have in the past condemned police human rights abuse are: Patrick E. Igbinovia, "Police Misconduct in Nigeria" (1985) 8 Police Stud Intl Rev Police Dev 111; Charles Mwalimu, "Police and Human Rights Practices in Nigeria: A Primer Case Study Toward Complete Enjoyment of Fundamental Human Rights in Sub-Saharan Africa" (1991) 5 Emory Intl Rev 515.

[16] Mathias O. DadaOjo, "The Nigeria Police and the Search for Integrity in the Midst of Diverse Challenges: An Effective Police Management Approach" (2014) 16 Intl J Police Sci & Mgmt 87 at 89. (Dadaojo 2014).

lawful arrest and detention (and also torture in most cases). Thus, among several instances of police violation of human rights that I have witnessed was one involving Mr. Niyi – one of my clients. My notes on this case are as follows:

> "Sometime in 2011, my legal service was sought by one Mr. Niyi (full name withheld). Mr. Niyi was arrested and detained in FCDA Police Unit FCT Abuja, Nigeria for his inability to pay the balance of a debt arising from his purchase of a used vehicle. It is unlawful for the police in Nigeria to act as agents of debt recovery because debt recovery, a civil matter, does not fall within the scope of the statutory duties of the police. This notwithstanding, the police arrested and detained Mr. Niyi. He was compelled to sign an undertaking (prepared by the police) for the payment of the debt and was also detained until he paid the sum of Three Thousand Naira [Canadian $20]. Mr. Niyi could not proceed against the police in court for unlawful arrest and detention because of lack of funds and also for fear of being harassed by the police."[17]

Pervasive human rights violations, especially with respect to unlawful arrest and detention, have attracted both domestic and international attention and condemnation. Amnesty International has on many occasions investigated and reported cases of unlawful arrests and

[17] Again, in 2011, the author represented (pro bono) one Mr. S (Name withheld) in a magistrate court in Life Camp, Jabbi District, Abuja, Nigeria. Mr. S, a labourer, had misunderstanding with his employer because of the employer's refusal to complete the payment of his wage. The employer in sheer wickedness (knowing that Mr. S was both uneducated and poor) threatened to 'deal with' him. Thus, the employer colluded with the police who arrested and detained him for three days. When Mr. S could not pay the sum of money demanded by the police, he was arraigned to Court on a frivolous charge for fraud. The court subsequently struck out the case for want of merit and diligent prosecution. The author could not proceed against the police for unlawful arrest and detention for lack of fund and his safety.

detentions in Nigeria.[18] Amnesty International has specifically reported that there is a torture chamber in every police station in Nigeria where those who are unlawfully detained are also tortured.[19] Dada-Ojo confirms also that the Nigerian police not only engage in unlawful arrest and detention, but also rely on torture as a means of investigation, and that suspects are regularly subjected to torture in order to elicit confessions.[20]

The Nigerian NHRC has been empowered to "deal with all matters relating to the protection of human rights as guaranteed by the Constitution of the Federal Republic of Nigeria, the African Charter, the United Nations Charter and the Universal Declaration on Human Rights."[21] The NHRC Act of 1995 has also been amended in order to give the commission quasi-judicial powers to investigate complaints of human rights violations and make orders and decisions that are enforceable by courts.[22] This raises the question: in view of the systemic problem of unlawful arrests and detentions, can it rightly be said that Nigeria's NHRC is effective in dealing with human rights violations? If the answer to this question is in the negative, are there factors that impede these institutions from effectively dealing with such human rights issues?

On the other hand, Canada is one of the countries that have advanced the respect for and promotion of human rights. Canada runs a relatively human rights-friendly society and operates a very sophisticated human rights legal regime. Of course, the development of the Cana-

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[18] See, e.g., Amnesty International, "Nigeria's Torture Chambers Exposed in New Report", online: http://www.amnesty.org/en/news/nigeria-s-torture-chambers-exposed-new-report-2014-09-18 accessed 27 November, 2014. (Amnesty International).

[19] *Ibid*.

[20] Dadaojo 2014, *supra* note 16.

[21] *National Human Rights Commission Act,* 1995, Supp. To Official Gazette Extraordinary No. 28, Vol 82, 6th Oct, 1995-Part A.

[22] *National Human Rights Commission (Amendment) Act,* 2010, s 6 (j). (NHRC Act (as amended))

dian human rights system was not without its own chequered history. During the course of this historical process, Canada violated human rights in a number of ways. Among such challenges were the discriminatory treatment of Canada's First Nations,[23] the confinement of Ukrainian Canadians in camps during and after First World War,[24] the "Chinese head tax" and the 1923 Chinese Immigration Act,[25] the internment of Japanese Canadians during the Second World War,[26] and the discriminatory provisions of the Indian Act (highlighted in the 1977 case of *Lovelace v Canada* by the United Nations Human Rights Committee).[27] These challenges demonstrate that every country has at one time or the other faced critical human rights issues.

Canada's gradual human rights development process involves the signing of the UDHR in 1948. Although Canada at the time was not as committed to the promotion of human rights as it later came to be, the signing of UDHR provided grounds for the growth of human right activism. The Canadian Bill of Rights, adopted by parliament in 1960, represented another advancement of the Canadian human rights system. Although the Bill of Rights was a federal law and applied only to federal institutions and the capital territory, it contained almost all the rights in the present Canadian Charter of Rights and Freedoms. Canada also signed and ratified the In-

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[23] Claire Hutchings, "Canada's First Nations: A Legacy of Institutional Racism" (1998). Online: http://www.tolerance.cz/courses/papers/hutchin.htm accessed on 24 February 2015.

[24] See *War Measure Act,* SC 1914 c 2 assented to August 22 1914; *War Measures Act*, RSC 1927, c 206, see also Lubomyr Y. Luciuk, "Without Just Cause: Canadian First National Internment Operations and the Ukranian Canadians, 1914 -1920" (2006) Online: uccla.ca/without_just_cause.pdf accessed 24 February 2015; Patricia Peppin, "Emergency Legislation and Rights in Canada: The War Measures Act and Civil Liberties" (1993) 18 Queens L J 129.

[25] *Chinese Immigration Act*, 1885 Assented to 20 July 1885; *The Chinese Immigration Act*, 1923 Assented to 30 June 1923; see also Chinese Canadian Women, "Anti-Chinese Immigration Laws in Canada, 1885 – 1967", online: http://www.mhso.ca/chinesecanadianwomen/en/downloads/education/immigration_laws_handout.pdf accessed 24 February 2015.

[26] See Pamela Sugiman, "Memories of Internment: Narrating Japanese Canadian Women's Life Stories" (2004) 29 Can J Sociology 359. See also William W. Black, "Canadian Human Rights System and the International Covenants" (2011) 6 NTU L Rev 207. (Black).

[27] *Sandra Lovelace v. Canada*, Communication No. R.6/24 (29 December 1977), U.N. Doc. Supp. No. 40 (A/36/40) at 166 (1981).

ternational Covenant on Civil and Political Rights (ICCPR) and the International Covenant on Economic, Social and Cultural Rights (ICESCR).[28] This is very important in the development of human rights in Canada, because these two covenants, particularly the ICCPR, influenced the language and rights in the present Charter of Rights and Freedoms.[29]

In 1982 the Canadian Charter of Rights and Freedom was adopted and incorporated into the Canadian Constitution.[30] Unlike the Canadian Bill of Rights, the Canadian Charter of Rights and Freedoms does not apply simply to the federal government but also constitutes part of the *Grundnorm* (that is, the basic constitutional law) of Canada. The effect is that any law, whether federal or provincial, that is held to be inconsistent with a provision of the Charter, will be regarded as void. This is a milestone in Canadian human rights history.

The enforcement mechanisms of the Canadian human rights system make it very interesting and attractive for a comparative study with a country like Nigeria. Importantly, besides labour arbitrators and labour relations boards across Canada, human rights in Canada are enforced at the national level through three basic mechanisms: the Human Rights Commission ("HRC"), the Human Rights Tribunal ("HRT") and the courts. Thus, in 1977, the Parliament of Canada enacted the Canadian Human Rights Act ("CHR Act"), which establishes and empowers both the HRC and HRT. There is also similar legislation in almost all the provinces of Canada. These bodies were established to investigate and enforce rights to freedom from discrimina-

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[28] *International Covenant on Civil and Political Rights*, 19 December 1966, 999 UNTS 171; *International Covenant on Economic, Social and Cultural Rights*, 19 December 1966, 993 UNTS 3.

[29] See Black *supra* note 26 at 211 – 214; see also *R v Whaling* 2014 SCC 20, [2014] 1 SCR 392 at para 33 where the Supreme Court of Canada found that section 11(h) of the Charter "mirrors the language and purpose" of Article 14.7 of ICCPR.

[30] *Canadian Charter of Rights and Freedoms*, s 2, Part 1 of the Constitution Act, 1982 being Schedule B to *Canadian Act* 1982 (UK), 1982, c 11. (Charter of Rights).

tion. Generally, human rights are enforced by courts, which are understood to guard Charter rights with great vigour.

The police in Canada are empowered by relevant laws to arrest and possibly detain any person where the law permits them to do so. It is to be expected that in the course of carrying out their duties, there will be cases of misjudgments. Thus, in Canada, there are also cases of unlawful arrest and detention. However, such instances of unlawful arrest and/or detention have met in a number of cases with judicial rebuke. For instance, in *Davidson v Toronto Blue Jays Baseball Ltd*,[31] the court awarded $50,000 in aggravated damages, and $125,000 in punitive damages against the Blue Jays, the Metropolitan Police Board and three named police officers for the unlawful arrest and humiliation of the plaintiff. The courts in Canada have, on a good number of occasions, demonstrated their commitment to tackle any form of human rights violations, especially police abuse of power of arrest and/or detention. My observation is that the promotion of human rights in Canada does not rest only in the laws but also in the living culture for the respect of human rights.

As previously noted, the high expectations in Nigeria's NHRC have dwindled as a result of the pervasive violation of human rights through unlawful arrest and detention. This calls for re-evaluation of the human rights norms and institution in Nigeria. To achieve this purpose, it is necessary to examine Nigerian human rights norms and institution alongside those of a state that has developed a well-organized human rights system. Canada has developed an advanced human rights regime, and both Canada and Nigeria are common law states with similar judicial and legal systems. Unlike Nigeria, which has only one human rights institution, Canada has ac-

[31] *Davidson v Toronto Blue Jays Baseball Ltd*, [1999] CarswellOnt 626, [1999] O.J No. 692.

tive human rights commissions, tribunals, labour arbitrators and labour relations boards that deal with human rights matters both at the national and provincial levels. Again, Canada has an efficient judicial system that is statutorily disposed to combat human rights violations, especially unlawful arrest and detention. The comparative analysis of the Canadian human rights system and that of Nigeria will expose some statutory limitations of the Nigerian justice system, especially as regards arbitrary arrest and detention, with the aim of offering a template for a better system. In view of these facts, I find it apt and timely to embark on this comparative analysis of the human rights norms and institutions of both states, paying particular attention to the issue of unlawful arrest and detention.

This thesis employs a mixture of doctrinal, non-doctrinal (empirical) and international/comparative methodologies in order to achieve this objective. Through doctrinal analysis, the thesis analyzes relevant human rights norms, the legal framework of human rights institutions in Nigeria and Canada and cases concerning unlawful arrest and detention. In addition, the thesis uses non-doctrinal (empirical) analysis in order to evaluate these laws and their relevance to solving substantive problems. Some empirical historical facts are used to enrich the research in this regard. Finally, the thesis employs an international/comparative methodology. That is, the laws establishing the two respective national human rights institutions will be examined in light of international instruments and working templates for ideal national human rights institutions.

This thesis is divided into three major chapters. Chapter One will review the NHRC and cases of unlawful arrest and detention by the Nigerian police. To achieve this objective, the chapter will commence with a brief history of human rights norms and institutions in Nigeria.

This will be followed by an analysis of the legal framework of the NHRC of Nigeria, with particular attention being paid to its independence; its powers and functions; the appointment and removal of members of its governing council; its funding; its quasi-judicial powers and the enforcement of its decisions. In addition, the chapter will examine cases of unlawful arrest and detention, relevant human rights instruments and other laws incidental to the subject matter of this chapter. My aim is to show that despite all the statutory powers of the NHRC to deal with and inquire into all cases of human rights in Nigeria, it has not been able to address effectively the issue of unlawful arrest and detention.

Chapter Two will review the human rights norms and institutions in Canada with a particular focus on cases of unlawful arrest and detention. To achieve this purpose and to show the challenges that Canada has faced to achieve her present level of human rights compliance, this chapter will briefly consider the historical development of human rights norms in Canada. The legal framework of human rights institutions in Canada (the HRC and HRT) will be analyzed with a particular focus on their independence; their powers and functions; the appointment and removal of their members; and the enforcement of their decisions. The chapter will examine the relevant provisions of the Canadian Charter of Rights and Freedoms especially the right not to be arbitrarily detained and the right to personal liberty. Most importantly, it will examine the attitudes of the Canadian courts (through decided cases) towards unlawful arrest and detention by the police.

Chapter Three will offer a comparative analysis of the legal framework of human rights institutions in Nigeria and Canada. Its aim is to identify the strengths and weaknesses of these institutions and the areas in the Canadian human rights system that can be borrowed by Nigeria in order to improve her human rights institutions and norms. The chapter will also explore similarities and differences in mechanisms for enforcing human rights, particularly how the human rights institutions and the courts address the issues of unlawful arrest and detention.

This thesis will be concluded with recommendations for improvement in respect of the identified areas of weaknesses in the two human rights systems but with particular emphasis on Nigeria, which is the target audience for this thesis.

Chapter One

A Review of the National Human Rights Commission and Cases of Unlawful Arrest and Detention by the Police in Nigeria

In this chapter, I will review the National Human Rights Commission Act ("NHRC Act"). I will focus on the powers of the NHRC to investigate, inquire into and deal with all matters relating to the protection of human rights, especially unlawful arrest and detention by the Nigerian police Force. I will then examine surveys and reports of individual incidents of arbitrary arrest and detention by the police and the few cases that have been decided relating to unlawful arrest and detention in Nigeria. The objective of this chapter is to demonstrate that the NHRC is empowered by the NHRC Act to address pervasive human rights violations by the police, and that it is merely reluctant to employ these powers to address cases of unlawful arrest and detention. To accomplish this task, the relevant provisions of Nigeria's human rights instruments and other relevant laws shall be examined. Since a brief history of human rights norms and institutions in Nigeria will constitute the foundation on which this chapter is built, I begin with the history of human rights norms and institutions in Nigeria.

History of Human Rights Norms and Institutions in Nigeria

Although there are no clear-cut records of the historical development of what we now call "human rights" in Nigeria, they can be traced back to pre-colonial traditional Nigerian society. The traditional societies that constitute the political structure now called Nigeria recognized and conformed to some form of human rights norms before the domination and imposition of colonial rule by the British. While the concept of rights, as recognized and practiced in traditional Nigerian societies resembles in some respects the notion of human rights as conceptualized and practiced in modern society, Nigerian pre-colonial traditional societies recognized rights and fundamental freedoms that were in consonance with their traditions and cultures. As stated in a report published by the NHRC in conjunction with the United Nations Development Programmes (UNDP) and human rights NGOs in Nigeria, the Nigerian pre-colonial traditional societies recognized and promoted "such values as the right to family, kin and clan membership, freedom of thought, speech, belief and association, the right to enjoy private property and the right to participate in governance of the affairs of society."[32] These societies believed in the sanctity of lives and thus jealously protected rights to life and property. Adult men and women enjoyed the right to participate in the decision-making of the society in manner similar to the enjoyment of modern political rights. Where conflicts arose among members of the community, the parties were called upon to present their cases; hence, the right to a fair hearing was recognized. Also, like contemporary cultural rights, people had the right to engage and practice cultures, traditions and practices approved by the community. Although these rights were not articulated and classified in the same way as human rights concepts today, precolonial societies in Nigeria recognized and respected many rights and freedoms. However, emphasis was placed to a greater degree on group rights (i.e. community rights). Membership and obedience to the

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[32] "The State of Human Rights In Nigeria 2005 – 2006" (A Report on human rights violations monitored by Network of Human Rights Violations Monitors in Collaboration with the NHRC, UNDP and NORAD) 2006, at page ix, online: http://web.ng.undp.org/publications/governance/STATE OF_HUMAN_RIGHTS_REPORT_IN_NIGERIA.pdf accessed on January 7, 2015 (NHRC Report 2006).

community group guaranteed and entitled one to rights defined in those communities. The imposition of colonial rule eroded the traditional values and liberties of the people.[33]

The successful imposition of colonial rule altered much of the political culture under which the people practiced and enjoyed their traditional rights and freedoms.[34] Colonial rule was initially characterized by the use of armed force, suppression, domination, dethronement and imposition of traditional rulers – emirs in the north and warrant chiefs in the south. European imperialists were repressive. There was little or no respect for human rights during its early stage. The major consequence of early colonial rule, according to the NHRC Report, was the denial of political and economic rights.[35]

The introduction of a colonial constitution by Sir Hugh Clifford in 1922 marked something of a shift. Clifford was somewhat liberal, and believed that "it was the primary responsibility of colonial government to introduce as quickly as possible the benefit of western experience."[36] The constitution encouraged economic development and political participation by the indigenous people. In the South, it introduced a legislative council of forty-six members, four of whom were elected.[37] This gave rise to the emergence of political parties, as well as ethnic and non-political organizations. There were also movements organized by nationalists who would qualify as human rights activists in contemporary society. This political development heightened the demand and struggle for respect of the rights of the people and the ultimately right to

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[33] *Ibid*.

[34] See "The Cathedral", a poem written by Koofi Awooner that reflects upon the erosion of African tradition by colonialists.

[35] NHRC Report 2006, *supra* note 32.

[36] Helen Chapin Metz, ed. "Nigeria: A Country Study" (1999) Washington: GPO for the Library of Congress, Online: http://countrystudies.us/nigeria/, accessed on 12 January, 2015. (Metz).

[37] *Ibid*.

self-determination. Such agitation was comprehensive. It ranged from the demand for an end to racial discrimination, particularly with regard to access to basic amenities reserved for imperial officials, to employment and promotion into offices or ranks that were exclusively reserved for white colonial officers. Colonial administrators began to promote Nigerians into the cadres of the senior civil service that had initially been reserved for white men. There were further favourable constitutional developments,[38] and wider political participation. All of this contributed greatly to the development and recognition of human rights as they are known today.

Outside the movements for self-determination by the Nigerian elite, the most notable human rights concern during the lead-up to Nigeria's independence concerned minority rights. Minority groups in Nigeria expressed fears that upon independence, the majority ethnic groups – the Igbo, the Hausa and the Yoruba - would dominate and violate their rights. In 1956 the colonial government established a commission of inquiry under the chairmanship of Sir Henry Willink (the "Willink Commission") to investigate these concerns and make recommendations as to how they could be addressed.[39] However, after rigorous inquiry, the Willink Commission recommended that in order to allay the fears of minorities, basic fundamental rights needed to be enshrined in an independence constitution. These rights were as follows: "Right to life, freedom from inhuman treatment, freedom slavery and forced labour, right to personal liberty, right to Private and family life, Freedom of conscience, Freedom of expression, right to peaceful assembly and association, freedom of movement, freedom from discrimination, right to acquire

[38] Richards Constitution of 1946, MacPherson Constitution of 1951 and Lyttleton Constitution of 1954.

[39] Philip C. Aka, "Nigeria since May 1999: Understanding the Paradox of Civil Rule and Human Rights Violations under President Olusegun Obasanjo" (2003) 4 San Diego Int'l L J 209. See also R. T. Akinyele, "States Creation in Nigeria: The Willink Report in Retrospect" (1996) 39 No 2 Afr Studies Rev 71-94.

and own property."[40] Importantly, the rights to personal liberty, which prohibits unlawful arrest and detention, was provided for pursuant to section 20 of the 1960 Constitution.[41]

The inclusion of fundamental rights in the Independence Constitution of 1960 and their continued retention in the Republican Constitution of 1963 further consolidated human rights norms in the Nigerian legal system.[42] Nigerian's admission to the United Nations on 7 October 1960,[43] and its endorsement of the UDHR soon after her independence, was another factor which contributed to the development of human rights norms in Nigeria.

The normative development of human rights in post-independence Nigeria has been chequered. Power struggles between post-colonial political leaders who were divided along ethnic lines gave rise to various forms of intimidation, as well as arbitrary arrest and detention of opposition groups. This inhibited every attempt to inculcate human rights culture in Nigerian elites. Worse still, the military coup and counter coup of 1966 undoubtedly threw the country into political and legal turmoil. Human rights, especially rights to personal liberty, were often violated. The coup was not only bloody but it was also characterized by pervasive arrest and detention of civilians. Unsurprisingly, the power-hungry juntas quickly issued a military decree -

[40] Constitution of the Federation of Nigeria 1960 Chapter III, ss 17 18, 19, 20, 21,22,23,24,25,26,27,28,30.

[41] However, the 1999 Constitution introduced two more subsections and few other modifications to the 1960 provisions. For example, the 1999 constitution introduced such provisions as the right of any person arrested to remain silent; the right of any person arrested to be informed "in writing" of the grounds for his arrest; the definition of the expression "a reasonable time"; and few other clauses and modifications.

[42] Both the 1960 and 1963 Constitutions were Parliamentary Constitutions. However, under the 1960 Constitution, Nigeria was a bit under the control of the British government because the executive powers continued to be vested in Her Majesty in England and exercised on her behalf by a Governor-General. The 1963 Republican Constitution was introduced to completely sever colonial influence of the British government and to ensure true independence. Consequently, under the 1963 Constitution, the executive powers were vested in a Nigerian President and no more in Her Majesty in England.

[43] United Nations, "Members States of the United Nations" UN Official website: http://www.un.org/en/members/ accessed on 14 January, 2015.

the Constitution (Suspension and Modification) Decree - which suspended and modified the Republican Constitution of 1963. In particular, this decree suspended Chapter III of the 1963 Constitution, which provided for fundamental rights. It also stripped the courts of the jurisdiction to inquire into anything done in pursuance of the decree. Notwithstanding the sharp ethnic divide within the Nigerian political class, not to mention a pattern of discrimination and autocratic military rule, Nigeria ratified the International Convention on Elimination of all Forms of Racial Discrimination on 16 October 1967.[44]

Another remarkable challenge to the development of human rights norms in Nigeria was the Nigerian Civil War (1967 to 1970). It started as civil unrest, followed by police action, and then escalated to a three-year civil war. During this period, the Nigerian government flagrantly committed crimes against humanity: killing of unarmed children and women; rape; kidnapping; persecution; starvation; and other inhumane acts, including genocide.[45] The military government continued after the civil war, lasting from 1970 to 1979. In 1979 Nigeria returned to civilian rule with a new constitution.[46] The constitution provided for civil and political rights, known as fundamental rights, in Chapter IV. It also provided for a form of economic, social and cultural rights in Chapter II, which enshrined the fundamental objectives and principles of state policy. The civil and political rights in Chapter IV of the 1979 Constitution were justiciable, meaning that they were enforceable pursuant to section 42 of the Constitution. On the other hand, the provisions of Chapter II of the Constitution were non-justiciable and somewhat simi-

[44] *International Convention on the Elimination of all Forms of Racial Discrimination*, 7 march 1966, No. 9464 Vol 660, p.195 adopted by UNGA Resolution 2106 (xx) 21 Dec 1965, entered into force 3 Sept 1969.
[45] See also (Metz) *Supra* note 36.
[46] *The Constitution of the Federal Republic of Nigeria*, 1979.

lar to those of the International Covenant on Economic, Social and Cultural Rights. Although Nigeria did not ratify the International Covenant on Economic, Social and Cultural Rights until 1993, this instrument seems to have influenced the provisions of the fundamental objectives and principles of state policy, as expressed in the 1979 Constitution. Importantly, the right to personal liberty (prohibiting unlawful arrest and detention) was also provided under section 32 of the 1979 Constitution and equally enforceable under section 42.

Relief from military rule during the democratic administration of 1979 was again cut short. Thus, on 31 December 1983, Nigeria's democratic government was toppled in a military coup organized by Mohammadu Buhari and Tunde Idiagbo. This was followed by the promulgation of Constitution (Suspension and Modification) Decree No. 1 of 1984. This decree suspended the fundamental rights provisions of the 1979 Constitution and specifically removed the jurisdiction of the courts from inquiring into the legality of the military government's actions. The military government further promulgated an even more vicious and draconian decree: the State Security (Detention of Persons) Decree No. 2 of 1984. This decree was directed against "enemies" of the military government and sought to silence pro-democratic human rights activists and the press.[47] Under the same decree, the military violated the fundamental human rights of the people pervasively. The decree empowered the deputy military president to arrest and detain both citizens and foreigners at will. For example, Tunde Thompson and Nduka Irabor (among many other Nigerians and foreigners) were arrested and imprisoned for issuing reports

[47] Kaniye S. A. Ebeku, "Constitutional Guarantee of Personal Liberty and Preventive Detention in Nigerian Law" (1995) 7 Afr J Intl & Comp L 620. (Ebeku)

on the situation in Nigeria.[48] Decree No. 2 was a piece of retrospective legislation, as it empowered the military government to arrest, prosecute, convict and imprison or otherwise execute any person (often without fair hearing) for acts or omissions that did not constitute a criminal offence before the decree. Regardless, on 13 June 1985, Nigeria ratified the Convention on the Elimination of all Forms of Discrimination against Women.[49]

In August 1985, following the outcry against the pervasive and cruel decrees passed by the regime, the Buhari/Idiagbo regime was toppled in a coup organized by Major General Ibrahim Babangida. As much as people detested military rule, the Babangida-led military government was initially somewhat human rights-friendly. Babangida supported the previously suspended 1979 Constitution and restored to some degree the rights of the press. He released a number of persons who had been wrongly detained or imprisoned by the Buhari/Idiagbo regime. However, contrary to his image as a human rights champion, Babangida retained the infamous State Security (Detention of Persons) Decree No. 2 of 1984. According to Metz, Babangida was "deft and tactical". In his words, Babangida "often hounded opposition interest groups, especially those of labour and students, and detained many radical and anti-establishment persons for various offenses."[50] For instance, in May 1986, students of Ahmadu Bello University and Kaduna Polytechnic demonstrated against government activities, and this resulted in the brutal killing of many students by the military. In addition, the military government arrested and detained union leaders in June 4, 1986, soon after a national sympathy rally

[48] *Ibid*.
[49] Convention on the Elimination of all Forms of Discrimination against Women, New York, 18 December 1979, entered into force in 3 September 1981 UNTS No. 20378, Vol 1249 P.13.
[50] (Metz) *Supra* note 36.

organized by the Nigeria Labour Congress, as well as students and university teachers.[51] Babangida gradually grew worse - arresting journalists and forcibly closing many newspaper houses. The undoing of his regime was the infamous annulment of democratic election on 12 June 1993 of Moshood Abiola as president of Nigeria.[52] However, on 28 July 1988, Nigeria signed the Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment.[53] Moreover, in August 1993, Babangida set up a civilian interim government headed by Ernest Sheniko to conduct a fresh general election that would usher in civilian rule.

In less than three months of the interim government, in yet another coup on 7 November 1993, General Sani Abacha toppled Ernest Sheniko's interim government and suspended the Interim Government (Basic Constitutional Provisions) Decree No. 61 of 1993. Abacha's regime retained the State Security (Detentions of Persons) Decree and further amended it to extend the detention period.[54] Abacha became notorious for pervasive human rights violations. The regime tried a lot of people in absentia. The right to a fair hearing was also denied regularly during the regime's reign of terror. For instance, Wole Soyinka, the Nobel laureate, was tried in absentia for treason.[55] The regime also arrested, tried and jailed Gen Olusegun Obasanjo for treason.[56] Human rights activists who dared to cry out against the regime's pervasive actions were arrested and detained without trial. There was no press freedom – several journalists who

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[51] Ibid.

[52] Obiora Chinedu Okafor, *The African Human Rights System, Activist Forces and International Institutions*, (United Kingdom: Cambridge University Press, 2007) at 101. (Okafor)

[53] Convention Against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment, 10 December 1984, UNTS No. 24841 Vol. 1465 P. 85, entered into force on 26 June 1987 .

[54] State Security (Detentions of persons) (Amendment) Decree No 11 of 1994.

[55] (Ebeku) *Supra* note 47.

[56] *Ibid*.

reported against the actions of the government were arrested and detained without trial. Political parties were banned. The regime's worst human rights violation was the arrest, unfair trial and subsequent execution of Ken Saro Wiwa, the prominent Niger Delta human rights activist.[57] This not only attracted international condemnation but caused Nigeria to be treated by the international community as a pariah state.

However, in what could be described as a paradox, General Sani Abacha passed Decree No. 22 in 1995. This decree established the National Human Rights Commission (NHRC). Ironically, the NHRC was empowered by this decree to deal with all matters relating to the protection of human rights, including the monitoring and investigation of all alleged cases of human rights violations in Nigeria, of which the government was the chief violator. The action was described by Quashigah, an African human rights commentator, as a deliberate attempt by some "African leaders to hoodwink the international community."[58] Some human rights scholars believe that the establishment of the NHRC resulted from pressure by the international community and human rights NGOs at the time.[59]

In May 29, 1999, the military finally handed power over to a democratically elected government in a general election with a written constitution.[60] Fundamental human rights and the procedures for their enforcement are provided in Chapter IV of the Constitution. Since 1999 Nigeria has been a democratic state. It has signed and ratified several international human

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[57] *Ibid*.

[58] Edward K. Quashigah, "National Human Rights Institutions in Africa: Functions and Weaknesses" (1999) 11 AFICL Proc 134 at 142. (Quashigah).

[59] See Okafor *supra* note 52. See also Quashigah, *Ibid*.

[60] Constitution of the Federal Republic of Nigeria, 1999 As Amended (The constitution has undergone several amendments).

rights instruments.[61] Through the domestication of the Covenant on the Rights of the Child and several other international human rights instruments, Nigeria has demonstrated an intention to ensure the promotion and protection of human rights.[62]

Nigeria has also improved its record in respect of some human rights issues, including harmful widowhood practices (e.g subjecting widows to a compulsory two-year period of mourning for their deceased husbands, requiring them to shave their hair upon the death of their husbands and drink the bath water of their deceased husbands), discrimination and domestic violence against women, child trafficking and labour and press freedom. However, extra-judicial killings, torture, cruel, inhuman and degrading treatment and/or punishment,[63] and particularly unlawful arrest and detention by the police, have not abated. Notwithstanding the establishment of the NHRC in Nigeria, unlawful arrest and detention still remain common.[64]

Review of NHRC and the Legal Framework

While the overall task of this thesis is to provide a comparative analysis of human rights norms and institutions in Nigeria and Canada, the focus is on how these institutions are empowered to

[61] Among the international human rights instruments signed and ratified within this period are: *Convention Against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment*, 10 December 1984 UNTS No. 24841 Vol 1465 P. 85 entered into force in 26 June 1987, ratified by Nigeria on 28 June 2001; *Rome Statute of International Criminal Court*, 17 July 1998, UNTS No. 2187 entered into force on July 1 2002, ratified by Nigeria on 27 September 2001; *Convention on the Rights of Persons with Disabilities*, 13 December 2006, UNTS No. 44910 Vol. 2515, P. 3 entered into force on 3 May 2008, ratified by Nigeria on 24 September 2010;

[62] See the Nigeria's *Child's Rights Act* of 2003. See also UNICEF, "Information Sheet: The Child's Rights Act", August 2007, http://www.unicef.org/wcaro/WCARO_Nigeria_Factsheets_CRA.pdf, accessed on 24 April, 2015.

[63] See note 1 above, See also Amnesty International, "Nigeria: 'Welcome to Hell Fire': Torture and Other Ill-Treatment in Nigeria" 18 September 2014, online: http://www.amnesty.org/en/library/info/AFR44/011/2014/en, accessed on 22 January 2015.

[64] *Ibid*.

address unlawful arrest and detention. In this part, my task is to examine the legal framework of the NHRC, the National Human Rights Commission Act (NHRC Act), which creates, empowers and defines its general scope of operation and administration. Since the NHRC has not been able to effectively address and tackle instances of arbitrary arrest and detention in Nigeria, this part sets out to analyze the NHRC Act critically. First, I will attempt to determine whether the Nigerian NHRC has the requisite powers and operational independence to tackle unlawful arrest and detention. Second, I will examine whether the functions assigned to the NHRC under the Act cover cases of unlawful arrest and detention. Third, I will consider the question of whether the NHRC has the required financial autonomy under the Act to execute its statutory mandate and in particular address unlawful arrest and detention. Finally, I will ascertain whether the decisions, awards and recommendations of the NHRC under the Act are enforceable. In other words, the question that this section seeks to answer is whether the NHRC has the requisite statutory powers and operational independence to tackle pervasive human rights violations, especially unlawful arrest and detention.

The NHRC Act

As seen in the brief history of human rights norms and institution in Nigeria that I provided above, the NHRC was born under the autocratic and dictatorial military regime of General Sani Abacha - a regime notorious for draconian and repressive laws. Human rights violations by the military government of Abacha were extremely pervasive, so that Nigeria was treated by the international community as a rogue state. Thus, the establishment of the NHRC was received with skepticism. In the words of Okafor and Agbakwa, “the establishment of [this] body (NHRC) was widely viewed (quite understandably) as a red herring, as a design to deflect attention from that regime's ultra-dismal human rights record, and as an entirely cynical move on the part of that regime."[65] Importantly, although the NHRC was established in 1995 by National Human Rights Commission Decree No. 22 of 1995,[66] the physical establishment of the NHRC occurred in 1996.

Although the regime under which the NHRC was established was a reign of terror, the presence of the NHRC made little impact in Nigeria's human rights regime. It provided a platform for the promotion of human rights in Nigeria. Five years after the establishment of the NHRC, Okafor and Agbakwa observe that "[h]uman rights violations are no longer as massive or wanton as they were at the time of its birth, yet they persist with a level of frequency that remains disturbing."[67]

Beyond the supplementary provisions relating to the proceedings and committees of the NHRC's governing council, the provisions of the 1995 NHRC Act are set out in twenty sections. While section 1 of the Act establishes the NHRC and assigns to it a corporate status, section 2 creates the governing council responsible for discharging the NHRC's functions. The conditions and procedures for the removal of the members of the council are contained in section

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[65] (Okafor & Agbakwa), *supra* note 7 at 665; see also Edward K. Quashigah, "National Human Rights Institutions in Africa: Functions and Weaknesses" (1999) 11 AFICL Proc 134.

[66] The *National Human Rights Commission Decree* No. 22 of 1995, Supplement to 82 Official Gazette Extraordinary of the Federal Republic of Nigeria, pt. A, 6 Oct. 1995. Note: Since we are no longer in a military era, the president is empowered under section 315 of the Constitution of Federal Republic of Nigeria 1999 (As Amended) to modify existing laws in order to bring them in conformity with the constitution. Therefore, the Decree No. 22 of 1995 is now referred to as National Human Rights Commission Act of 1995 (NHRC Act) and shall be so referred in this thesis where necessary.

[67] (Okafor & Agbakwa), s*upra* note 7 at 666.

4, while the functions and powers as well as the funding of the commission are set out in sections 5, 6, and 12 respectively.

However, the NHRC Act also contains provisions that limit the independence of the NHRC. For example, section 4 (2) of the 1995 NHRC Act empowered the President to remove a member of the governing council of the commission if he or she was satisfied that it is not in the interest of the public that the member should remain in office. Likewise, section 17 of the 1995 Act empowered the Attorney General of the Federation to issue directives of a general nature to the council in the exercise of its functions under the Act. Furthermore, under the Act, the NHRC was funded by the federal government. In 2006, the President, exercising his powers under section 17 of the Act, removed at will (and with no just cause) the Executive Secretary of the NHRC. The above section and the action of the President were found not to be in line with the Principles Relating to the Status of National Institutions for the Protection of Human Rights ("Paris Principles"). The Paris Principles were principles articulated and defined at the first international workshop on national institutions for the protection of human rights in Paris in 1991. These principles were adopted by the UN General Assembly in Resolution 48/134 in 1993, as guiding and standard principles to be met by any national institution established for the protection of human rights. In view of the action of the President mentioned above, the International Coordinating Committee for National Human Rights Institutions, upon investigation, raised issues about the independence and funding of the NHRC, as well as the processes for the appointment and dismissal of the members of the commission.[68]

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[68] NHRC Report 2006, *supra* note 32.

The Vienna World Conference on Human Rights called on states to establish and strengthen national human rights institutions, having regards to the "Principles relating to the status of national institutions."[69] And Paragraph 1 of the Principles Relating to the Status of National Institutions provided that "[a] national institution shall be vested with competence to promote and protect human rights."[70] This, however, gave rise to an overall review and amendment of the Act by the National Assembly.[71] It is important to note here that the NHRC Amendment Act of 2010 not only refers to the 1995 NHRC Act as the principle piece of legislation but also intends that the new amendments should immediately be reflected in it.[72] This unfortunately has not been achieved. As a result, I proceed to review the relevant provisions of the 2010 NHRC Amendment Act and the relevant provisions of the 1995 NHRC Act that were not amended.

Objectives of the NHRC Act

The primary objectives of the NHRC Act, as expressly stated in its Preamble, are threefold. First, the Act aims to facilitate Nigeria's implementation of her various human rights treaty obligations, which include the UDHR, the International Covenant on Civil and Political Rights, the In-

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[69] *Vienna Declaration and Programme of Action* Adopted by the World Conference on Human Rights in Vienna on 25 June 1993, pp 36, online: http://www.ohchr.org/EN/ProfessionalInterest/Pages/Vienna.aspx, accessed on 27 January, 2015.

[70] *Principles Relating to the Status of National Human Rights Institutions* (Paris Principle) \endorsed UNGA A/RES/48/134, 85th Plenary Meeting 20 December, 1993, pp. 1

[71] See the *National Human Rights Commission (Amendment) Act 2010., supra* note 22.

[72] For instance, the NHRC Amendment Act 2010 uses such words as "Section 2 of the principal Act is substituted for a new section 2", "section 3(3) of the principal Act is amended by substituting for a new section 3(3)" and "delete section 2 and renumber the sections appropriately." In view of this, the reference to the expunged provisions of the principal Act (1995 Act) will be followed using the word "old" while extant provisions of both the NHRC Act 1995 and NHRC Act 2010 will be referred to as NHRC Act (as amended).

ternational Covenant on Economic, Social and Cultural Rights, the International Covenant on the Elimination of all Forms of Racial Discriminations, the African Charter on Human and Peoples' Rights and many others.[73] Second, the Act aims to create an enabling environment for the extra-judicial recognition, promotion and enforcement of all rights recognized and enshrined in the Constitution of the Federal Republic of Nigeria, international and regional human rights instruments, and other laws on human rights.[74] Finally, the Act aims to provide a forum for public enlightenment and dialogue, to limit controversy and confrontation over allegations of human rights violations by individuals, corporate bodies, public officers and agencies, and to reaffirm the sacred and inviolable nature of human and other fundamental rights.[75] These objectives, it seems, are what the NHRC is, under the Act, intended to achieve.

Independence of the NHRC

The independence of the NHRC is a factor that determines whether or not the NHRC will be successful in carrying out its mandate under the Act. A national human rights institution that lacks operational independence under the law will most likely turn out to be a rubber stamp for political decisions. In this regard, the 1995 Professional Training Series 4 on strengthening national institutions organized by the UN Centre for Human Rights stated that "[a]n effective national institution will be one which is capable of acting independently of government, of party politics and of all other entities and situations which may be in a position to affect its work. In-

[73] See the New Preamble to the NHRC Act, *supra* at note22.
[74] *Ibid*.
[75] *Ibid*.

dependence is, however, a relative concept."[76] The independence of the NHRC has significant implications for its powers and functions, its composition, the appointment and removal of the members of the governing council, and its funding.

Corporate Status of the NHRC

The Act provides that the NHRC shall be a "body corporate with perpetual succession and a common seal and may sue and be sued in its corporate name."[77] In other words, the NHRC has a distinct legal personality and is legally capable of entering into contracts, investing its funds and carrying out the functions.[78] It can sue and be sued in its corporate name, and it is free to conduct its legitimate business as allowed by the Act without external control except to the extent expressly allowed by the Act. This status enables the NHRC to sue any branch of government. It therefore goes without saying that the section accords the NHRC the independence it needs to stand on its own and to proceed, in line with provisions of the Act, against any person, body or agency of government that impedes the exercise of its powers.[79]

Political Control

It is without doubt that "an effective national institution will be one which is capable of acting independently of government, of party politics and of all other entities and situations which

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[76] Centre for Human Rights Geneva, National Human Rights Institutions: A Handbook on the Establishment and Strengthening of National Institutions for the Promotion and Protection of Human Rights, A Professional Training Series No. 4 (United Nations: New York and Geneva 1995) (UN Handbook) at 10 Para 68. Un Hankbook, supra note 10.
[77] The NHRC Act (as amended), *supra* note 22, s 1 (2).
[78] *Ibid*, s 14 (3).
[79] *Ibid*, s 6 (4)(a)(b)(d).

may be in a position to affect its work."[80] Thus, the NHRC may be ineffective if it is under the control of a political office holder. Linda C. Reif is convinced that "[a] crucial condition for the effectiveness of every national human rights institution is its independence in law and fact from all branches of government, and especially from the executive/administrative branch, which is usually the main target of its work."[81] Prior to the NHRC Amendment Act 2010, the Attorney General of the Federation was empowered to issue "directives of a general nature" to the governing council of the NHRC with regard to the exercise of its functions under the Act.[82] The implication of the provision was that the Attorney General or the President could stop the NHRC at will from investigating any person for allegations of human rights violations.

In order to ensure complete independence of the NHRC in carrying out its functions, this provision was expunged under the 2010 NHRC Amendment Act. The NHRC Act now provides that the NHRC shall not be "subject to the direction or control of any authority or person in exercise of its powers and functions under the Act."[83] By virtue of this provision, the NHRC can refuse to submit to the control, interference or unlawful directive of any arm of government or any political office holder in the exercise of its statutory powers and functions.

Annual and Special Reports

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[80] UN Handbook, *Supra note 76 at 10* Para 68.

[81] Linda C. Reif, "Building Democratic Institutions: The Role of National Human Rights Institutions in Good Governance and Human Rights Protection" (2000) 13 Harv Hum Rts J 1 at p.4.

[82] NHRC act, supra note 21, (Old), s 17.

[83] NHRC Act (as amended), *supra* note 22, s 6 (3).

Prior to the NHRC Amendment Act, the NHRC was required to submit annual reports of its activities, including audited accounts and auditor's comments, to the Federal Executive Council.[84] The Act specifically required it to submit such reports to the Attorney General of the Federation. Since the Attorney General had the power to issue directives of a general nature to the NHRC in the exercise of its functions and powers, the content of the annual report could also be influenced by the Attorney General.

Currently, the NHRC has the power to publish and submit annual reports on the state of human rights promotion and protection from time to time, to the President, the National Assembly, the judiciary, and state and local governments.[85] The important improvement is that the NHRC has been given control over its report, and that it is, by necessary implication, accountable to the country, represented here by these offices and institutions. Consequently, the NHRC has the requisite operational independence to carry out its functions and exercise freely its powers under the Act.

Appointment and Removal of the Members of the Governing Council

The independence of any national human rights institution rests on an unstable foundation if the appointment and removal of its members are not governed seriously by law. The legal or financial autonomy of a national human rights institution will be meaningless if the members of

[84] NHRC Act, *supra* note 21, (Old) s 16.
[85] NHRC Act (as amended), supra note 22, s 5 (e).

the institution cannot by reason of their tenure of office, especially their mode of appointment and removal, act in an independent manner.[86] It has been observed that "the method by which members of national institutions are appointed can be critical in ensuring independence."[87] Prior to the 2010 amendment of the NHRC Act, the President was empowered to appoint members of the governing council of the NHRC (members of the NHRC) on the recommendation of the Attorney General.[88] The president could remove any member of the NHRC if he or she were satisfied that it was not in the interest of the public that the member should remain in office.[89] The inherent limitation of this provision became clear in 2006 when the President removed the Executive Secretary of the NHRC. It then became evident to the members of the NHRC, local human rights actors and the International Coordinating Committee for National Human Rights Institutions that the provision was sufficient to render the NHRC a paper tiger. With international pressure and local efforts, the provision and several others were amended in 2010.

Currently, the appointment of a member of the NHRC is made by the President, subject to confirmation by the Senate.[90] A member of the NHRC can only be removed by the President subject to confirmation by simple majority of the Senate if he or she "is of unsound mind,[91] is bankrupt,[92] is convicted of a felony or any offence involving dishonesty,[93] or is guilty of serious

[86] UN Handbook, supra note 10.
[87] *Ibid at* 11 para 79.
[88] The NHRC Act, *Supra* note 21, (Old) s 2(3)(b).
[89] *Ibid* (Old) s 4(2).
[90] NHRC Act (as amended), *supra* note 22, s 2(3)(b); for the composition of the NHRC, see Ibid, s 2(1)(2)(a-h).
[91] *Ibid*, s 4(1)(a).
[92] *Ibid*, s 4(1)(b).
[93] *Ibid*, s 4(1)(c).

misconduct in relation to his/her duty."[94] Equally importantly, the NHRC (not the President) has the power to appoint such employees as may be required to assist it in the discharge of its functions under the Act.[95] The NHRC has the power to determine the conditions of service, including salaries, pension and gratuities for its employees.[96] It follows that the NHRC is now relatively structured to be able to deal effectively with all human rights matters in Nigeria including unlawful arrest and detention.

Funding of the NHRC

A national human rights institution cannot be completely independent without being financially autonomous. Obviously, "[a] national institution with no control over its finances will be dependent on the government ministry or other body which exercises such control."[97] Currently, the NHRC's funding comes out of the Consolidated Revenue Fund of the Federation.[98] This guarantees the financial autonomy of the NHRC. This is because, once the NHRC's budget is passed, the fund will be fully disbursed from the Consolidated Revenue Fund of the Federation. Similarly, the NHRC is empowered to take out such loans as may be required to meet its obligations and discharge its functions under the Act.[99] The NHRC may invest all or any of its funds,[100] and particularly any surplus funds in securities prescribed by the Trustee Investment Act.[101] Ex-

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[94] *Ibid*, s 4(1)(d).
[95] *Ibid*, s 8(1).
[96] *Ibid*, s 10.
[97] UN Handbook, *Supra* note 10 at 11 Para 73.
[98] The NHRC Act (as amended) *supra* note 22, s 12 (2).
[99] *Ibid*, s 14(1).
[100] *Ibid*, s 14(2).
[101] *Ibid*, s 14(3).

cept as directed by the court, any sum awarded by any court against the NHRC can only be paid from the reserve fund of the NHRC.[102]

Functions and Powers of the NHRC

While the functions of the NHRC derive from duties assigned to it under the Act and which it is primarily established to carry out, the powers of the NHRC refer to its legal authority as defined by the Act. The functions and powers of the NHRC are detailed expressly and distinctly in two separate sections of the Act.

The Paris Principles recommend that "a national institution shall be given as broad a mandate as possible, which shall be clearly set forth in a constitutional or legislative text."[103] Thus, the NHRC is mandated to publish and submit from to time to time to the President, the National Assembly, the judiciary, state and local governments, reports on the state of human rights promotion and protection;[104] to liaise and cooperate with local and international organizations on human rights with the purpose of advancing the promotion and protection of human rights;[105] to participate in international activities relating to promotion and protection of human rights;[106] to maintain a library, collect data and disseminate information and materials on human rights generally;[107] to prepare and publish guidelines for the avoidance of acts or practices

[102] *Ibid*, s 20.
[103] (Paris Principles) *Supra* note 70 at Para 2.
[104] The NHRC Act (as amended), supra note 22, s 5(e).
[105] *Ibid,* s 5(g).
[106] *Ibid*, s 5(h).
[107] *Ibid*, s 5(i).

with respect to its functions and powers under this Act;[108] to report an action that should be taken by the federal, state or local governments in order to comply with the provisions of any relevant international human rights instruments;[109] to act as a conciliator between parties to a complaint, where it considers it appropriate to do so;[110] to intervene, where it considers appropriate, in any proceeding in court that involves human rights issue;[111] and to carry out all such other functions as are necessary or expedient for the performance of the functions under the Act.[112]

Furthermore, the NHRC has the duty to deal with all matters relating to the promotion and protection of human rights guaranteed by the Constitution of the Federal Republic of Nigeria and all international and regional instruments on human rights to which Nigeria is a party.[113] The key words here are “all matters relating to promotion and protection of human rights.” This raises the question: do these matters include unlawful arrest and detention by the police? The answer to this question is in the affirmative, since unlawful arrest and detention is a serious human rights matter. It is therefore included in the matters which the NHRC has a duty to deal with. Similarly, the rights must be guaranteed by the constitution or international and regional human rights instruments to which Nigeria is a party. The next question is whether the right to

[108] *Ibid*, s 5(l).
[109] *Ibid*, s 5(o).
[110] *Ibid*, s 5(q)
[111] *Ibid*, s 5(r).
[112] *Ibid*, s 5(s).
[113] *Ibid,* s 5(a); the international and regional instruments referred to include: the United Nations Charter and Universal the Declaration of Human rights, the International Convention on Civil and Political Rights, the International Convention on Economic, Social and Cultural rights, the International Convention on Elimination of all Forms of Racial Discrimination, the Convention on the Elimination of all Forms of Discrimination against Women, the Convention on the Rights of a Child, the African Charter on Human and People’s Rights.

freedom from arbitrary and unlawful arrest and detention is guaranteed under the constitution and relevant international or regional human rights instruments.

The constitution provides:

> "35. (1) Every person shall be entitled to his personal liberty and no person shall be deprived of such liberty save … in accordance with a procedure permitted by law – …
>
> (6) Any person who is unlawfully arrested or detained shall be entitled to compensation and public apology from the appropriate authority or person…"[114]

The ICCPR provides:

> "Article 9. 1. Everyone has the right to liberty and security of person. No one shall be subjected to arbitrary arrest or detention. No one shall be deprived of his liberty except on such grounds and in accordance with such procedure as are established by law."[115]

These provisions protect a person from unlawful arrest and detention, whether by the police or any other person or authority. The NHRC has a duty under the Act to deal with all matters relating to the promotion and protection human rights. It is therefore settled that the NHRC is mandated under the NHRC Act to deal with matters relating to unlawful arrest and detention by the police. In accordance with the introductory language of the section of the Act, which reads "The Commission shall",[116] it is mandatory that the NHRC deal with any matter relating to unlawful arrest and detention.

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114 The 1999 Constitution as Amended, *supra* note 60, s 35(1) & (6).

115 *ICCPR supra* note 3, art 9.1.

116 NHRC Act (as amended), *supra* note 22, s 5.

Further, the Act specifically provides that the "commission (the NHRC) shall monitor and investigate all alleged cases of human rights violation in Nigeria and make appropriate recommendation to the federal government for prosecution and such other action as it may deem expedient in each circumstance."[117] While the functions of the NHRC are mandatory, it has the discretion to decide what to do with the result of each investigation of an alleged human rights violation (e.g. unlawful arrest and detention) if the investigation does not reveal that an offence was committed. Where the investigation reveals that an offence has been committed, the NHRC is bound to make a recommendation to the federal government for prosecution. Further, on the issue of prosecution, the Act also provides that the NHRC shall refer any human rights violations requiring prosecution to either the Attorney-General of the Federation or the relevant state, as the case may be.[118]

The NHRC is also bound to "assist victims of human rights violation and seek appropriate redress and remedies on their behalf."[119] A thorough examination of the first three functions of the NHRC under the Act, which includes the present function, reveals that they are not only mandatory but also interlinked. This is because, according to the language of the Act, the NHRC is duty-bound to deal with all matters relating to human rights, investigate and monitor all alleged cases of human rights violation and assist victims of human rights violation. There is nothing in these provisions that would suggest that in carrying out its function, the NHRC has the discretion to choose which human rights matter to monitor or investigate, or for what kind of matter it should assist victims who seek redress. I just observed that the NHRC has the discre-

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[117] *Ibid*, s 5(b).
[118] *Ibid*, s 5(p).
[119] *Ibid*, s 5(c).

tion to decide what to do where the investigation does not reveal that an offence has been committed. The provision requiring the NHRC to assist victims of human rights violation and to seek appropriate redress and remedies seems to have curtailed this discretion. This is because if during an investigation of an human rights violation (e.g. unlawful arrest and detention), the NHRC finds that a victim's rights have been violated, the NHRC is obligated to assist the victim and to seek appropriate redress and remedies.

Importantly, the NHRC has the statutory mandate to "receive and investigate complaints concerning violations of human rights and make appropriate determination as may be deemed necessary in each case."[120] This provision - section 5(j) - is similar to Section 5(b) of the NHRC Act, which was discussed above. For the sake of clarity, section 5(b) provides that the NHRC "shall monitor and investigate all alleged cases of human rights violation in Nigeria and make appropriate recommendation to the federal government for the prosecution."[121] The provision under consideration does not only go a step further but also represents the milestone achieved in the 2010 NHRC Amendment Act. As observed in the UN handbook on international human rights institutions, "[i]t is not common for a human rights commission to be granted authority to impose a legally binding outcome on parties to a complaint."[122] Thus, this provision, now accords the NHRC a quasi-judicial status. The NHRC not only receives and investigates complaints on human rights violations, but also (like a court) makes determinations in each case.

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[120] *Ibid*, s 5(j).
[121] NHRC Act, *supra* note 21.
[122] UN Handbook, *supra note 70* at 7 para 50.

Moreover, the NHRC has a duty to "[e]xamine any existing legislations, administrative provisions and proposed bills or bye-laws for the purpose of ascertaining whether such enactments, proposed bills or bye-laws are consistent with human rights norms."[123] This is in line with the Paris Principles, which suggest that a national human rights institution should "promote and ensure the harmonization of national legislation, regulations and practices with the international human rights instruments to which the state is a party, and their effective implementation."[124] Because of the importance of domestic laws and policies in the promotion of human rights, the Act also requires the NHRC to "undertake studies on all matters pertaining to human rights and assist Federal, State and Local Governments where it considers appropriate to do so in the formulation of appropriate policies on the guarantee on human rights."[125] As I will argue later in this thesis, some of the laws that specify the powers of the police to arrest or to detain contain provisions that encourage police abuse of such powers. For example, the 1999 Constitution (as amended) provides as follows:

> "35(4) Any person who is arrested or detained in accordance with subsection (1) (c) of this section shall be brought before a court of law within a reasonable time, and if he is not tried within a period of –
>
> (a) two months from the date of his arrest or detention in the case of a person who is in custody or is not entitled to bail; or
>
> (b) three months from the date of his arrest or detention in the case of a person who has been released on bail, he shall (without prejudice to any further proceedings that

[123] The NHRC Act (as amended), *Supra* note 22, s 5(k).
[124] Paris Principles, *supra* note 70 art 3(b).
[125] NHRC Act (as amended), *supra* note 22, s 5(d).

may be brought against him) be released either unconditionally or upon such conditions as are reasonably necessary to ensure that he appears for trial at a later date."[126]

This provision encourages detention without trial for a period of up to two or three months as the case may be, provided that the arrest or detention is in accordance with section 35 (1)(c) of the Constitution. Section 35 (1)(c) provides as follows:

> "(1) Every person shall be entitled to his personal liberty and no person shall be deprived of such liberty save in the following cases and in accordance with a procedure permitted by law –
>
> (c) for the purpose of bringing him before a court in execution of the order of a court or upon reasonable suspicion of his having committed a criminal offence, or to such extent as may be reasonably necessary to prevent his committing a criminal offence."[127]

The problem with this constitutional provision is that the decision as to what counts as "reasonable suspicion" resides with the arresting officer. Yet, when such an arrest is made, the arresting officer may detain the arrested individual for two months. The NHRC Act thus makes it mandatory for the NHRC to examine existing legislation and make appropriate recommendations for their immediate amendment so as to be consistent with human rights norms.

Most importantly, the NHRC has the mandatory duty to "organize local and international seminars, workshops and conferences on human rights issues for public enlightenment." This function is very important for the effective promotion and protection of human rights in any

[126] The 1999 Constitution as amended, supra note 60, s 35(4)(a)(b).
[127] *Ibid*, s 35(1)(c).

society. As stated in the Paris Principles, "[t]he full realization of human rights cannot be achieved solely through adequate legislation and appropriate administrative arrangements. In recognition of this fact, [commissions] are often entrusted with the important responsibility of improving community awareness of human rights."[128] Also, the NHRC is required under the Act to promote an understanding of public discussions of human rights issues in Nigeria.[129]

The NHRC has demonstrated the importance of community awareness of human rights norms and values in many ways. First, the NHRC created and devoted, for this important function, a unit known as the "Human Rights Education and Linkages Unit" ("HREL Unit"). Second, the NHRC also (through the "HREL Unit") organized a four-day in-house training course on basic human rights for its staff – clerical officers, drivers, National Youth Service Corps (NYSC) members and interns.[130] The objective of the training was to educate and equip the internal staff on basic human rights norms so that they might become human rights advocates in their work places, homes and in society as a whole. Third, it also organized a two-day training course for the Inter-Ministerial Committee on Human Rights Education in Nigeria.[131] The aim was to educate and equip the members with the skills and best practice model for the implementation of World Programme for Human Rights Education (WPHRE).[132] The NHRC often organizes town

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[128] Paris Principles, *supra* note 70 at 8, para 52.

[129] NHRC Act (as amended), *supra* note 22, s 5(m).

[130] See the NHRC Events and Programmes, Activities carried out by Human Rights Education and Linkages Unit, (In-House Training on Basic Human Rights for Commission Drivers, Clerical Officers, NYSC Members and Interns, 12 – 15 August 2013 at The Commission's Auditorium, Abuja). Accessed on 2 February 2015, http://www.nigeriarights.gov.ng/blog/2013/12/activities-carried-out-by-human-right-education-and-linkages-unit.

[131] The NHRC Events and Programmes, Activities carried out by Human Rights Education and Linkages Unit, (**A** Two-Day Training of the Inter-Ministerial Committee on Human Rights Education in Nigeria, held at Grandeur Hotel, Nasarawa State on the 19 to 20 September, 2013). Accessed on 2 February 2015, http://www.nigeriarights.gov.ng/blog/2013/12/activities-carried-out-by-human-right-education-and-linkages-unit

[132] *Ibid*.

hall meetings for the protection and promotion of human rights.[133] The objective of these town hall meetings is to "advance the knowledge of human rights by raising awareness on human rights and provoking public discourse" on key human rights issues.[134]

In order to address human rights abuses by the police in an effective manner, the NHRC enlightens the police on best practices in law enforcement consistent with human rights norms. Thus, the NHRC organized training for police officers on human rights standards and practice in the following six police commands: Imo State Police Command, Edo State Police Command, Benue State Police Command, Ekiti State Police Command, Kaduna State Police Command and Federal Capital Territory (FCT) Police Command.[135] The three major objectives for this training are to improve the knowledge of police on human rights, to make human rights the mainstream in the operation of the police, and to improve the human rights culture in law enforcement in Nigeria.[136]

The success of a human rights institution depends greatly on the degree of powers at its disposal. In order to be effective, a National Human Rights Commission must be armed with statutory powers to carry out its functions under the law. The UN handbook emphasizes that a national institution should be granted adequate powers to ensure effective discharge of its

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[133] See also the NHRC Events and Programmes, Activities carried out by Human Rights Education and Linkages Unit (A Town Hall Meeting for the Promotion and Protection of Human Rights held at the Mirage Hotel, Calabar, Cross Rivers State on 26 September 2013). Accessed on 2 February 2015, http://www.nigeriarights.gov.ng/blog/2013/12/activities-carried-out-by-human-right-education-and-linkages-unit

[134] *Ibid*.

[135] The NHRC, NHRC Training of Police Officers on Human Rights Standards and Practice, 6 November, 2013. Accessed on: http://www.nigeriarights.gov.ng/blog/2013/12/nhrc-training-of-police-officers-on-human-rights-standards-and-practice.

[136] *Ibid*.

functions and that the powers must be enforceable.[137] Before the 2010 amendment, the functions and powers of the NHRC were not different from that of a human rights rapporteur. The NHRC was to monitor and investigate human rights violations, and also to research and report on the human rights situation in Nigeria for the president. The Act simply provided that "the commission shall have power to do all things which by [this] Act or any other enactment are required or permitted to be done by the commission."[138]

The NHRC is now empowered to discharge its new functions under the Act. The powers of the NHRC shall be considered under three separate subheadings namely: quasi-judicial powers; power to summon and compel the production of evidence and attendance of witness; and enforcement of decisions, orders and recommendations.

Quasi-Judicial Powers

The NHRC has the quasi-judicial powers to conduct inquiries and investigations over complaints of human rights violations and to make decisions, findings and recommendations that can be enforced by regular courts. The NHRC has the duty to "monitor and investigate all alleged cases of human rights violation in Nigeria and make appropriate recommendation to the federal government for prosecution and such other action as it may deem expedient in each circumstance."[139] The NHRC has the power, when conducting an inquiry, to make determinations as to

[137] UN Handbook, *supra* note 10 at paras 95 & 96.
[138] NHRC Act, *supra* note 21, (Old) s 6.
[139] The NHRC Act (as amended), supra note 22, s 5(b).

the damages or compensation that may be payable in relation to any violation of human rights, should this prove to be necessary.[140]

In 2013-14, the NHRC invoked its quasi-judicial authority for the first time in *Re Global Rights & Three Others v. Federal Republic of Nigeria & Three Others.*[141] The case arose in connection with the activities of an organized armed group, *Jama'atu ahlus sunnah lid da'awati wal jihad* (also known as "Boko Haram"), that operates in the North East Nigeria. In 2013, a number of armed officers from the Department of State Service ("DSS"), as well as officers from the Nigerian Army, invaded an incomplete building in the Apo/Gudu District of the Federal Capital Territory, Abuja. These officers alleged that they had received intelligence regarding the location of some members of Boko Haram. They also alleged that these Boko Haram members buried their arms in a bush behind the incomplete building in question and that they were planning to bomb the Federal Capital Territory. On September 20, 2013, the soldiers and DSS officers invaded the incomplete building, rounded the people up, shot and killed eight persons and injured about eleven others who out of fear attempted to run away. The officers also arrested and detained several others. The officers claimed that the deceased were killed in self-defence. A case was then brought by the complainants – Abuja-based human rights NGOs and trade unions for tricycle and motorcycle owners and riders, Abuja unit[142] – to the NHRC. As a result, the

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[140] *Ibid*, s 6(e).

[141] In *Re: Global Rights, Human Rights Law Service (HURI-LAWS), Nasiru Adamu and National Association of Commercial Tricycle and Motorcycle Owners and Riders Association (NATOMORAS) (Compalinants) vs Federal Republic of Nigeria, The Department of State Services, Chief of Army Staff and Attorney-General of the Federation* (Respondents) Complaint No. C/2013/7908/HQ reported in National Human Rights Commission, Report of the Alleged Killings of Squatters at Apo/Gudu District, 8 April, 2014. Accessed on 13 November, 2014, Online: http://www.nigeriarights.gov.ng/blog/2014/04/report-on-the-alleged-killings-of-squatters-at-apogudu-district.

[142] *Ibid*

NHRC formed a panel of inquiry which, after conducting a hearing on the matter, found that there was no credible evidence to support the claim that the victims were members of Boko Haram. Instead, it found that they were civilian non-combatants. It further held that the application of lethal force was disproportionate, and that the arrest and detention of other innocent squatters was unlawful. Consequently, the NHRC awarded ₦10 million in damages for each of the deceased families and ₦5 million in damages for of each of the injured victims. It also ordered the Attorney-General of Federation to file evidence of payment within thirty days of the decision. The NHRC added that the report and decision was to be registered with the Federal High Court for enforcement in accordance with section 22 (1) of the NHRC Act.[143]

The action taken by the NHRC in this case is commendable and clearly shows that it is duly empowered under the Act to address cases of unlawful arrest and detention by the Nigerian police. The NHRC will need to invoke these quasi-judicial powers to address other cases of unlawful arrest and detention. The NHRC could have a significant impact in promoting respect for human rights if it continued to exercise its quasi-judicial powers in other human rights complaints. My concern is that since the NHRC Act was amended to give quasi-judicial powers to the NHRC, the *Re Global Rights* case is the only one in which such powers were invoked to address unlawful killing, arrest and detention. Despite numerous instances of arbitrary arrest and detention, the NHRC has not constituted a quasi-judicial panel to sit over similar complaints of human rights violations on even one other occasion. In light of this fact, either the NHRC is re-

[143] *Ibid*.

luctant to invoke its powers in order to address other cases of unlawful arrest and detention or it is simply abdicating its statutory duties.

Power to Summon and Compel the Production of Evidence and Attendance of Witnesses

As stated in the above mentioned UN handbook, "[t]he legal authority to compel cooperation of others, particularly government agencies, is another pre-requisite for full operational autonomy of a national institution which is vested with power to investigate."[144] The power of the NHRC to conduct inquiries into human rights complaints will be incomplete without the power to compel the production of evidence and the attendance of witnesses. Thus, the Act empowers the NHRC to summon and interrogate any person, body or authority to appear before it in public inquiry to resolve a complaint of human rights violation;[145] issue a warrant to compel the attendance of a person who refuses or fails to honour its summon with satisfactory excuse;[146] compel any person, body or authority who in its opinion has any information relating to a matter under investigation to attend and furnish this information;[147] and compel the attendance of witness to produce evidence before it.[148] The NHRC exercised these powers in *Re Global Rights*, compelling the attendance of the respondents and the witnesses in the inquiry.

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[144] UN Handbook *supra* note 10 at 11 para 72.
[145] NHRC Act (as amended), *supra* note 22, s 6(2)(b).
[146] *Ibid*, s 6(2)(c).
[147] *Ibid*, s 6(2)(d).
[148] *Ibid*, s 6(2)(e).

Importantly, if there is evidence of the commission of an offence under the Act in an investigation or proceeding before it, the NHRC has the power, by an order of court, to enter any premises to search and obtain evidence that will be of assistance to it.[149] The NHRC can also employ these powers to tackle cases of unlawful arrest and detention in Nigeria. The NHRC is also empowered by the Act to visit prisons, police cells and other places of detention to study conditions and make recommendations to appropriate authorities.[150]

Enforcement of Decisions, Orders and Recommendations

The decisions, awards and recommendations of the NHRC are binding upon the parties to the complaint that is the subject of any inquiry. Such decisions or awards, upon application in writing to a high court, can be enforced as a judgment of the court.[151] Unfortunately, the awards and recommendations made by the NHRC in *Re Global Rights* have not been enforced until now. This is because the DSSS, via an *ex parte* application to the Federal High Court, has obtained an order to stay the execution of the decision of the NHRC.[152] The DSSS challenges the decision of the NHRC on the grounds that the NHRC lacks jurisdiction to make such a decision, since the alleged acts involve a criminal offence that is beyond the powers of the NHRC. The

[149] *Ibid*, s 6(2)(a).
[150] *Ibid*, s 6(1)(d).
[151] *Ibid*, s 22 (1).
[152] Tobi Soniyi, "Court Stops Execution of NHRC Report on Apo Killing", ThisDaylive - OnlineNewspaper, (3 July 2014), accessed on 7 February 2015, http://www.thisdaylive.com/articles/court-stops-execution-of-nhrc-s-report-on-apo-killing/182546/.

DSSS also argues that it was not given a fair hearing in the public inquiry and was not served with a copy of the complaint.[153]

Equally importantly, it an offence for any person, body or authority to refuse to provide evidence, including documentary evidence, to the NHRC in response to a written request to do so;[154] to obstruct or do anything to prevent any member of the council or an employee of the NHRC from lawful exercise of its functions under the Act;[155] to punish, intimidate, harass or discriminate against any person for co-operating with the NHRC in the exercise of its powers under the Act,[156] or to refuse to comply with the lawful directives, determinations, decisions or findings of the NHRC.[157] Furthermore, any person who commits any of the above offences is liable on conviction to imprisonment for a term of six months or a fine of ₦100,000 or both.[158]

Cases of Unlawful Arrest and Detention by the Police in Nigeria

Unlawful arrest or detention is an infraction of the right to personal liberty guaranteed under the Nigerian Constitution. According to Brecht, a violation of the right to personal liberty renders other rights "destitute of meaning."[159] Ebeku contends that it is the most important fun-

[153] *Ibid.*
[154] The NHRC Act as amended, *supra* note 22, s 6(4)(a).
[155] *Ibid*, s 6(4)(b).
[156] *Ibid*, s 6(4)(c).
[157] *Ibid*, s 6(4)(d).
[158] *Ibid*, s 6(5).
[159] Arnold Brecht, "European Federation – The Democratic Alternative", (1942) 55 Harv LR 561.

damental right and the foundation of all other rights.[160] In *Union Pacific Railway Co. v. Botsford,*[161] the US Supreme Court put the point thus:

> "No right is held more sacred or is more carefully guarded by the Common law than the right of every individual to the possession and control of his own person, free from all restraint or interference of others, unless by clear and unquestionable authority of law."[162]

The 1999 Nigerian Constitution (as amended) provides that every person is entitled to his or her personal liberty and no person should be deprived of such liberty except in a manner permitted by law.[163] Where a person is unlawfully arrested or detained, he or she is entitled to compensation and public apology from the appropriate authority or person.[164] The Constitution specifies the circumstances under which a person may be deprived of his or her right to personal liberty. These circumstances include arrest or detention made in pursuance of the execution of the sentence or order of a court in respect of a criminal offence of which that person has been found guilty;[165] to secure the fulfilment of any obligation imposed upon him or her by law or the order of a court;[166] to bring him or her before a court in execution of the order of a court or upon reasonable suspicion of his or her having committed a criminal offence, or to such ex-

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[160] Ebeku, supra note 47 at 621.
[161] (1891)141 US 250, quoted from (Ebeku) *Ibid* at 622.
[162] *Ibid* at 622.
[163] The 1999 Constitution, *supra* note 60, s 35(1).
[164] *Ibid*, s 35(6).
[165] *Ibid*, s 35(1)(a).
[166] *Ibid*, s 35(1)(b).

tent as may be reasonably necessary to prevent that person from committing a criminal offence;[167] also, for the purpose of education or welfare of a person who has not attained eighteen years;[168] in the case of persons suffering from infectious or contagious disease, persons of unsound mind, persons addicted to drugs or alcohol or vagrants, for the purpose of their care or treatment or the protection of the community;[169] and finally, to prevent the unlawful entry of any person into Nigeria or to effect the expulsion, extradition or other lawful removal of a person from Nigeria.[170] A person who is charged with an offence and who has been detained in lawful custody awaiting trial shall not continue to be kept in such detention for a period longer than the maximum period of imprisonment prescribed for the offence.

However, there are some provisions of the Nigerian laws that seem to permit arbitrary arrest and detention. One of such provisions is Section 35 (4)(5), which permits a police officer to arrest and detain a person for two months if the police officer has reasonable suspicion that the person has committed a criminal offence or that the measure is necessary to prevent him or her from committing a criminal offence.[171] In addition, the Criminal Procedure Act (CPA) empowers any police officer to arrest without a warrant or order from a magistrate, any person who has no ostensible means of subsistence and who cannot give a satisfactory account of him or herself.[172] Similarly, the CPA permits a police officer to arrest any person found taking "precautions to conceal his presence in circumstances which afford reason to believe that he is tak-

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[167] *Ibid*, s 35(1)(c).
[168] *Ibid*, s 35(1)(d).
[169] *Ibid*, s 35(1)(e).
[170] *Ibid*, s 35(1)(f).
[171] See my argument on this provision under the functions of the NHRC above.
[172] *Criminal Procedure Act*, LFN 1990, Cap 80, s 10 (1)(i).

ing such precautions with a view to committing an offence."[173] These provisions are prone to abuse because in Nigeria, labourers can move from place to place in search of menial jobs. Also, there are a significant number of illiterate persons who hide themselves whenever they see armed police officers, sometimes because of indiscriminate arrests by the police. These laws are not consistent with international human rights norms. Hence, the NHRC should study them and make appropriate recommendations for their amendment.[174]

Survey of the Network of Police Reform in Nigeria

In August 2010, prior to the NHRC Amendment Act, the Network of Police Reform in Nigeria ("NOPRIN"), in collaboration with the NHRC and National Committee on Torture ("NCoT"), conducted a public hearing on police abuses in Nigeria.[175] The public hearing took place in Imo State, in southeast Nigeria, on August 19 and 20, 2010. During the public hearing, several cases of police abuses (torture, extra-judicial killings, unlawful arrest and detention) were discussed. The goal was to survey cases of human rights violations by the police that had not been investigated.

One of the cases that were discussed involved a Catholic priest – Reverend Fr. Eustace Okorie – and the former governor Ikedi Ohakim of Imo State of Nigeria. According to the report, the Governor alleged that the priest was an agent of his political opponents and as a result willfully blocked his convoy. The priest claimed that he parked his car rightfully while avoiding a

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[173] *Ibid*, s 10(1)(j)
[174] See the NHRC Act (as amended), *supra* note 22, s 5 (d)(e) & (k).
[175] NOPRIN is a human right NGO that advocates human rights best practices in the Nigerian Police Force.

dangerous ditch at the spot where the Governor's security men pounced on him and smashed his car side mirror with gun butts. On the order of the Governor, the priest was arrested and detained at the office of the DSSS for about twenty-six hours. While in detention, he was stripped of his underpants and his phone was confiscated. Thus, he was not allowed to call his lawyer or any other person.[176]

Also discussed was a case involving the arrest, torture and detention of Nnachetam Anthony Nnamani. According to the report, Nnachetam was arrested and detained for five days without investigation, on an allegation of stealing made up by Mr. Afam Nnaji (because of a previous misunderstanding between the accuser and the victim). When Nnachetam was finally released, Afam Nnaji further instigated officers of Special Anti-Robbery Squad ("SARS") to re-arrest him. He was detained and tortured for five months. His lawyer, Mr. Ray Nnaji, was also detained in the course of seeking his release. Finally, Mr. Charles Maduka Ede and Mr. Onyekachi Edenta, who visited Nnachetam at the police station, were arrested, detained and tortured for six weeks, and were eventually released without any charges.[177]

These cases represent common experience of people and are mostly not investigated by state authorities. The arrests are not made on the basis of a reasonable suspicion that the victims have or might have committed an offence, or for any other reasons contemplated under the constitution. Rather, the arrests were made with a malicious and corrupt intention to ex-

[176] Communique issued at the end of the Public Tribunal on Police Abuses in Nigeria Organised by Network on Police Reform in Nigeria (NOPRIN) in Collaboration with National Human Rights Commission (NHRC) and National Committee On Torture (NCoT) in Owerri, Imo State for the Southeast Region on August 19 And 20, 2010, dated August 23, 2010. Accessed on 14 February, 2015. http://webcache.googleusercontent.com/search?q=cache:2RUQDukJK6UJ:www.noprin.org/COMUNIQUE%2520OF%2520SOUTHEAST%2520PUBLIC%2520TRIBUNAL%2520%2BFINDINGS%2520AND%2520RECOMMENDATIONS.doc+&cd=4&hl=en&ct=clnk&gl=ca.

[177] *Ibid*.

ploit and dehumanize the victims. Human rights violations by the police in Nigeria are all the more problematic since the concerned police officers are usually corrupt and dangerous.

Consider, for instance, a complaint that was handled by NOPRIN concerning the arrest, detention and torture of Chinagorom Ihejiagwa by SARS in Awkuzu, Anambra State of Nigeria.[178] According to NOPRIN, Chinagorom was arrested by SARS in Awkuzu, and has been detained since May 31, 2014. Since then, Chinagorom had been denied access to his family members and lawyers. The SARS Officer in Charge has also refused to charge him. NOPRIN states that the police officer who arrested Chinagorom accused him of buying a stolen vehicle some years prior and refused to "settle" him. Because Chinagorom apparently refused to give money, SARS threatened to kill him, claiming that he was a "confessed kidnapper." According to NOPRIN, Anambra State Police Command has "condoned the continued unlawful detention of Chinagorom at Awkuzu SARS for over two months without trial and in utter disregard of a court order that he should be released, or otherwise charged to court."[179]

Survey by Amnesty International[180]

Amnesty International has conducted surveys on pervasive human rights violation in Nigeria involving unlawful arrest, detention and torture.[181] In one of its publications, Amnesty Interna-

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[178] Ayodele Olalere, "Alleged Unlawful Detention: NOPRIN Petitions IG over Anambra SARS Court Contempt", Newswatch Time (31 August 2014), online: http://www.mynewswatchtimesng.com/alleged-unlawful-detention-noprin-petitions-ig-anambra-sars-court-contempt/, accessed 14 February 2015.

[179] *Ibid*.

[180] Amnesty International is an international non-governmental organization focused on human rights with over 7 million members and supporters around the world. It has its headquarters in London, United Kingdom. See https://en.m.wikipedia.org/wiki/Amnesty_International.

tional observes that “despite the … provisions in Nigeria’s constitution and international human rights law and standards, arbitrary arrest and arbitrary and incommunicado detention are routine in Nigeria. Many people who had been formerly detained at police stations told Amnesty International that they were not told the nature of their offences during arrest, they had no access to lawyers and they were subjected to long detention without trial.”[182]

In one of its surveys, Amnesty International reports that Chinwe, a hotel worker, was arrested by SARS in Onitsha, Anambra State of Nigeria on July 31, 2013. This was done after a human skull and two guns were allegedly found in the hotel.[183] According to the survey, Chinwe was arrested with thirteen other workers, including the owner of the hotel, and was detained and tortured at the SARS Centre. Some of those who could afford the services of lawyer were not allowed to meet with their lawyers.

Decided Cases/Judicial Decisions on Unlawful Arrest and Detention

The Federal High Court, the High Court of FCT and high courts of states of the federation have original jurisdiction to enforce the fundamental rights enshrined in the Nigerian Constitution.[184] However, the result of my research reveals that there is dearth of cases on unlawful arrest and detention in Nigeria. One of the reasons for this is that a good number of those who are victims

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[181] Amnesty International, “Welcome to Hell Fire: Torture and Other Ill-Treatment in Nigeria”, published by Amnesty International 2014, London, UK, Index: AFR 44/011/2014. See also Amnesty International, “Nigeria: Tortured, beaten and sentenced to death: Moses Akatugba: Write for Rights case card” 1 October 2014, Index Number: AFR 44/015/2014, accessed 16 February, 2015. http://www.amnesty.org/en/region/nigeria?page=2.

[182] *Ibid* at 25.

[183] *Ibid* at 25 & 26.

[184] The 1999 Constitution as amended, *supra* note 60, s 46 (1).

of unlawful arrest and detention are indigent, and therefore unable to pursue their cases in court. Another reason is fear of persecution by police officers involved in corrupt practices. Still another is the apprehension that victims will never obtain justice in court, due to delays and technicalities. There are, however, some cases involving the issue of unlawful arrest and detention.

In *General Sani Abacha & Ors v Chief Gani Fawehinmi*,[185] the respondent, a legal practitioner, was arrested without warrant at his residence on January 30, 1996 by officers of the State Security Service ("SSS") and police. He was later detained in the office of the SSS at Shangisha. At the time of his arrest, the respondent was not informed that he had committed any criminal offence or charged with any offence. He was later transferred to a prison in Bauchi State. Consequently, he made an *ex parte* application through his counsel to the Federal High Court in Lagos for the following reliefs: a declaration that his arrest and continued detention was a violation of his fundamental rights and therefore unlawful; an injunction restraining the authorities from further arresting and detaining him; and ₦10 million in damages for the unlawful arrest and detention. The appellants filed a preliminary objection challenging the jurisdiction of the court on the following grounds: that the Inspector-General of Police is immune from legal liabilities arising from any act done in exercise of the powers conferred upon him by State Security (Detention of Persons) Decree No. 2 of 1984 (as amended); and that the trial court lacked the jurisdiction to entertain any action relating to the enforcement of any of the provisions of Chapter IV of the 1979 Constitution (as amended) and the African Charter on Human

[185] *General Sanni Abacha, Attorney-General of the Federation, State Security Service and Inspector-General of Police v. Chief Gani Fawehinmi* [2000] 6 NWLR (Pt. 660) 228 (Abacha v Fawehinmi).

and Peoples' Rights (Ratification and Enforcement) Act, the jurisdiction of the court having been ousted by Decree No. 2 of 1984. The trial court sustained the preliminary objection and held that it lacked jurisdiction to entertain the matter pursuant to Decree No. 2 of 1984. The court also held that any of the provisions of the African Charter on Human and peoples' Rights which is inconsistent with the Constitution (Suspension and Modification) Decree No, 107 of 1993 is void on account of the inconsistency. Dissatisfied with the ruling, the respondent appealed to the Court of Appeal. The Court of Appeal allowing the appeal in part, held as follows: the trial court was correct to dismiss the matter for lack of jurisdiction by virtue of section 4 of Decree No. 2 of 1984 (as amended) and Decree No. 11 of 1994; and that while the African Charter on Human and Peoples' Rights (Ratification and Enforcement) Act was promulgated by the National Assembly in 1983, it is a law with international content and the ouster clauses contained in Decree No. 2 of 1984, Decree No. 107 of 1993 or No. 11 of 1994 cannot affect its operation in Nigeria. Dissatisfied, the appellants appealed while the respondent cross-appealed. The Supreme Court dismissed the appeal of the appellant and allowing the cross-appeal of the respondent, holding, *inter alia*, that the arrest and the detention of the appellant clearly breached the Charter and could be enforced under it. The court also held that pursuant to African Charter on Human and people's rights, the trial court had jurisdiction to enforce the fundamental right of the respondent.

Obviously, this case was decided during the military era, when the powers and jurisdiction of the courts to enforce fundamental rights provisions of the constitution were circumscribed through draconic decrees. The courts during the military era tended to adopt liberal interpretations in order to safeguard and promote human rights, particularly the right to personal liberty (i.e. freedom from arbitrary arrest and detention). Thus, in pursuance of this objective, the court ruled in the above case that the African Charter on Human and People's Rights (Ratification) Act is a statute with international flavour and where any other local statute is in conflict with it, that other statute shall to that extent be void.

Similarly, in *Molokwu v. C.O.P*,[186] a case decided several years before *Abacha v. Fawehinmi, Agbakoba*, J. declared succinctly:

> "It is my view that the wording of the section and similar words in other statutes (ouster clauses) do not impose absolute prohibition or operate as a complete bar ... no matter how strong the words, the court cannot accept a retreat from their responsibility. The writ of Habeas Corpus remains of the highest constitutional importance for by it the liberty of the citizen is vindicated…. In as much as and for so long as the Federal Government of Nigeria remains a signatory of the Universal Declaration of Human Rights for so long would the Nigerian courts protect and vindicate fundamental rights entrenched in the Declaration."[187]

In the relatively recent case of *Amos Akila & Ors v. Director General Security Services & Ors*,[188] the appellants - Amos Akila, Daniel Gyang and Yakubu Sule - were arrested on July 30, 2010 by the officers of the SSS at a house in Maiduguri. Upon the execution of a search warrant on the premises, the appellants were found to be in possession of a variety of arms and ammunition. This led to their arrest and detention without bail. On August 19, 2010, they were paraded be-

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[186] Suit No. E/59M/72 (Reported in Gani, *Habeas Corpus,* p.96) Quoted from (Ebeku) *supra* note 47.
[187] (Ebeku) *Ibid* at 645.
[188] *Amos Akila, Daniel Gyang & Yakubu Sule v Director General State Security Services, State Director State Security Services Bornu, Media Trust Nigeria Ltd & Isa Umaru Gusau* [2013] LPELR-20274(CA) (Amos & ors v DG SSS & ors).

fore members of the public and media. As a result, the third and fourth respondents, Media Trust Nigeria Ltd and Isa Umaru Gusau, who were present and watched the public spectacle, featured the story with photographs in the *Daily Trust* newspaper on August 19, 2010. On October 8, 2010, while still in detention and having not been arraigned before any court of law, one Auta Maisamari Esq., counsel for the appellants, filed a motion seeking the enforcement of the appellants' fundamental rights pursuant to sections 35 and 36 of the Nigerian Constitution. Specifically, this motion sought a number of reliefs: 1. A declaration that the arrest of the applicants on July 30, 2010 and their continued detention since that date for more than two months by the first and second respondents without charging them to a court of competent jurisdiction even when there are courts within a radius of one kilometer from the place of their incarceration is unlawful. 2. A declaration that the arrest and detention of the applicants by the first and second respondents without informing them in writing of the facts and basis for their arrest and detention is unlawful. 3. Finally, ₦2 million in damages for their unlawful arrest and detention. The trial court dismissing this application, holding that the arrest and detention of the appellants were within the law. Dissatisfied with the decision of the trial court, the appellants appealed to the Court of Appeal. The Court of Appeal held, *inter alia*, that the arrest of the appellants without informing them in writing of the facts and basis for the arrest was unlawful, and that the continued detention of the appellants for more than two months without trial in a court of competent jurisdiction is unlawful.

In addition, consider the 2003 case of *McLaren v. Jennings*.[189] In that case, Nicon-Noga Hilton Hotels Limited awarded a contract of supply of hotel equipment to Sotra Nigeria Limited. The respondent in the case was the managing director of the company which received an advanced payment of ₦2628,428.27. Due to a number of reasons, this company could not supply the specified goods within the time period that had been agreed. As a result, the appellants demanded the refund of the deposit. It was in pursuance of this demand that the respondent was arrested in Kano and brought for remand to the Nicon-Noga Hilton Hotel, Abuja until the said sum of money was refunded. Consequently, on August 2, 1996, the respondent brought a suit against the appellants in the Kano State High Court of Justice, claiming that the appellants owed him, jointly and severally, ₦5,000,000 in damages for his wrongful arrest and unlawful detention in Kano and Abuja. The appellants filed a motion challenging the competence of the court on the ground that it lacked jurisdiction to hear the matter. Rejecting the motion, the trial judge held that Kano State High Court had jurisdiction to hear the case. Being aggrieved, the appellants appealed to the Court of Appeal. The issue for determination was whether the respondent's statement of claim disclosed any cause of action against the appellants for false detention or imprisonment in Kano and whether the High Court of Justice of Kano State could assume and exercise jurisdiction over the case. The Court held, *inter alia*, that the police are not empowered by law to enforce contracts, collect common debts or act as recovery agents, and that the arrest and detention of the respondents in Kano and Abuja was prima facie unlawful. Thus, the respondent could bring an action in tort against the appellants in the High Court of

[189] *Ken McLaren, Abay Abebe & J.C Onuoha v James Lloyd Jennings* [2003] 3 NWLR (Pt.808)470 (McLaren v. Jennings).

Justice for false imprisonment. Salami JCA stated in obiter that "[i]t is equally gradually becoming fashionable for counsel instructed to recover debts and rents to resort to use of members of the armed forces particularly the police. Resorting to force rather than rule of law is fastly (sic) gaining currency."[190]

The courts in Nigeria tend toward judicial interpretations that safeguard the right to personal liberty, although their powers are sometimes statutorily circumscribed. Where limitations of this right are expressly permitted by law, courts insist on strict adherence to the procedures that are stipulated by the law. If the authority of the courts and NHRC is strengthened through statute, the Nigerian legal system will stand to address human rights violations to a greater degree.

In conclusion, the development of human rights norms and institutions in Nigeria has been chequered. Such norms and institutions have developed within the context of colonialism, post-independent administrative inexperience, civil war, military coups and counter coups, as well as a variety of internal and external pressures. The process has been slow and gradual, and the weaknesses of the system are huge and sometimes overwhelming – extra-judicial killing, torture, unlawful arrest and detention by the police and other security agents are common. Pervasive human rights violations have strengthened the Nigerian legal system as much as they have weakened it. They have given reason for the establishment of NHRC, strengthened the human rights NGOs and emboldened the judges and more so the National Assembly to enact stronger human rights legislation and a stronger NHRC Act – the 2010 NHRC Amendment Act.

[190] *Ibid*.

This thesis focuses upon the problem of unlawful arrest and detention and the question of whether the NHRC is sufficiently empowered to tackle this problem, demonstrating that the NHRC is in fact empowered to address cases of unlawful arrest and detention in Nigeria.

Chapter Two

Human Rights Norms and Institutions in Canada

and Cases of Unlawful Arrest and Detention

The entry into force in 1982 of the *Canadian Charter of Rights and Freedoms* as part of the Constitution of Canada marked a turn of events in the Canada's human rights history. The activities of human rights commissions, human rights tribunals and courts in Canada are crucial to making human rights law effective. Thus, in Canada, the enforcement of the right not to be arrested and detained unlawfully and arbitrarily falls within the competence of the courts.

This chapter is divided into three main sections. The first section assesses the historical development of human rights norms in Canada. While it explores the gradual development of human rights in Canada, the aim is to lay the foundations for a comprehensive comparative review of the historical development of human rights norms and the institutions in both Nigeria and Canada in Chapter Three of this thesis. The second section reviews the legal framework of human rights institutions in Canada, specifically the Human Rights Commission ("HRC") and the Human Rights Tribunal ("HRT"). These bodies, created under the same statute (CHR Act), are federal human rights institutions and have been chosen for this study because of their dual structure.[191] As stated above, the HRC and HRT deal with the specific issue of discrimination; they are not empowered to deal with the human rights issues of unlawful arrest and detention. Thus, their powers, functions and structures are discussed simply to establish a basis for comparing human rights institutions in Nigeria and Canada. Finally, the third section deals with the specific issue of unlawful arrest and detention, reviewing judicial decisions against unlawful arrest and detention in Canada.

Historical Development of Human Rights Norms in Canada

Canada has developed a comprehensive human rights system. This is demonstrated by the well-structured court system, the Charter of Rights and Freedoms and the establishment of human rights enforcement bodies in all the territories and provinces of Canada. All these combine to give Canada the aura of a human rights-friendly society. In addition, the adoption of anti-racist policies and the establishment of a multicultural system set Canada apart in the field of international human rights advocacy.

However, this has not always been the case. According to William Blacks, "for most of the time Canada has existed, its legal system was more notable for violations of human rights

[191] The states in Nigeria will be well advised to establish human rights commissions and tribunals similar to those in the provinces in Canada.

than for protection of these rights. Racial and religious discrimination was prevalent."[192] The human rights system in Canada developed from a legal system that was not committed to the promotion of human rights and people's freedom.

First, the Chinese head tax and the Chinese Immigration Act of 1923 constituted violations of human rights in Canada. The Chinese Immigration Act was a law to exclude Chinese persons.[193] The act banned Chinese immigration into Canada except for Chinese merchants, diplomats and foreign students.[194] The statute was so discriminatory that while the immigration of people from other countries was simply regulated, the Chinese were completely prohibited from entering Canada.[195] It was a grievous discrimination against Chinese Canadians because while people from other countries could bring their families to Canada, many Chinese people could not unite with their wives and children. Prior to 1923, Chinese immigration to Canada had been regulated by the Immigration Act of 1885.[196] This act had also restricted Chinese immigration, though not as severely. It stipulated that Chinese immigrants were to pay $50 for the right to land in Canada.[197] The penalty for landing any Chinese before the payment of the duty or an actual attempt to evade payment of the duty attracted $500 or a term of twelve months imprisonment.[198]

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[192] William Black, "Canada: Disparities in Recognition of Different Rights" (2014) at 2, http://www.taiwanhrj.org/get/2015011911352749.pdf/THRJ_2_4_black_en.pdf, Retrieved on 13 April, 2015. (Wilian Black 2014).
[193] *Chinese Immigration Act* 1923, Chap 38, 13-14 George V.
[194] *Ibid*, s 5(a to c).
[195] *Ibid*, ss 6, 7.
[196] *Chinese Immigration Act* 1885, c-71
[197] *Ibid*, s 4.
[198] *Ibid*, ss 7, 16. See also UBC Library, "The Chinese Experience in British Columbia: 1850 – 1959", http://www.library.ubc.ca/chineseinbc/exclusion.html, accessed on 14 April, 2015.

The internment of Ukrainian Canadians was another systemic human rights abuse by the government of Canada. At the onset of the First World War, the Canadian government implemented the War Measures Act. Many people who immigrated to Canada from territories under the control of the Austro-Hungarian Empire were obliged to register as "enemy aliens" and were sent to internment camps.[199] Many such people, numbering up to 5000, were of Ukrainian heritage. The internment camps were not only horrible but the internees were used as forced labourers in Banff National Park, the logging industry in Northern Ontario and Quebec, and steel mills in Ontario and Nova Scotia.[200] They were also made to turn over their salaries to the government and to report frequently to the police. Conditions in the internment camps were dehumanizing and abusive. Many of the interned Ukrainians died of various diseases and injuries sustained in the camp, some were killed while trying to escape, and some went insane or committed suicide as a result of the experience.[201]

Similarly, the Indian Residential School System was not only horrific but created intergenerational effects in First Nations communities throughout Canada.[202] The 1884 amendment of the Indian Act of 1876 provided for the creation of the Residential School System. According to Claire Clutchings, "[t]he Indian residential schools in Canada were predominately funded and operated by the Government of Canada and Roman Catholic, Anglican, Methodist, Presbyterian

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[199] Lubomyr Luciuk, *In Fear of the Barbed Wire Fence: Canada's First National Internment Operations and the Ukrainian Canadians, 1914-1920*, (Canada: the Kashtan Press, 2001), See also *the Internment of Persons of Ukrainian Origin Recognition Act, Statute of Canada, 2005, C-52*.
[200] *Ibid*.
[201] *Ibid*.
[202] The terms Indians, First Nations, Aboriginal people and Native Indians are used interchangeably in this paper.

and United churches."[203] The Indian Act was amended in 1920 to make it mandatory for every Aboriginal child between the ages of seven to sixteen to attend residential schools. This resulted in the forced removal and separation of the Aboriginal children from their parents and communities. About 150,000 First Nations, Inuit and Metis children between the ages of six and sixteen are believed to have attended residential schools.[204] The last residential school in Canada was closed in 1996. The following human rights abuses and dehumanizing experiences were meted out against the Indian Residential School children: native language discrimination and denial of right to freedom of religion; use of toxic chemical to cleanse the children's hair and skin; sexual assault; rape; forced abortion; use of electric shock for punishments; forced feeding of own vomit when sick; exposure to freezing temperatures; racial discrimination; exposure to contagious diseases by refusing to separate students with tuberculosis; serving of spoiled food and malnutrition; starvation; public beating of naked children.[205] This callousness and wickedness against Aboriginal peoples has been described as a genocide, and certainly involved systemic oppression and marginalization.[206]

Moreover, the Second World War-era internment of Japanese Canadians is another illustration of Canada's history of racist discrimination. During the Second World War, the government of Canada, acting under the 1914 War Measures Act, issued a notice in British Columbia prohibiting all persons of Japanese race from certain specified areas. According to the gov-

[203] Claire Clutchings, "Canada's First Nations: A Legacy of Institutional Racism" (2002), http://www.tolerance.cz/courses/papers/hutchin.htm, retrieved on 13 April, 2015.
[204] *Ibid*.
[205] John S. Millo, *A National Crime: The Canadian Government and the Residential School System-1879 to 1986* (Manitoba: University of Manitoba Press, 1999).
[206] Interview of Leslie Spillett by Nichodemus Nnaji (25 March 2015) at 5. (The Original transcript of the interview is with the author). (Leslie's Interview).

ernment, this was intended to safeguard the pacific coast from Japanese spies. By October 1942, about eight internment camps had been opened, leading to the subsequent removal of about 22,000 people of Japanese origin.[207] Japanese Canadians were denied their citizenship rights, issued special clothing, discriminated against, humiliated and placed in detention camps and compelled to perform manual labour. Canada's only official "justification" was that these people were not white and could therefore be Japanese spies.[208] In addition, many people of Japanese descent were denied the opportunity to enlist in the Canadian army. Worse still, in 1943, the Canadian "Custodian of Aliens" auctioned the possessions of the Japanese in the internment camps to offset the cost of operating the detention camps.[209] A good number of Japanese Canadians were deported to Japan during and after Second World War. It is widely believed that the internment of Japanese Canadians was borne out of racism and hatred against the Japanese.[210]

Lastly, there is the ongoing discriminatory treatment of the Canadian First Nations. Although Canada enjoys the reputation of having a sophisticated human rights system, particularly in respect of anti-racism and anti-discrimination law, it is doubtful if that is true inasmuch as the Canadian First Nations are concerned. Manuel and Schabus observe that an indigenous person born in Canada would likely not be living at "Canada's much touted high level of develop-

[207] Ann Gomer Sunahara, *The Politics of Racism: The Uprooting of Japanese Canadians During The Second World War Publisher*, 2nd ed, (Ottawa: James Lorimer and Company, 2000). See also http://www.yesnet.yk.ca/schools/projects/canadianhistory/camps/internment1.html, retrieved on 13 April, 2015
[208] *Ibid*.
[209] *Ibid*.
[210] *Ibid*.

ment."[211] In their view, the conditions of "registered Indians" living on reserves in Canada are "below the living conditions found in developing countries."[212] The economic discrimination against the Aboriginal people in Canada results in lower life expectancy, fewer high school graduates, higher unemployment, and higher levels of incarceration and infant mortality.[213] First Nations peoples were so racialized that until the 1930s, no First Nations person could leave his or her reserve without first obtaining permission from a farming instructor. First Nations persons were also required to obtain permission to sell their crops or to wear traditional dress outside the reserve.[214] Prior to 1951, First Nations persons were not allowed to vote or to vie for any elective office. They had no right to become lawyers, retain the services of lawyers or even sit on juries.[215] The Indian Act was used as an instrument of discrimination. The act was so discriminatory that if a "status Indian"[216] woman were to marry a non-status Indian, she and her children would automatically lose their rights as "status Indians." On the other hand, where a status Indian man married a non-status Indian woman, both the woman and the children of the marriage would enjoy all the rights pertaining to status Indians.[217]

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[211] Arthur Manuel and Nicole Schabus, "Indigenous Peoples at the Margin of the Global Economy: A Violation of International Human Rights and International Trade Law" (2005) 8 Chap L Rev. 229 at 230 & 231.

[212] *Ibid* at 231.

[213] Claire Clutchings, *supra* note 203. According to Clutchings, "They have lower incomes, enjoy fewer promotions in the workplace and remain, as a group, the poorest in Canada. In Canada, suffering clearly continues to be related to the politics of race."

[214] *Ibid*.

[215] *Ibid*.

[216] A "Status Indian" is an Aboriginal person in Canada who is registered or entitled to be registered in accordance with section 6 of the Indian Act of 1985 on the Indian Register which is a central register maintained pursuant to section 5 of the Act by Indian and Northern Affairs Canada (INAC).

[217] See also s 12(1)(b) of *Indian Act, see also Sandra Lovelace v Canada*, supra

In the 1940s, there was no human rights legislation in Canada.[218] The concept of human rights was alien to the government of Canada in this era. This may have informed the initial hesitation exhibited by Canada towards the signing of the UDHR in 1948. The principle of parliamentary supremacy that was operative in Canada at that time largely held back the development of human rights norms in the Canadian legal system.[219] Under this principle, the Canadian parliament had supreme legislative powers and as a result passed several laws that violated people's rights. Canada was in many ways a repressive society. Canada was not particularly committed to the promotion of human rights and thus it was never a priority for Canadian foreign policy.[220]

However, in the 1950s, a number of civil liberties associations began to emerge.[221] Unfortunately, these associations were caught up in the Cold War.[222] Clement observes that this context led to the formation of two organizations, the Civil Liberties Association and the communist-led Civil Rights Union: "[t]he Civil Liberties Association of Winnipeg refused to allow known communists to join, and the Ottawa Civil Liberties Association disbanded largely because of ideological conflict."[223] The discourse in the Cold War era centred on civil liberties rather than the more fully elaborated human rights provisions contained in the UDHR, ICCPR and

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[218] Dominique Clement, "Human Rights in Canadian Domestic and Foreign Politics: From "Niggardly Acceptance" to Enthusiastic Embrace" (2012) 34 Hum Rts Q 751. (Clement 2012).
[219] *Ibid* at 758.
[220] *Ibid* at 759.
[221] Dr. C Dominique, Will Silver & Dr. Daniel Trottier, "The Evolution of Human Rights in Canada" (2012) © Minister of Public Works and Government Services 2012, Cat. No. HR4-19/2012E-PDF, ISBN 978-1-100-20988-3 (Canadian Human Rights Commission) (Dominique et al).
[222] Clement 2012, supra note 218 at 759.
[223](Clement 2012), Supra note 218 at 759, see also Dominique Clement, "Spies, Lies and a Commission: A Case Study in the Mobilization of the Canadian Civil Liberties Movement", (2000) 7 LEFT HIST 53. (Clement 2000)

ICESCR.[224] Thus, the civil liberty groups prioritized civil and political rights, but the communist or socialist rights unions tended to prioritize economic and social rights. The preoccupation of this period was anti-colonial movements towards self-determination or statehood. While anti-colonial movements did not pertain to countries like Canada where statehood had already been achieved, it was a dominant issue in the international communities during this era.

Although there was great reluctance on the part of Canada to embrace and prioritize human rights domestically or in its foreign policy during the 1940s and 1950s, there was also a gradual development towards certain human rights ends. Thus, in 1960, Canada enacted a bill of rights. The Canadian Bill of Rights contained most of the rights in the present Charter of Rights and Freedoms, but it was of less consequence.[225] The Bill of Rights was a piece of federal legislation and the provincial governments were not bound by it. Nevertheless, it demonstrated the gradual development and acceptance of human rights norms in Canada.[226]

The efforts of these civil liberties organizations influenced a number of anti-discrimination laws in 1950s in British Columbia, including the 1956 Fair Employment Practice Act,[227] the 1961 Fair Accommodation Practice Act[228] and the 1953 Equal Pay Act.[229] These laws were rarely enforced despite their narrow conception of rights. Moreover, in 1962, Ontario passed a human rights code. According to Dominique et al, this legislation marked the begin-

[224] *Ibid* at 757.
[225] *Ibid* at 12.
[226] *Ibid* at 12.
[227] *Fair Employment Practice Act*, S.B.C, 1956, c. 16.
[228] *The Fair Accommodation Practice Act*, S.B.C, 1961, c. 50.
[229] *The Equal Pay Act*, S.B.C, 1953 (2nd Session), c. 6. See (Clement 2012) Supra note 218.

ning of the Canadian human rights revolution.[230] The Human Rights Code was enforced by the Ontario Human Rights Commission and the law specifically prohibited discrimination on the basis of religion, race, and ethnicity in accommodation, employment, and services.[231]

However, the 1970s witnessed a great human rights revolution that brought about a turnaround in Canadian human rights history. International development and renewed interest in human rights during this period began to set the tone for international politics and influence. Canada was not unaffected. Clement notes that despite the challenge posed by the resistance of some of the provincial governments against the attempts by the federal government to ratify treaties that fell within their constitutional powers, "the federal government was under intense pressure from international institutions, a domestic human rights movement, and a maturing Canadian legal profession in the 1970s to ratify human rights treaties."[232]

In 1975, the federal government set up the "Federal/Provincial/Territorial Continuing Committee of Officials on Human Rights to Consult Over International Treaties."[233] The result was an agreement that while the federal government could ratify human rights treaties, provincial governments would retain the power to enforce treaties falling within their constitutional jurisdiction. In 1976, Canada signed both the ICCPR and the ICESCR.

International and domestic human rights bodies and movements and the resulting pressures that dominated this period had great influence over the development of human rights norms and institutions all over the world, and in Canada in particular. There was a significant

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[230] (Dominique et al) *supra* note 221 at 16.
[231] (Dominique et al), *Ibid* at 16.
[232] (Clement 2012), *supra* note 218 at 760.
[233] (Clement 2012), *Ibid* at 761.

surge in the establishment of human rights institutions across the world. In the words of Linda Reif, "[a]s states started to emerge from authoritarian and other non-democratic regimes during the 1970s and 1980s, such as in Southern Europe, Latin America, and Central and Eastern Europe, their transition to democracy has included the establishment of national human rights institutions."[234]

In 1977, Canadian federal legislature enacted the Canadian Human Rights Act, thereby creating two bodies - the HRC and the HRT - to administer, interpret and enforce human rights. The Act's aim was to discourage and prohibit discrimination on certain stipulated grounds. Similar legislation was enacted in almost all the provinces of Canada. Most importantly, in 1982, the Charter of Rights and Freedoms was adopted and entrenched in the Constitution of Canada. With all these human rights statutes, policies and regulations, and administrative and quasi-judicial bodies created to enforce the human rights and the very effective court system in place, Canada earned itself a place on the international plane of human rights.

Review of Canadian Human Rights Act

The CHR Act was entered into force in 1977. As a federal statute, the provisions of the CHR Act apply only to persons, establishments and institutions within the legislative competence of the federal parliament. There are similar laws in effect in almost all the provincial governments of Canada. For example, there is the *Quebec Charter of Human Rights and Freedoms*, passed on

[234] Linda. C. Reif, *supra* note 81 at 7.

June 27, 1975 and entered into force on June 28, 1976.[235] The Quebec Charter contains a lot of provisions on judicial rights.[236] According to Clement et al, the CHR Act was the product of decades of human rights-related legal reform at the provincial level and simply completed a nationwide effort to entrench human rights in law.[237] The law seeks to tackle discrimination and its stated purpose is:

> "to extend the laws in Canada to give effect, within the purview of matters coming within the legislative authority of Parliament, to the principle that all individuals should have an opportunity equal with other individuals to make for themselves the lives that they are able and wish to have and to have their needs accommodated, consistent with their duties and obligations as members of society, without being hindered in or prevented from doing so by discriminatory practices based on race, national or ethnic origin, colour, religion, age, sex, sexual orientation, marital status, family status, disability or conviction for an offence for which a pardon has been granted or in respect of which a record suspension has been ordered."[238]

The primary goal of the CHR Act is to discourage discrimination, whether on grounds on race, national or ethnic origin, colour, religion, age, sex, sexual orientation, marital status, family status, disability or conviction for an offence for which a pardon has been granted or in respect of

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[235] Charter of Human Rights and Freedoms, CQLR, c. C-12. (Quebec Charter).

[236] The judicial rights provisions are contained in sections 23 to 38 of the Charter. Specifically, sections 24, 25, 27, 28 to 31 deal with arrest, search and detention.

[237] Dominique et al, *supra* note 221 at 25.

[238] *Canadian Human Rights Act* R.S.C. 1985, c. H-6, s. 2. (CHR Act). see *Johnstone v. Canada (Border Services Agency)* [2014] CAF 110, [2014] F.C.J. No. 455, where the court noted that the Parliament purposefully chose family status, which in the case include childcare obligation, as a prohibited ground of discrimination.

which a record suspension has been ordered.[239] It also provides the framework and platform for redress for anyone who has been discriminated against.

To achieve this end, the CHR Act establishes the HRC and the HRT to deal with cases involving discrimination. Importantly, the jurisdiction of these bodies is limited to the enforcement of the right to freedom from discrimination based on the prohibited grounds listed above.[240] However, in addition to the powers to enforce anti-discrimination Charter rights, the HRT has the authority to apply Charter remedies as well as to deal with other Charter rights incidental to its powers as a quasi-judicial body (tribunal).[241]

In view of the foregoing, the review of the CHR Act shall not in any way refer to whether the HRC or HRT are sufficiently empowered to tackle cases of unlawful arrest and detention since, in these circumstances, unlawful arrest and detention are outside the sphere of their competence. The review of the CHR Act is for the purpose of the comparative analysis of the legal frameworks of human rights institutions in Nigeria and Canada. The aim of this thesis is to suggest ways in which the NHRC could be strengthened to deal effectively with the issue of unlawful arrest and detention in Nigeria. As a result, in this part, the framework of the HRC and HRT will be examined with a particular focus on their independence: powers and functions;

[239] *Ibid,* s 2.

[240] As mentioned earlier, regular courts and other administrative bodies such as labour arbitrators and labour relations boards have the jurisdiction to enforce at first instance the Charter rights on discrimination as much as the HRC and the HRT.

[241] See *R. v. Conway*, 2010 SCC 22, 2010 CarswellOnt 3847, [2010] 1 S.C.R. 765, where the court in para 20 stated that "administrative tribunals with the authority to apply the law have the jurisdiction to apply the *Charter* to the issues that arise in the proper exercise of their statutory functions."

composition; the appointment and removal of their members; their funding and the enforcement of their decisions.

The Composition, Appointment and Removal of Members of the HRC

The CHR Act provides that the HRC will consist of a Chief Commissioner, a Deputy Chief Commissioner and not less than three or more than six other members.[242] The members of the HRC are appointed by the Governor in Council.[243] The Chief Commissioner and Deputy Chief Commissioner are appointed as full-time members while other members may be appointed as full-time or part-time members of the Commission.[244]

Full-time members of the HRC are appointed for a term not exceeding seven years while the part-time members are appointed for a term not exceeding three years.[245] A member of the HRC is eligible to be reappointed in the same or another capacity.[246] Members of the HRC hold office on the condition of good behaviour and may be removed by the Governor in Council on address of the Senate and House of Commons.[247] The CHR Act does not state what amounts to good behaviour. The CHR Act is equally silent on the circumstances under which a member of the HRC may be removed. This omission is worrisome as the condition and procedure for removal of a member of the HRC are factors that affect and define its independence and effec-

[242] CHR Act, supra note 238, s 26(1).
[243] *Ibid*, s 26(1).
[244] *Ibid*, s 26(2).
[245] *Ibid,* s 26(3).
[246] *Ibid*, s 26 (5).
[247] *Ibid*, s 26 (4).

tiveness.[248] The Quebec Charter provisions on the security of tenure seem to be preferred. Section 58.3 of the Charter provides that "The term of office of the members of the commission may not exceed ten years. Once determined, it shall not be reduced."[249]

Importantly, the HRC has the power to employ such officers and employees as are necessary for the proper conduct of the work of the HRC and which appointment must be in accordance with the Public Service Employment Act.[250] The HRC also has the power, in specific projects, to enter into contracts for services with persons having technical or specialized knowledge of any matter relating to its work and who may advise and assist it in the exercise of its powers or the performance of its statutory duties and functions.[251] In *CUPE v. Air Canada*,[252] the applicant (CUPE) applied for a judicial review of a decision of the HRC dismissing its complaint against Air Canada for wage discrimination based on sex. The applicant argued, *inter alia*, that the commission acted without jurisdiction by engaging a private company to investigate its human rights complaint. The court dismissing the application restated the law as follows: "It is clear from a reading of subsection 32(2) that the Commission is expressly empowered to retain the services of persons having technical or specialized expertise to assist it in carrying out its statutory responsibilities under the *CHRA.* Such persons may be retained for 'specific projects'…

[248] As stated in the UN Handbook, "an effective national institution will be one which is capable of acting independently of governments, of party politics and of other entities and situation which may be in a position to affect its work." See UN handbook, *supra* note 76 at 10 para 68.
[249] Quebec Charter, *supra* note 235, s 58.3.
[250] CHR Act, supra note 238, s 32(1).
[251] *Ibid*, s 32(2).
[252] *CUPE v Air Canada* [2013] FC 184; [2013] CarswellNat 469.

The term "specific projects" is not defined in the Act, but the ordinary meaning of the phrase would encompass the conduct of a specific investigation into a human rights complaint."[253]

The CHR Act further provides that the HRC may designate a person, referred to in the Act as an "investigator", to investigate a complaint on its behalf.[254] Thus, in *Halifax Employer Association v. Tucker*,[255] the trial court quoted with approval the view of the Federal Court of Appeal in *Sketchley v. Canada (Attorney General)*[256], that "[i]n this context of the Commission's screening function, the investigator must be considered "as an extension of the Commission" who "prepares a report for the Commission."[257]

The full-time members of the HRC are deemed to be persons employed in the public service for the purposes of the Public Service Superannuation Act and to be employed in the federal public administration for the purposes of the Government Employees Compensation Act and any regulations made under section 9 of the Aeronautics Act.[258]

Powers and Functions of the HRC

There is no delineation of the powers, duties or functions of the HRC under the CHR Act. As a result, I shall simply examine the powers, duties and functions together, in line with the CHR Act itself. The CHR Act is divided into parts I, II, III and IV. The HRC is generally responsible for

[253] Ibid at para 52.
[254] CHR Act, *supra* note 238, s 43(1).
[255] *Halifax Employer Association v Tucker* [2008] FC 516, [2008] CarswellNat 1194.
[256] Sketchley v. Canada (Attorney General), 2005 CAF 404, 2005 CarswellNat 4194, [2005] F.C.J. No. 2056.
[257] *Ibid* at para 115.
[258] CHR Act, *supra note 238*, s 38.

the administration of parts I, II and III of the Act.[259] As stated in its 2012-13 annual report, the HRC promotes the "core principle of equal opportunity and works to prevent discrimination in Canada. Its services include discrimination prevention, dispute resolution, and regulatory, policy and knowledge development."[260] The HRC is simply responsible for the administration of the CHR Act since the whole purpose of the law is contained in these parts. The powers, duties and functions of the HRC as specifically set out in the CHR Act are multiple.

First, the HRC has the primary duty and power to deal with any complaint that is submitted to it.[261] The HRC is not bound to deal with a complaint if the alleged victim of the discriminatory practice to which the complaint relates has not exhausted grievance or review procedures that are otherwise reasonably available,[262] or if the complaint is trivial, frivolous, vexatious or made in bad faith.[263] These position go a long way to strengthen and enable the HRC to be focused on dealing with serious issues of discrimination.

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[259] *Ibid*, s 27(1).

[260] Canadian Human Rights Commission, "Departmental Performance Report 2012-13" (31 March, 2013). Online: http://www.chrc-ccdp.gc.ca/eng/content/departmental-performance-report-2012-13#mm, accessed on 24 March, 2015.

[261] CHR Act, supra note 238, s 41(1).

[262] *Ibid*, s 41(1)(a). In *Bagnato v Canada Post Corp.* [2014] FC 914, [2014] CarswellNat 3716, the court dismissed an application for a judicial review of the commission's decision not to deal with applicant complaint until the applicant has exhausted other remedies, particularly grievance procedure provided for in a collective agreement.

[263] *Ibid*, s 41(1)(d). See the case of *Love v. Canada (Privacy Commissioner)*, [2014] FC 643, or [2014] CarswellNat 2422. Here the applicant applied to Federal Court for a judicial review of a decision of the HRC which had refused to deal with the applicant's compliant against the respondent on the ground that the complaint was trivial, frivolous, and vexatious or made in bad faith. The court held that the decision of HRC was reasonable and that the HRC had powers to refuse to deal with complaints pursuant to the provisions of s. 41(1)(b) of the CHR Act. See also *Carroll v. Canada (Attorney General)* [2015] FC 287, [2015] CarswellNat 468, where in an application for judicial review, the court set aside the decision of the commission not to deal with applicant's complaint on ground of being vexatious within the meaning of s. 41(1)(d). the court held that the decision was in breach of duty of procedural fairness and unreasonable

The HRC also has the power to initiate and investigate complaints when it has reasonable grounds for believing that a person is engaging or has engaged in discriminatory practices.[264] This is an important provision. It underscores the significance of establishing a human rights enforcement institution outside the courts. The power to initiate investigative action enables the HRC to deal with discriminatory activities at the onset and probably nip them in the bud. This distinguishes its human rights enforcement approach from that of the courts, which cannot initiate enforcement proceedings *suo motu*.

The HRC is empowered to designate a person to investigate complaints on its behalf and the investigator is bound to carry out the investigation in accordance with regulation made for that purpose.[265] The above provision emphasizes the need for efficiency and effectiveness on the part of a national human rights institution. The use of experts by a human rights institution in carrying out its investigative functions ensures efficiency and also inspires effectiveness.

The HRC has the responsibility to develop and conduct information programs to foster public understanding of the CHR Act, its role and activities under that law and to foster public recognition of the principle and purpose of the CHR Act under section 2.[266] This is a very important aspect of the duties and powers of the HRC because the legal principle that "ignorance is no excuse in law" has a correlative duty on the part of government to educate the public in

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[264] *Ibid*, s 40(3).

[265] *Ibid*, s 43(1&2). See *Halifax Employer Association*, supra at note 23. See also *Niaki v. Canada (Attorney General)* [2006] FC 1104, [2006] CarswellNat 2884. In this case, the applicant filed complaints of having been discriminated against on grounds of racial, national and ethnic origin. The HRC appointed an investigator who investigated the complaints and reported to the HRC. Based on the report, the HRC dismissed the applicant's complaints. The applicant then applied to court for judicial review. Dismissing the application, the court found that the decision of the HRC was reasonable and that the investigation process adopted by the investigator was unimpeachable.

[266] *Ibid*, s 27(1)(a).

the said law. The HRC has the mandate to undertake or sponsor research programs relating to its duties and functions and also in respect of the principle described in section 2 of the Act.[267] In pursuance of the above duties, the HRC has produces several publications to educate the public. For instance, it has published *A Guide to Balancing Work and Caregiving Obligations: Collaborative Approaches for a Supportive and Well-performing Workplace*;[268] *Framework for Compliance Audits under the Employment Equity Act: Audit Process and Statutory Requirements*;[269] *Policy on Environmental Sensitivities*;[270] *Report on Equality Rights of Aboriginal People*;[271] and many other publications.[272]

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[267] *Ibid*, s 27(1)(b).

[268] Canadian Human Rights Commission, "A Guide to Balancing Work and Caregiving Obligations: Collaborative Approaches for a Supportive and Well-performing Workplace" (2014)(Minister of Public Works and Government Services 2014, Cat. No. HR4-24/2014E-PDF, ISBN 978-1-100-24087-9), online: http://www.chrc-ccdp.gc.ca/eng/content/guide-balancing-work-and-caregiving-obligations. accessed on 24 March, 2015.

[269] Canadian Human Rights Commission, "Framework for Compliance Audits under the Employment Equity Act: Audit Process and Statutory Requirements", (January 2015) Online: http://www.chrc-ccdp.ca/sites/default/files/framework_for_compliance_audits_under_the_employment_equity_act_june_2014.pdf, accessed on 24 March, 2015. This document summarizes the roles, responsibilities and statutory requirements under the Employment Equity Act. It also outlines the Canadian Human Rights Commission's approach for its employment equity (EE) Compliance Program by providing information on the strategic planning of audits as well as on the audit process. It notes that the purpose of employment equity is to achieve equality in the workplace so that no person is denied employment opportunities or benefits for reasons unrelated to ability

[270] Canadian Human Rights Commission, "Policy on Environmental Sensitivities." (2014), online: http://www.chrc-ccdp.ca/sites/default/files/policy_sensitivity_0.pdf , accessed on 24 March, 2015. In this document, the commission explains that "individuals with environmental sensitivities experience a variety of adverse reactions to environmental agents at concentrations well below those that might affect the "average person". This medical condition is a disability and those living with environmental sensitivities are entitled to the protection of the Canadian Human Rights Act, which prohibits discrimination on the basis of disability. The Canadian Human Rights Commission will receive any inquiry and process any complaint from any person who believes that he or she has been discriminated against because of an environmental sensitivity. Like others with a disability, those with environmental sensitivities are required by law to be accommodated."

[271] Canadian Human Rights Commission, "Report on Equality Rights of Aboriginal People", (2013, No. HR4-22/2013E-PDF ISBN 978-1-100-22172-4), online: http://www.chrc-ccdp.ca/eng/content/report-equality-rights-aboriginal-people, Accessed on 24 March, 2015. This report provides a national portrait of Aboriginal people living in Canada. It uses seven criteria to determine if there are gaps in the well-being of Aboriginal people compared to non-Aboriginal people.

[272] See also CHRC's Gender Integration Framework (GIF), April 2013, Report on Equality Rights of People with

According to the CHR Act, the HRC is to maintain close ties to similar bodies and authorities in the provinces in order to foster common policies and practices and to avoid conflicts respecting the handling of complaints for reason of overlapping jurisdiction.[273] This is to ensure effectiveness and convenience in tackling discrimination. The HRC is generally required to employ any means it considers appropriate, whether by persuasion or publicity and as far as it is practical and consistent with part III of the CHR Act, to discourage and reduce discriminatory practices.[274]

Finally, the HRC is empowered under the CHR Act to make by-laws for the conduct of its affairs.[275] It also has a duty to appear at a hearing before the HRT, to present evidence and to

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Disabilities, July 2012. Check online: http://www.chrc-ccdp.ca/eng/content/publications?field_publication_type_value_i18n=All&field_subject_matter_value_i18n=All&sort_bef_combine=field_publication_date_value%20DESC&sort_order=DESC&sort_by=field_publication_date_value&page=1, Accessed on 24 March, 2015. The HRC also ensures that employers observe the principles set out in section 2 of the Act. In particular, it corroborates with employers to facilitate the achievement of equality of employees. This, the HRC does by implementing the following initiatives: Assessing or auditing employers to ensure their consistent compliance with the provision of the Act; publication of a forward plan for notification, so that employers are informed in advance that they will be subject to assessment; working out a shorter assessment questionnaire for employers undergoing a follow-up audit that focuses on essential information to achieve results; maintaining service standard performance reporting on its website and ensuring that feedback survey are sent alongside audit reports in order to gain employers' insight into the compliance review process. See the Commission's website, (Organizations and Business), http://www.chrc-ccdp.ca/eng/content/organizations-and-businesses, 24 March 2015.

273 CHR Act, *supra* note238, s. 27(1)(c)

274 *Ibid*, s. 27(1)(h). In *Zundel v Canada (Attorney General)*, [1999] CarswellNat 1152, [1999] 4 FC 289 at para. 29, the court stated that s. 27(1)(h) among others makes it clear that the statutory role of the HRC in administering the Canadian Human Rights Act and furthering its objectives , is not limited to the processing of complaints. That giving public speeches to community and professional groups on current human rights issues, is a very appropriate way for members of the HRC particularly the Chief Commissioner and the Deputy, to discharge these responsibilities

275 For example, the calling of the meeting of the commission or any of its divisions, fixing quorum for its meetings ; conduct of business at its meetings or any of its divisions; establishment of committees of the Commission, the delegation of powers, duties and functions to those committees and the fixing of quorums for meetings thereof; the procedure to be followed in dealing with complaints under Part III that have arisen in Yukon, the Northwest Territories or Nunavut; prescribing the rates of remuneration to be paid to part-time members of the Commission and any person engaged under subsection 32(2); and prescribing reasonable rates of travel and living expenses to be paid to members of the Commission and any person engaged under subsection 32(2). See CHR Act, Supra note 238, s. 37(1)

make representations. Thus, in doing so, the HRC is required to adopt such positions which in its opinion are in the public interest, having regard to the nature of the complaint.[276] In summary, the functions of the HRC are simply investigative and prosecutorial.

The HRT

While the HRC administers the provisions of the Act, the HRT is primarily empowered to interpret the Act by way of adjudicating over any matter brought before it. In *Zundel v. Canada (Attorney General)*,[277] the Federal Court of Canada stated as follows: "the Commission is not an adjudicative body that determines the legal rights of individuals. In the scheme of the *Canadian Human Rights Act* the Commission is the body that screens and investigates complaints, deciding which should be dismissed and which referred on for adjudication by a tribunal."[278] The HRT is an adjudicative body that determines the legal rights of parties in any matter referred to it by the HRC.

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[276] *Ibid*, s 51.

[277] *Zundel,* supra *note 274.*

[278] *Ibid* at para 20. However, in *Canada (Canadian Human Rights Commission) v Canada (Attorney General)*, [2011] 3 SCR 471, 2011 SCC 53, the Court states at para 53: "this Court has permitted consideration of an administrative body's own interpretation of its enabling legislation." …"the considered and consistent view of the Commission itself about the meaning of its constitutive statute meets these requirements." At para 56, the Court states the following: "While, as noted, the Commission's views about the limits of its statutory powers are not binding on the court, they may be considered. The Commission is the body charged with the administration and enforcement of the *CHRA* on a daily basis and possesses extensive knowledge of and familiarity with the Act."

Similarly, in *Bell Canada*,[279] the Supreme Court summarized the underlying purpose of the HRT as follows:

> "The Tribunal is part of a legislative scheme for identifying and remedying discrimination. As such, the larger purpose behind its adjudication is to ensure that governmental policy on discrimination is implemented. It is crucial, for this larger purpose, that any ambiguities in the Act be interpreted by the Tribunal in a manner that furthers, rather than frustrates, the Act's objectives… The Act therefore evinces a legislative intent, not simply to establish a Tribunal that functions by means of a quasi-judicial process, but also to limit the interpretive powers of the Tribunal in order to ensure that the legislation is interpreted in a non-discriminatory way"[280]

The jurisdiction of the Tribunal arises only when a matter is referred to it by the commission. Thus, if after a preliminary investigation, the HRC is satisfied that a complaint warrants inquiry, this complaint will be referred to the HRT. In the words of the CHR Act, "at any stage after the filing of a complaint, the Commission may request the Chairperson of the Tribunal to institute an inquiry into the complaint if the Commission is satisfied that, having regard to all the circumstances of the complaint, an inquiry is warranted."[281] Unlike the HRC, the HRT cannot initiate complaint proceedings *suo motu*. The work of the HRT is adjudicatory, since it is a quasi-judicial body. There is no right of appeal against the decisions of the HRT; its decisions are only subject to judicial reviews.

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[279] *Bell Canada v. C.T.E.A.* (2003) SCC 36, [2003] 1 SCR 884.
[280] *Ibid* at para 26.
[281] CHR Act, supra note238, s 49(1).

Composition, Appointment and Removal of the HRT

The HRT consists of a maximum of fifteen members, including a Chairperson and a Vice-Chairperson, as may be appointed by the Governor in Council.[282] The Chairperson and Vice-Chairperson must be members in good standing of the bar of a province or the Chambre des notaires du Québec for at least ten years and at least two of the other members of the HRT must be members in good standing of the bar of a province or the Chambre des notaires du Québec.[283] Persons appointed as members of the HRT must have experience, expertise and interest in, and sensitivity to, human rights.[284] Appointments are to be made having regard to the need for regional representation in the membership of the HRT.[285] If a member is absent or incapacitated, the Governor in Council may appoint a temporary substitute member to act during the absence or incapacity.[286]

The CHR Act further provides that the Chairperson and Vice-Chairperson are to be appointed to hold office during good behaviour for terms of not more than seven years, and the other members are to be appointed to hold office during good behaviour for terms of not more than five years. The Chairperson may be removed from office by the Governor in Council for cause and the Vice-Chairperson and the other members may be subject to remedial or discipli-

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[282] CHR Act, *supra* note 238, s 48.1(1).
[283] *Ibid*, s 48.1(3).
[284] *Ibid*, s 48.1(2).
[285] *Ibid*, s 48.1(4).
[286] *Ibid*, s 48.1(5).

nary measures in accordance with s. 48.3 of the CHR Act.[287] A member whose appointment expires may, with the approval of the Chairperson, conclude any inquiry that the member has begun; and, in such circumstances, the person is deemed to be a part-time member for the purposes of sections 48.3, 48.6, 50 and 52 to 58 of the Act.[288] The Chairperson, Vice-Chairperson or any other member whose term has expired is eligible for reappointment in the same or any other capacity.[289] The Chairperson and Vice-Chairperson are to be appointed as full-time members, and the other members are to be appointed as either full-time or part-time members.[290]

In *Bell Canada v C.T.E.A*,[291] the Supreme Court addressed the issue of the power of the Chairperson of the HRT to extend the tenure of any member of the HRT to ongoing inquiries. It did so in the following words:

> "The power of the tribunal chair to extend the appointments of tribunal members in ongoing inquiries does not deprive members of sufficient security of tenure or threaten their impartiality. Just as the discretionary power of the chief justice and the judicial councils of the provincial courts to extend the tenure of judges does not compromise the judges' independence, the discretionary power of the tribunal chair does not compromise the independence of tribunal members in a way that contravenes common

[287] *Ibid*, s 48.2(1).
[288] *Ibid*, s 48.2(2).
[289] *Ibid*, s 48.2(3).
[290] *Ibid*, s 48.4(1).
[291] *Bell Canada v. C.T.E.A.* (2003) SCC 36, [2003] 1 SCR 884.

law procedural fairness. A reasonable person would not conclude that tribunal members might be illegitimately pressured to adopt the views of the chair."[292]

Powers and Functions of the HRT

The primary duty of the HRT is to interpret the CHR Act. This duty arises only when it is appointed by the HRC to conduct an inquiry into any complaint.[293] In carrying out this function, the CHR Act provides that "after due notice to the Commission, the complainant, the person against whom the complaint was made and, at the discretion of the member or panel conducting the inquiry, any other interested party, the member or panel shall inquire into the complaint and shall give all parties to whom notice has been given a full and ample opportunity, in person or through counsel, to appear at the inquiry, present evidence and make representations."[294]

In *Bell Canada,*[295] the Supreme Court outlined the functions of the HRT in the following words:

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[292] *Ibid* at para 53 (summarized).

[293] However, in Ontario, any person who believes that she or he has been discriminated against may apply to the tribunal for redress. See the Human Rights Code R.S.O. 1990, c. H.19, s. 34.

[294] *Ibid*, s 50(1). See *Itty v Canada Border Services Agency*, [2015] CarswellNat 14, the complainant brought a Disclosure Motion asking the court to order the Respondent to produce all relevant documents in the Respondent's possession and an unredacted and complete copy of the Respondent's Simulation Exercise Administration Manual including certain specified pages. The Motion was, *inter alia,* brought pursuant to part of s. 50(1) which provides that "...the member or panel shall inquire into the complaint and shall give all parties to whom notice has been given a full and ample opportunity, in person or through counsel, to appear at the inquiry, present evidence and make representations." The court granted the motion as prayed.

[295] *Bell Canada,* Supra note 291.

"The main function of the Canadian Human Rights Tribunal is adjudicative. It conducts formal hearings into complaints that have been referred to it by the Commission. It has many of the powers of a court. It is empowered to find facts, to interpret and apply the law to the facts before it, and to award appropriate remedies. Moreover, its hearings have much the same structure as a formal trial before a court. The parties before the Tribunal lead evidence, call and cross-examine witnesses, and make submissions on how the law should be applied to the facts. The Tribunal is not involved in crafting policy, nor does it undertake its own independent investigations of complaints: the investigative and policy-making functions have deliberately been assigned by the legislature to a different body, the Commission."[296]

The Chairperson of the Tribunal is also empowered under the Act to make rules of procedure governing the practice and procedure before the HRT, including, but not limited to, rules governing the giving of notices to parties; the addition of parties and interested persons to the proceedings; the summoning of witnesses; the production and service of documents; discovery proceedings; pre-hearing conferences; the introduction of evidence; time limits within which hearings must be held and decisions must be made; and awards of interest.[297]

Enforcement of Decisions of HRT and Punishment

[296] *Ibid* at para 23. See also CHR Act, *supra* note 238, s 50(2) & (3)(a to e).
[297] *Ibid*, s 48.9(2). See *Canada (Human Rights Commission) v Canada (Attorney General),* [2012] FC 445, [2012] CarswellNat 1026, where the court, *inter alia*, considered the power of the Chairperson of the Tribunal under the Act to make rules of procedures. See paras 130 to 132.

At the conclusion of any inquiry conducted by it, the HRT will dismiss the complaint if the member or panel finds that the complaint is not substantiated.[298] However, where the member or panel finds that the complaint is substantiated, the member or panel may, subject to s. 54 of the Act, make any or all of the following orders against the person found to be engaging or to have engaged in the discriminatory practice.[299] First, that the person should cease the discriminatory practice and take measures, in consultation with the HRC, to redress the practice or to prevent the same or a similar practice from occurring in future, including the adoption of a special program, plan or arrangement referred to in ss. 16(1) and 17 of the CHR Act.[300] Second, that the person make available to the victim of the discriminatory practice, on the first reasonable occasion, the rights, opportunities or privileges that are being or were denied the victim as a result of the practice.[301] Third, that the person compensate the victim for any or all of the wages that the victim was deprived of and for any expenses incurred by the victim as a result of the discriminatory practice.[302] Fourth, that the person compensate the victim for any or all additional costs of obtaining alternative goods, services, facilities or accommodation and for any expenses incurred by the victim as a result of the discriminatory practice.[303] And finally, that the person compensate the victim, by an amount not exceeding twenty thousand dollars, for any pain and suffering that the victim experienced as a result of the discriminatory practice.[304] For the purposes of enforcement, any order issued under s. 53 of the CHR Act may be made an or-

[298] *Ibid*, s 53(1).
[299] *Ibid*, s 53(2).
[300] *Ibid*, s 53(2)(a)(i & ii).
[301] *Ibid*, s 53(2)(b).
[302] *Ibid*, s 53(2)(c).
[303] *Ibid*, s 53(2)(d).
[304] *Ibid*, s 53(2)(e).

der of the Federal Court by following the requisite procedures or by the HRC filing in the Registry of the Court a copy of the order certified to be a true copy.[305]

Once an order of the HRT is filed in the Federal Court, it automatically becomes an order of the court. However, contempt proceedings cannot lie against the Crown or any individual not mentioned in the order in a bid to enforce such an order. In *Tahmourpour v Royal Canadian Mounted Police*,[306] the applicant was a Canadian citizen of Iranian origin and Muslim faith. In 1999, while enrolled as a cadet at the RCMP Training Academy, he was the victim of systemic discrimination. His training contract was terminated in October 1999, and he was subsequently denied re-enrolment. The applicant filed a complaint against the RCMP with the HRC, alleging violations of sections 7 and 14 of the CHR Act. After a lengthy investigation and a subsequent hearing by the HRT, the HRT found in his favour and ordered several remedies to put an end to the discrimination, prevent future discrimination and compensate the applicant for past discrimination. RCMP applied to the Federal Court for judicial review and the decision of the HRT was quashed. On appeal to Federal Court of Appeal, the decision of the HRT was reinstated. Thereafter, when there arose a disagreement between the parties about how the decision of the HRT would be implemented, the applicant brought a motion for contempt against Bob Paulson, Commissioner of the RCMP, and Inspector Monique Beauchamp. Dismissing the motion, the Court stated, *inter alia*, that:

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[305] *Ibid*, s 57. See also *Bremsak v P.I.P.S.C*, [2012] FC 213, [2012] CarswellNat 399, Where the court quoted with approval the dictum of Justice Marc Noel in *Warman v. Tremaine*, [2011] FCA 297, as follows: "It is now settled law that decisions of lower Tribunals can be enforced on their own account through contempt proceedings because they, like decisions of the superior Courts, are considered by the legislator to be deserving of the respect which the contempt powers are intended to impose. This is what section 57 achieves with respect to orders made by the Tribunal under sections 53 and 54 of the Act.

[306] *Tahmourpour v Royal Canadian Mount Police*, [2013] FC 622, [2013] CarswellNat 2620.

> "[t]he order which Mr. Tahmourpour seeks to enforce is the order of the Tribunal, which became an order of this Court pursuant to section 57 of the *Canadian Human Rights Act*. Section 57 provides that orders of the Tribunal may be made orders of the Federal Court for the purpose of enforcement by filing a certified copy of the order with the Court's Registry. The Tribunal's order, [as excerpted above], is directed against the RCMP, and not against a particular individual. Indeed, only the RCMP is named as a Respondent in the Tribunal's order and in the registration proceedings in this Court."[307]

The Court added that the RCMP is in fact the Crown and does not have an independent existence. The Court also stated that contempt cannot be available against the Crown.

According to the CHR Act, no person should threaten, intimidate or discriminate against an individual because that individual has made a complaint or given evidence or assisted in any way the initiation or prosecution of a complaint or other proceeding under Part III of the CHR Act, or because that individual proposes to do so.[308] It is an offence under the Act for a person to issue such a threat or intimidate or discriminate against an individual for the reasons specified above.[309] Again, any person who obstructs a member of the HRT or a panel from carrying out its function is guilty of an offence under the Act.[310] It is also an offence for a person to obstruct an investigator in the investigation of a complaint, or for an employer to reduce wages in

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[307] *Ibid* at paras 6 & 7.
[308] CHR Act, *supra* note 238, s 59.
[309] *Ibid*, s 60(1)(c).
[310] *Ibid*, s 60(1)(b).

order to eliminate a discriminatory practice described in s. 11 of the CHR Act.[311] A person who is guilty of an offence under s. 60(1) of the Act is liable on summary conviction for a fine not exceeding $50,000.[312]

A prosecution for an offence under s. 60 of the CHR Act may be brought against an employer organization or employee organization and in the name of the organization, and, for the purpose of the prosecution, the organization is deemed to be a person and any act or thing done or omitted by an officer or agent of the organization within the scope of their authority to act on behalf of the organization is deemed to be an act or thing done or omitted by the organization.[313]

In conclusion, from the above discussions, it is observed that the provisions of the CHR Act particularly on the composition, powers, functions, punishment and enforcement of the decisions of the HRC and the HRT demonstrate some degree of independence on the part of these bodies. However, the manner of the appointment and removal of the members of the HRC and the HRT is worrisome. This is because of a fear that members of the HRT could be influenced by the appointing authorities as a result of the manner of their appointment and or removal. The method of appointment and removal may raise doubts about the independence of the above human rights bodies. Thus, in *Bell Canada*, the court noted "the fact that the Tribunal functions in much the same way as a court suggests that it is appropriate for its members to have a high degree of independence from the executive branch. A high degree of independ-

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[311] *Ibid*, s 60(1)(c), 11(6) and 43(3).
[312] *Ibid*, s 60(2).
[313] *Ibid*, s 60(3).

ence is also appropriate given the interests that are affected by proceedings before the Tribunal."[314]

Review of Judicial Decisions against Unlawful Arrest and Detention in Canada

In Canada, all Charter rights against unlawful arrest and detention are enforced by the courts. Anyone who alleges that he or she has been unlawfully arrested or detained may therefore seek redress in the courts. The primary duty of the courts is to interpret the laws that govern any matter brought before them and to make necessary orders and decisions. Unlike the HRC, the courts cannot *suo motu* initiate Charter rights enforcement proceedings except in cases of contempt of court committed *in facie curia.* Thus, in any proceedings relating to unlawful arrest and detention, the court, depending on the facts of each case, will most likely examine the following: the facts of the case and the acts or omissions that constitute the alleged breach, the relevant provisions of the Charter that are alleged to have been breached and any other laws or facts necessary for the determination of the case.

First, section 7 of the Charter provides that "[e]veryone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice."[315] The portion of this provision that is relevant for this thesis is the right to liberty. It follows that unlawful arrest or detention amounts to a deprivation of a person's liberty in a manner that is not consistent with principles of fundamental justice.

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[314] *Bell Canada*, *supra* note 291 at para 24.
[315] (The Charter of Rights), *supra* note 30, s 7.

Section 9 of the Charter provides that "[e]veryone has the right not to be arbitrarily detained or imprisoned."[316] Section 10 of the Charter further states that "[e]veryone has the right on arrest or detention, to be informed promptly of the reasons therefor; to retain and instruct counsel without delay and to be informed of that right; and to have the validity of the detention determined by way of habeas corpus and to be released if the detention is not lawful."[317] In addition, under section 8, the Charter provides that "[e]veryone has the right to be secure against unreasonable search or seizure."[318] While entertaining any matter on unlawful arrest and detention, the courts may consider the above provisions in the light of section 1 of the Charter, which states that rights guaranteed under the Charter are "subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society."[319]

Another important provision of the Charter that is relevant for the determination of whether an arrest or detention is unlawful is section 11. It provides that any person charged with an offence has the right to be informed without unreasonable delay of the specific offence, to be tried within a reasonable time, and not to be denied reasonable bail without just cause.[320] In *R. v. Tran,* the Ontario Court of Appeal explained that "[o]ne of the two main purposes of s. 11(b) of the *Charter* is the protection of an accused's rights under the *Charter* to security of the person, liberty and a fair trial. An accused will suffer actual prejudice where the

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[316] *Ibid*, s 9.
[317] *Ibid*, s 10(a to c).
[318] *Ibid*, s 8.
[319] *Ibid*, s 1.
[320] *Ibid*, s 11.

accused can demonstrate that the delay in bringing a case to trial has impaired one of those rights. Prejudice may be inferred where the delay between arrest and trial is simply too long."[321]

These provisions of the Charter shall where necessary constitute the basis for the review of cases on unlawful arrest and detention. The cases that I shall now review reveal some of the circumstances under which the court may hold an arrest or detention to be unlawful. It is important to note that this is not an attempt to review all the grounds under which arrests or detentions may be held to be unlawful. Rather, it is an attempt to demonstrate to some degree the disposition of the Canadian courts towards unlawful arrest and detention.

Unlawful Detention

Section 9 of the Charter provides as follows: "[e]veryone has the right not to be arbitrarily detained or imprisoned."[322] It is settled that detention not authorized by law is arbitrary and violates s. 9 of the Charter.[323] Also, detention authorized by a law (which is itself not arbitrary) is not an arbitrary detention.[324] In *R v Therens,*[325] Le Dain J held that a person is detained where he or she "submits or acquiesces in the deprivation of liberty and reasonably believes that the choice to do otherwise does not exist."[326] Thus, detention for Charter purposes occurs "when a state agent by way of physical or psychological restraint, takes away an individual's choice

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[321] *R. v. Tran (2012), 288 C.C.C. (3d) 177* (Ont. C.A.) at para 23.
[322] (The Charter of Rights), *supra* note 30, s 9.
[323] R. v. Grant, 2009 SCC 32, 2009 CarswellOnt 4104, [2009] 2 S.C.R. 353 at para 54.
[324] *Ibid* at para 54.
[325] *R. v. Therens*, [1985] 1 S.C.R. 613 cited in *R v Grant* supra note 323 at paras 25, 28.
[326] *Ibid* at 644.

simply to walk away."[327] Detention could be physical or psychological. In *R v Grant,* the Supreme Court of Canada stated that "detention under ss. 9 and 10 of the *Charter* refers to a suspension of the individual's liberty interest by a significant physical or psychological restraint and that psychological detention is established either where the individual has a legal obligation to comply with the restrictive request or demand, or a reasonable person would conclude by reason of the state conduct that he or she had no choice but to comply. To establish psychological detention, the following factors may be considered: whether the police were providing general assistance; maintaining general order; making general inquiries regarding a particular occurrence; or, singling out the individual for focused investigation; the nature of the police conduct, including the language used, the use of physical contact, the place where the interaction occurred, the duration of the encounter; and lastly, the particular characteristics or circumstances of the individual where relevant, including age, physical stature, minority status, level of sophistication."[328]

For example, in *R v Grant,*[329] two police officers in plain clothes saw the appellant (a teenager) on a sidewalk and observed that as they drove past him, the appellant stared at them in an unusually intense manner while at the same time fidgeting with his coat and pants in a way that aroused their suspicion. They suggested to Gomes - another officer in uniform who was parked ahead of the appellant - that he have a chat with the approaching appellant. Gomes stopped the appellant on the sidewalk and asked him a few questions. While responding to Gomes' questions, the appellant nervously adjusted his jacket, prompting the officer to ask him

[327] *R v Grant* supra note 323 at para 25.
[328] *R v Grant* supra at para 44.
[329] *R v Grant* supra.

to “keep his hands in front of him”. Thereafter, the two other plain clothes police officers approached, introduced themselves as police officers and took a position behind Gomes – the uniform police officer blocking completely the intended path of the appellant. When asked if he had anything on him, the appellant said that he had a bag of marijuana and a firearm. At this point, the officers arrested and searched the appellant, seizing the marijuana and loaded revolver. The appellant was then advised of his right to counsel.[330] The appellant was later charged with five firearm offences and at trial, the appellant contended that his rights under ss 8, 9 and 10(b) of the Charter were infringed and that the marijuana and the firearm should be excluded in evidence. Dismissing the appellant’s argument, the trial court held he was not detained prior to his arrest and went ahead and convicted the appellant of the five firearm offences.[331] On appeal to Ontario Court of Appeal, the court held that the police officers detained the appellant in breach of his rights under s. 9 of the Charter. With respect to the admission of the evidence, the appeal court held that admission of the gun would not undermine the fairness of the trial and that the administration of justice would be damaged more by its exclusion than its admission. On further appeal to the Supreme Court of Canada, however, it was held that the detention was arbitrary and in breach of s 9 of the Charter. Consequently, the evidence was excluded.[332]

Also, in *R v Harrison*,[333] a police officer, on seeing the accused/appellant driving a rented vehicle without front license plate, turned on a flashlight in order to pull him over but realized

[330] *Ibid* at paras 4 to 8.
[331] *Ibid* at para 9.
[332] *Ibid* at paras 48 to 52, 57.
[333] *R v Harrison*, 2009 SCC 34, 2009 CarswellOnt 4108, [2009] 2 S.C.R. 494.

that the vehicle was registered in Alberta and did not require a front license plate. Notwithstanding this realization, the officer stopped and continued to detain the accused/appellant without cause. Along the line, he found that the accused/appellant was driving while under suspension and then arrested him and went ahead to search his vehicle without warrant and found 35 kg of cocaine. At trial, the court convicted the accused/appellant on drug charges. On appeal, his conviction was upheld. On further appeal, the Supreme Court of Canada, allowing the appeal and quashing his conviction, held that the initial stop and the continued detention were based on no reasonable grounds and therefore constituted a violation of the accused/appellant's rights under section 9 of the Charter.[334]

It is not every stop or delay that amounts to detention for the purposes of ss 9 and 10 of the Charter. Iacobucci J. explicitly stated as follows: "the police cannot be said to 'detain', within the meaning of ss. 9 and 10 of the *Charter*, every suspect they stop for purposes of identification, or even interview. The person who is stopped will in all cases be 'detained' in the sense of 'delayed', or 'kept waiting'. But the constitutional rights recognized by ss. 9 and 10 of the *Charter* are not engaged by delays that involve no significant physical or psychological restraint."[335] Thus, detention for investigative purposes may not amount to detention under section 9 of the Charter. Therefore, "an investigative detention that is carried out in accordance with the common law power recognized in this case will not infringe the detainee's rights under s. 9 of the *Charter.*"[336]

[334] *Ibid* at para 20.
[335] *R. v. Mann*, 2004 SCC 52, 2004 CarswellMan 303, [2004] 3 S.C.R. 59 at para 19.
[336] *Ibid* at para 20.

Investigative Detention

Investigative detention is a common law idea that the police have the power to detain for investigative purposes suspects of crimes. In *R v. Simpson*, the Ontario Court of Appeal stated that investigative detentions are justified at common law "if the detaining officer has some 'articulable cause' for the detention".[337] The principles guiding the exercise of investigative detention powers were set down by the Supreme Court of Canada in *R v. Mann*.[338] There is no general power of investigative detention.[339] However, the court recognized the common law power of the police to detain for investigation purposes but cautioned that such power to detain must not be exercised on the basis of a hunch.[340] The court held that policer officers may detain an individual if there are reasonable grounds to suspect in all the circumstances that the individual is implicated in a recent or ongoing crime under investigation and that the detention must be viewed as reasonably necessary on an objective view of all the circumstances.[341] The court also stated that the reasonableness of the decision to detain must be assessed against all the circumstance, which includes "the extent to which the interference with individual liberty is necessary to perform the officer's duty, the liberty interfered with, and the nature and extent of that interference".[342] Importantly, the investigative detention power is not a power to engage

[337] *R v Simpson* (1993), 12 O R (3d) 182 at 200. "Articulable Cause" was defined by Doherty J at P 202 as "… a constellation of objectively discernible facts which give the detaining officer reasonable cause to suspect that the detainee is criminally implicated in the activity under investigation." See also *R v Mann*, supra at para 27.
[338] *R v Mann*, supra note 333.
[339] *Ibid* at para 17.
[340] *Ibid* at para 35.
[341] *Ibid* at para 34. See also *R. v. Clayton*, 2007 SCC 32, 2007 CarswellOnt 4268, [2007] 2 S.C.R. 725, where the Supreme Court of Canada following *R v Mann*, justified the investigative detention and pat-down search of Clayton and Farmer on the grounds that both were reasonably implicated in the criminal activity under investigation.
[342] *Ibid* at para 34.

in *de facto* arrest, nor can it be exercised on the basis of intuition.[343] Such detention should be brief in duration and does not impose on the detained person the obligation to answer the questions posed by the police.[344] Any individual detained for investigative purposes must be advised in clear and simple language of the reasons for the detention.[345] Where a police officer has reasonable grounds to believe that his safety or the safety of others is at risk, he may engage in a protective pat-down search of the detained individual.[346]

Unlawful Arrest

Section 495(1) of the *Criminal Code* provides that a peace officer may arrest without warrant a person who has committed an indictable offence or who, on reasonable grounds, he believes has committed or is about to commit an indictable offence; a person who he finds committing a criminal offence; or a person in respect of whom he has reasonable grounds to believe that a warrant of arrest or committal is in force within the territorial jurisdiction in which he is found.[347] However, section 495(2) limits these powers and provides that a peace officer shall not arrest without warrant for an indictable offence mentioned in section 553; an offence for which the person may be prosecuted by indictment or for which he is punishable on summary conviction; an offence punishable on summary conviction; in any case where he believes on reasonable grounds that the public interest, having regard to all the circumstances including the need to establish the identity of the person, secure or preserve evidence of or relating to the

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[343] *Ibid* at para 35.
[344] *Ibid* at para 22.
[345] *Ibid* at para 21.
[346] *Ibid* at para 45.
[347] Criminal Code, R.S.C. 1985, c. C-46, s. 495(1).

offence, or prevent the continuation of or repetition of the offence or the commission of another offence, may be satisfied without so arresting the person; and where he has no reasonable grounds to believe that, if he does not so arrest the person, the person will fail to attend court in order to be dealt with according to law.[348]

Generally, if an individual's liberty is taken away by way of arrest, such an arrest should be by warrant. However, the law permits an arrest without warrant on the grounds stipulated above. Thus, the general rule is that an arrest without warrant will be lawful if the officer making the arrest has reasonable and probable grounds on which to base the arrest and those grounds are objectively justifiable. That is to say, a reasonable person placed in the position of the officer must be able to conclude that there were indeed reasonable and probable grounds for the arrest.[349]

Consequently, an arrest without warrant when the police officers making the arrest do not truly believe that reasonable grounds exist for the arrest has been held to be unlawful and to constitute a breach of section 9 of the Charter. For instance, in *R v Feeney*,[350] there were witnesses who claimed that the accused was near the scene of motor vehicle accident involving a murdered man's car. The police immediately went to the accused's residence and announced their arrival by saying "police." A police officer entered the accused's home without warrant and without the accused's permission and observed blood on his clothes. As a result, the accused was arrested in his home. During trial, the police officer admitted to having no reasona-

[348] *Ibid*, s 495(2).
[349] *R v. Storrey*, 1990 CarswellOnt 78, [1990] 1 S.C.R. 241 at para 17.
[350] *R v Feeney*, [1997] 2 SCR 13 (SCC).

ble grounds to make arrest when he entered accused's residence. Evidence was admitted at trial on *voir dire* and the accused was convicted of second degree murder. The accused appealed this conviction and the appeal was dismissed. A further appeal was allowed and the conviction was set aside while a new trial was ordered. The court held that the police officer did not have a personal (subjective) belief that there were reasonable or probable grounds to make the arrest without warrant and that the arrest was therefore unlawful. The Supreme Court of Canada further stated as follows:

> "Indeed, it would be inconsistent with the spirit of the *Charter* to permit a police officer to make an arrest without a warrant even though he or she does not believe reasonable grounds for the arrest exist. The absence of subjective belief, therefore, rendered the arrest in the present case unlawful irrespective of the existence of objective grounds for the arrest and the effect of the *Charter* on powers of police officers to enter a dwelling house without a warrant in order to effect an arrest."[351]

Similarly, in *R v Frieburg,*[352] the Manitoba Court of Appeal held the arrest and detention of the accused to be unlawful, since the arrest had been made for the purpose of keeping the accused away from her residence during the course of a search of her residence. The court found that a valid arrest requires not just that there are objectively reasonable grounds, but also subjectively reasonable grounds on the part of the officer who makes the arrest. The court observed that none of the officers involved in the case personally believed that there were rea-

[351] *Ibid* at para 29.
[352] *R v Frieburg*, (2013) CarswellMan 250, [2013] 10 WWR 444.

sonable grounds that the accused had committed an indictable offence, and that the reason for her arrest at that time was to keep the accused away from the residence. The court added that an arrest for the purpose of preventing the destruction of evidence is not a valid reason for an arrest.[353]

Also, the courts generally frown at any arrest or detention of the members of an organized group that is engaged in a peaceful protest to express their support or disapproval of a given policy. For example, in *R v. Botten,*[354] a case before the Ontario Superior Court of Justice, the accused was arrested for breaching the peace during a peaceful protest of the G20 summit in Toronto. The accused was taken to a prisoner processing facility, where she was detained overnight and subsequently released without charges. She was later charged with mischief of over $5,000 as one of the people who allegedly smashed shop windows at a different time during the G20 summit. The accused made an application that the charge be stayed on the grounds that her Charter rights had been violated. Allowing the application in part, the court found as follows: 1. that there was evidence showing that the crowd gathered to support a group of workers at a hotel, and to convey their dissatisfaction with G20 policies to one of the leaders whom they thought was staying there; 2. that contrary to the Crown's submissions, the accused's group was not the group that had gathered as a pretext to shelter protesters who had earlier committed acts of violence; 3. that evidence showed that the crowd did everything they could to indicate to police that they were engaging in a peaceful protest; 4. That although the accused's conduct did not justify an arrest for breach of peace, she was compliant and coopera-

[353] *Ibid* at para 23.
[354] *R v Botten*, [2012] CarswellOnt 13335, [2012] O.J No. 5053.

tive when she was arrested and there was no evidence that the crowd had intended to breach the perimeter fence surrounding the summit location. In view of these findings, the court held that the arrest and detention of the accused was unlawful and constituted an abuse of power. Consequently, the court held that the accused's Charter rights under section 9 had been violated.

The courts have shown complete intolerance to abuse of the discretionary power to effect arrest. Courts tend to adopt strict and purposeful interpretation for this purpose. For instance, in *Dulude v. Canada*,[355] the court held unlawful and unjustified an arrest made pursuant to discretionary power conferred by law. The plaintiff was a member of the armed forces due for imminent discharge. On the day he was due for release, he was absent from base on sick leave, having obtained permission for a leave from a physician. However, he had failed to obtain his commanding officer's approval. The military police were instructed to arrest the plaintiff for being absent from his place of duty and to bring him back to base. They arrested the plaintiff at his home, forced him to the ground and handcuffing him, and then detained him for several hours. As a result, the plaintiff brought an action against the Crown for damages for unlawful arrest and assault. At trial, his action was dismissed on the grounds that officers were performing a duty imposed by law and that the use of force had not been excessive. Being dissatisfied, the plaintiff appealed and his appeal was allowed. It was held that the trial judge misunderstood the applicable rule of law and that the military police were not performing duty imposed by law, but exercising a discretionary power of arrest pursuant to sections 154 and 156

[355] *Dulude v Canada,* (2000 CarswellNat 2772, 2000 CarswellNat 2169, [2000] F.C.J. No. 1454, [2001] 1 F.C. 545, 100 A.C.W.S. (3d) 1006, 192 D.L.R. (4th) 714, 264 N.R. 1).

of the *National Defence Act*. The court stated that the appropriate question was whether, given the prejudicial nature of the discretionary power to individual's rights and freedoms, its exercise was justified under these circumstances. The appellate court stated as follows: "In these circumstances, use of the power of arrest was in my opinion nothing less than an unlawful exercise of the discretionary power conferred by ss. 154 and 156 of the Act: it was nothing but a demonstration of authority and force which was as futile as it was unjustified. Consequently, the arrest and the use of force and detention that followed were unlawful and unjustified."[356] The court further noted that the arrest, use of force and detention of the appellant infringed his constitutional rights and that he was therefore entitled under section 24 of the Charter to a just and appropriate remedy. The court awarded $10,000 moral damages in favour of the appellant.

Similarly, in an earlier case, *Corrigan c. Montreal (Ville)*,[357] the Supreme Court of Quebec awarded $5,000 in moral and physical damages to the plaintiff for an unlawful and malicious arrest in public. Thus, the unlawful arrest of the plaintiff in public was held to have humiliated and caused him great anxiety.

Moreover, the courts often frown on the use by the police of excessive or unreasonable force when making arrests. Where there is the use of excessive or unreasonable force, the courts tend to award punitive and aggravated damages as a deterrent. For instance, in *Davidson v. Toronto Blue Jays Baseball Ltd*,[358] the plaintiff was arrested by three off-duty Metropolitan Toronto police officers while attending a Blue Jays game at the SkyDome on April 28,

[356] *Ibid* at para 16.
[357] *Corrigan c. Montreal (Ville)* [1980] C.S. 853 (Que. S.C.) cited in *Dulude.*
[358] *Davidson v. Toronto Blue Jays Baseball Ltd*, [1999] CarswellOnt 626, [1999] O.J. No. 692, 170 D.L.R. (4th) 559, 89 O.T.C. 64.

1995. At the time of the arrest, the plaintiff was told that he was arrested pursuant to the Trespass to Property Act. The plaintiff alleged that the arrest was unlawful, and that the Blue Jays, Metropolitan Toronto Police Board, and three named police officers were liable for general, special, aggravated and punitive damages. It was the plaintiff's alternative position that even if the arrest was lawful, the police and Blue Jays were liable for the excessive use of force in carrying out the arrest, and that the plaintiff was entitled to general, special, aggravated and punitive damages. The court per jury found that the arrest was unlawful and that there was no reasonable and probable ground for making the arrest. The jury also found that the plaintiff was humiliated, embarrassed, intimidated, harassed and subjected to unnecessary pain and suffering at the bottom of the exit stairs by being forced to the ground and held while being coerced into responding to demands made of him. The plaintiff was awarded damages including $50,000 in aggravated damages and $125,000 in punitive damages.

The court also frowned on the use of excessive force while making an arrest in *R v Cousin.*[359] The fact of the case was as follows: on December 10, 2008, during a police briefing, the officers of the Orangeville Police Services were advised by Detective Constable Ward that there were reasonable and probable grounds to arrest Mr. Billy Joel Cousins on an assault causing bodily harm charge that had occurred a week or two earlier. Found in a movie theatre, the accused was arrested without warrant at gun point, handcuffed, used his body to open the door, pinned him up against the police's Cruiser, excessively beaten with broken tooth and

[359] *R. v. Cousins* (2009) ONCJ 481, (2009) CarswellOnt 6160, [2009] O.J. No. 4252, 85 W.C.B. (2d) 14).

pepper sprayed. The court held that the arrest without warrant was not lawful.[360] The court further held that using the body of the accused to open the door, pinning him up against the police Cruiser and ignoring to wash off the pepper spray were not justifiable.[361] It was finally held that the accused's rights under sections 7, 9 and 12 of the Charter were breached.[362]

In some cases, the courts also consider whether the best interests of the society are satisfied by the grounds on which a given arrest is made. In *Steward c. Dugas*,[363] following a complaint of assault lodged against the plaintiff, the defendant police officers went to her house to conduct an inquiry. The plaintiff told them her name but was arrested when she refused to produce identity papers. As a result, the plaintiff filed for damages, claiming that she was not given time to change out of her nightgown and that the police officers used excessive force. The court held that the best interests of the society did not require that the plaintiff be arrested in order to complete her identification. Therefore, the arrest was held illegal, abusive and unjustified, although it was not established that the police officers acted in bad faith or infringed the plaintiff's rights deliberately. The court awarded $10,000 in damages to the plaintiff.

Similarly, the courts deem unlawful any arrest made without warrant if the arrest was made in circumstances that did not justify the arrest. In *Collins v. Brantford Police Services Board*,[364] the plaintiff was arrested and convicted of assaulting his neighbour. The plaintiff was later arrested but not convicted of breach of recognizance for having contacted his neighbour.

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[360] *Ibid* at para 141.
[361] *Ibid* at para 119.
[362] *Ibid* at paras 119, 126, 143.
[363] *Steward c. Dugas* [1992] R.R.A 268.
[364] *Collins v. Brantford Police Services Board*, 2000 CarswellOnt 691, [2000] O.J. No. 727, 131 O.A.C. 383, 95 A.C.W.S. (3d) 384.

Both arrests were made without warrant. The plaintiff brought an action against the police board for unlawful arrest and arbitrary detention, both in violation of his Charter rights and of relevant provisions of the Criminal Code. The plaintiff's claim for general damages in the amount of $6,000 was successful. The police board appealed and the appeal was dismissed. It was held that the trial judge did not err in failing to find that circumstances surrounding first and second arrest justified warrantless arrest.

Where a police officer without permission enters an accused's home and makes an arrest in a situation that does not justify such entry, the courts will hold such an arrest to be unlawful. In *Berketa v. Niagara Regional Police Board*,[365] the plaintiff brought an action for damages arising from her arrest by the second defendant Constable Gurney. She found her action on three causes: 1. that in grabbing and handcuffing the plaintiff during the course of her arrest, the defendant committed an assault and battery upon the plaintiff; 2. that by apprehending her, the defendant had falsely imprisoned and falsely arrested the plaintiff; 3. and that, in the alternative, the defendant was negligent in performing his duties in accordance with the standard of care he owed the plaintiff. The plaintiff claimed general damages in the amount of $30,000, punitive damages in the amount of $20,000 and the cost of her action. The court found that the arrest and the entry into the plaintiff's residence without permission were both unlawful. The court also found that the force applied by the defendant in arresting the plaintiff was excessive and awarded $25,000 in damages in favour of the plaintiff.

[365] *Berketa v. Niagara Regional Police Services Board* [2008] CarswellOnt 402, [2008] O.J. No. 260, 163 A.C.W.S. (3d) 842.

Where an arresting police officer does not have lawful right to enter a residential home to effect an arrest without warrant, the courts insist that the officer must first seek and obtain permission before the arrest. Therefore, where an arresting officer enters a residential home without permission to make arrest, the courts will hold such arrest as unlawful. In *Hudson v. Brantford Police Services Board*,[366] the police officers entered plaintiff's home to arrest him for failing to remain at the scene of the accident. The officers had a reasonable belief that the plaintiff had committed offence but did not have a warrant. The Crown subsequently withdrew the charges, and the plaintiff brought an action against the Police Services Board for damages in respect of unlawful entry and arrest. The trial judge found that entry into his home was unlawful, but dismissed the claim on the grounds that officers acted reasonably and in good faith and were protected by section 25 of Criminal Code and the common law. On appeal, the trial judge's findings of fact were set aside and a further appeal by Board was dismissed. It was held that both the entry and arrest were unlawful. Section 25(1) protects officer from civil liability for reasonable mistakes of fact, but does not protect against reasonable mistakes of law. Hence, the officers had no lawful right to enter plaintiff's home to arrest him, and therefore had no defence under s. 25(1) to claim for trespass. The court explained this thus:

> "in this case, the trial judge found that the police, who had no arrest warrant and no authorization to enter the dwelling, were not in hot pursuit and that none of the statutory exceptions in the new *Code* provisions applied. The trial judge also found that the police did not have permission to enter the dwelling. It follows from these findings that

[366] *Hudson v. Brantford Police Services Board,* [2001] CarswellOnt 3303, [2001] O.J. No. 3779, 108 A.C.W.S. (3d) 388, 150 O.A.C. 87, 158 C.C.C. (3d) 390, 204 D.L.R. (4th) 645, 48 C.R. (5th) 69.

> the police officers committed a trespass when they entered the plaintiff's home to arrest him without a warrant and authorization to enter. This court has previously held that if police officers have been trespassing at the time they purport to make an arrest in a dwelling house, this renders the arrest unlawful."[367]

A stop and search by the police that is not authorized by law may be held to constitute arbitrary detention depending on the circumstance of the case. The question of whether a random stop and search by the police constitutes an arbitrary detention was the issue for determination in *R v. Lux*.[368] In that case, the police stopped the accused driver while she was pulling out of the parking lot of a hotel. The police officers, who were on routine patrol and not on stop and check duty at the time, asked the accused a series of questions, one of which was whether she had consumed alcohol. When she answered in the affirmative, the police demanded her breath sample for analysis. When the accused failed to produce a suitable sample, she was arrested and charged for not complying to the "approved screening device" demand, contrary to section 254(5) of the *Criminal Code*. The trial judge held that the general provisions of the *Traffic Safety Act*, including section 209.1, which authorizes a peace officer to stop and obtain information from vehicle operators on highway, do not apply to private parking areas, and that the officers were therefore not authorized to detain and question the appellant. Thus, the accused was acquitted. The Crown appealed against the decision and the Summary Conviction Appeal Court allowed the appeal. On further appeal by the accused, the Saskatchewan Court of Appeal, reversing the decision of the Summary Conviction Appeal Court, held that the Traffic

[367] *Ibid* at para 17.
[368] *R. v. Lux* (2012) CarswellSask 849, (2012) SKCA 129, [2012] S.J. No. 796, [2013] 5 W.W.R. 732.

Safety Act does not authorize a peace officer to conduct random stop on private parking areas.[369] Consequently, according to the court, the random stop constituted an arbitrary detention that infringed the accused's right under section 9 of the Charter.[370]

A somewhat similar issue arose before the court in *R v. K. (A.)*.[371] Here, police officers who were members of anti-violence intervention unit saw two young men running down a lane in dark and joining others at their vehicle. The Police officers pulled up, blocked the group at their vehicle and immediately called for back-up. The group was informed that they could not leave until they were investigated. As soon as the back-up police officers arrived, they observed the accused in the car, and apparently decided that he was hiding suspiciously. When the accused did not consent to a search of his person, two officers became physically involved in struggle with accused, handcuffed him and search and found a gun in the accused's pocket. The accused young person was subsequently charged with eight weapons-related offences. During trial, the accused applied for exclusion of the gun found in the search of his person and the application was granted. The court found that every movement of these young men was cast by the police officers in a nefarious light to justify what unfolded.[372] Additionally, seeing their BMW X5 SUV parked unreasonably led the officers to question why black men had a high-end vehicle, rather than allaying the original suspicion of their presence in the lane. The court therefore held that detention began, physically and psychologically, when the police car blocked the vehicle and the officers called for back-up and arbitrarily prolonged their interaction with group

[369] *Ibid* at paras 36, 54, 55.
[370] *Ibid* at para 56.
[371] *R. v. K. (A.)* (2014) ONCJ 374, (2014) CarswellOnt 11378, [2014] O.J. No. 3908, 116 W.C.B. (2d) 138, 13 C.R. (7th) 75.
[372] *Ibid* at para 59.

in order to acquire the reasonable suspicion to detain them.[373] The court observed that the officers' account of what happened was constructed after the gun was found, and that this account falsely suggested that the accused's movements in the car stemmed from his attempt to conceal his gun.[374] The detention was held to be arbitrary and illegal, and involved a complete suspension of the accused's constitutional rights, specifically sections 8, 9 and 10.[375]

Remedies under Section 24 of the Charter

Section 24(1) of the *Charter* provides that "anyone whose rights or freedoms, as guaranteed by this Charter, have been infringed or denied may apply to a court of competent jurisdiction to obtain such remedy as the court considers appropriate and just in the circumstance."[376] Following this provision, the courts have awarded damages as remedies to applicants, as demonstrated in *Berketa*, *Collins* and *Dugas*.

However, of particular importance are the provisions of section 24(2) of the Charter. It provides that "where, in proceedings under subsection (1), a court concludes that evidence was obtained in manner that infringed or denied any rights or freedoms guaranteed by this Charter, the evidence shall be excluded if it is established that, having regard to all the circumstances, the admission of it in the proceedings would bring the administration of justice into disrepute."[377] To

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[373] *Ibid* at paras 47, 49, 50.
[374] *Ibid* at para 52.
[375] *Ibid* at paras 56, 57, 61, 62.
[376] The Charter of Rights, *supra* note 30, s 24(1).
[377] *Ibid*, s 24(2).

determine whether evidence obtained in Charter breach will be excluded, the question is whether a reasonable person, informed of all the relevant circumstances and the values underlying the Charter, would conclude that the admission of the evidence will bring the administration of justice into disrepute.[378] In *R v. Grant*,[379] the Supreme Court of Canada held that in assessing whether the admission of evidence obtained in breach of the Charter would bring the administration justice into disrepute, the following factors must be considered: (a) the seriousness of the Charter-infringing state conduct; (b) the impact of the breach on the Charter-protected interests of the accused; and (c) society's interest in the adjudication of the case on its merits.[380] With regard to the seriousness of Charter-infringing state conduct, the court noted that the more severe or deliberate the state conduct that led to the Charter breach, the greater the need for the court to disassociate itself from such conduct by excluding the evidence linked to that conduct to preserve public confidence in the rule of law.[381] The implication is that evidence obtained through minor violations of the Charter may be admitted.[382] Evidence may be excluded where the impact of the breach on the accused's protected interest is serious or high.[383] The court cautioned that the heightened interest of the public in the determination on its merit of serious offences should be balanced with the public vital interest in having a justice system that is above reproach.[384]

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[378] *R v Grant* supra note 323 at para 68.
[379] *R v Grant* supra note 323.
[380] *Ibid* at para 71.
[381] *Ibid* at para 72.
[382] *Ibid* at para 74.
[383] *Ibid* at para 76.
[384] *Ibid* at para 84.

As seen in the cases reviewed here, the courts in Canada have been tenacious in strictly upholding the relevant laws. While ensuring that the police and other security agents are able to carry out their duties, the courts have jealously guarded the Charter rights of the people through strict and purposeful statutory interpretation. In sum, the courts do not tolerate arrest and detention that defeat the overall objectives of the Charter.

In conclusion, the early human rights record in Canada was not a pleasant or particularly progressive one. Worse still, there is an ongoing pattern of structural, social and economic discrimination against First Nations peoples. The continued existence of the “reserves”, which are mostly in a deplorable state, leaves one wondering whether Canada is running two different economies – one for indigenous peoples (often squalid, neglected and subject to discrimination) and the other for “average Canadians” (putatively representing Canada’s generally strong image in the international community). It is hoped that Canada will swiftly address the structural discrimination against indigenous peoples. However, except as I noted above in relation to First Nations peoples, the human rights system in Canada is relatively effective, comprehensive, sophisticated and structurally independent. As in all other systems, cases of unlawful arrest and detention still occur in Canada. However, they are comparatively infrequent. Importantly, the justice system, though not perfect, is poised to combat infractions of human rights, particularly unlawful arrest and detention by the police.

Chapter Three

Comparative Analysis of Human Rights Institutions in Nigeria and Canada

Chapters One and Two of this thesis have examined the historical development of human rights norms and institutions in Nigeria and Canada, particularly human rights norms concerning and judicial pronouncements against unlawful arrest and detention. Human rights in Nigeria and Canada have evolved through various stages of social cultural, political and legal development. Each stage was marked by particular social values and political priorities that contributed to human rights. While the approaches and legal frameworks of the two countries are different as regards human rights issues, there are also areas of striking similarity.

This chapter offers a comparative analysis of human rights institutions in Nigeria and Canada. It highlights the strengths and weaknesses inherent in each system. This will inform the recommendations I make in this thesis. To achieve this goal, this chapter will be divided into three major sections. The first section will deal with comparative historical analysis. The second section compares the legal frameworks and structures of the NHRC in Nigeria and the human rights bodies - HRC and HRT in Canada. Finally, the last section provides a comparative review of judicial approaches to combatting unlawful arrest and detention.

Comparative Historical Analysis

The historical trajectories of human rights in Nigeria and Canada are as different as they are similar. In Nigeria, the development of human rights norms can be traced to pre-colonial, colonial and post-colonial eras, the case of Canada is different. Both jurisdictions have records of human rights violations even though their laws and understandings of human rights were different. Thus, William Black argues that in Canada, human rights have been violated more than they have been protected.[385] Similarly, in Nigeria, colonial and post-colonial political developments generated a greater number of violations of human rights than they did instances of the promotion and protection of human rights.

Pre-colonial Nigerian society recognized rights and freedoms in line with traditional cultural values. The following are some notable facts about rights as practiced in the pre-colonial Nigeria society. First, people enjoyed such basic rights as the right to life, the freedom of expression, the freedom of association, the right of adults to participate in decision-making process and other socio-cultural and economic rights. These rights were not as elaborate as human rights, as typically conceived in the modern society. However, they were broadly similar. Second, as Elechi puts it, "[t]he individual's right must be appreciated within a communal context. This is because the group or community rights or interests generally override that of the individual. However, the individual's membership in a community does not rob the individual of his or her dignity, and by extension, the individual's rights."[386] On the issue of unlawful arrest and

[385] (William Black 2014) supra note 192.
[386] Oko Elechi Ph. D, "Human Rights and The African Indigenous Justice System" (Paper Delivered at the 18th International Conference of the International Society for the Reform of Criminal Law, Montreal, Quebec, Canada, 8-12 August 2004), [unpublished].

detention by the police, many pre-colonial Nigerian societies had no organized police force.[387] However, some pre-colonial kingdoms, such as the Hausa/Fulani Kingdom, had organized police forces. Aside from the few hierarchically organized kingdoms, these societies were mostly egalitarian in character. The arrest, detention or punishment of offenders was based on the established rules of customs and traditions of each society, or as agreed by members of the community in question. In addition, there is no record of what may be considered arbitrary arrest and detention during this era.

The brief history of human rights development in Canada that was provided in the previous chapter did not trace the development of human rights norms to the pre-colonial or colonial period in Canada. However, accounts of the experiences of Canada's Aboriginal peoples are revealing. An oral history interview with Lestlie Spillett reveals that colonization brought patriarchy and violence into Indigenous communities in Canada.[388] Women and men enjoyed equal rights and treatment prior to colonization. Some rights, while not as distinctly defined as the present day concept of human rights, were recognized and promoted.[389] The Indigenous people of pre-colonial Canada promoted social, cultural, economic, religious and political rights within

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[387] For instance, as Audu Jacob puts it "In the Igala political kingdom, there was no standing police force like the contemporary Nigeria Police Force for the purpose of maintaining law and order but Attah and most of the senior chiefs had several servants, attendants, slaves and eunuchs who protect their persons and property. They were also on the watch out for any slightest public disturbance or unrest. In case of such occurrence, they would be dispatched to restore and maintain peace instantly." (Audu Jacob, "Pre-Colonial Political Administration in the North Central Nigeria: A Study of the Igala Political Kingdom", (2014) v. 10 No.19 E S J 392 at 400.)Audu Jacib Phd, is a senior lecturer in the department of political science and international studies, faculty of social sciences, Ahmadu Bello University, Zaria, Nigeria.

[388] Leslie Spillett is a Cree from Treaty Six (6) Territory, Saskatchewan, Canada. She is an activist, a community leader of Aboriginal community in Manitoba and the founder/Executive Director of Ka Ni Kanichhk, an indigenous organization that is culturally-based and involved in Aboriginal-led services in Manitoba.

[389] Although there is dearth of elaborate articles on the rights recognized by pre-colonial Indigenous people of Canada, such rights as equality rights, right to life, rights to own and acquire landed property, fishing rights, right to associate with others and other religious, socio-cultural and economic rights can be inferred.

their societies.[390] Similarly, Melodie Slabbert contends that prior to colonization, Aboriginal women were consulted on matters concerning the tribe and that they played an integral role in the enforcement of some laws and rituals associated with marriage.[391] She also argues that violence and discrimination against Aboriginal women stems mainly from colonization. While these statements are primarily concerned with violence against Aboriginal women in Canada, it is not hard to infer that the pre-colonial indigenous people of Canada recognized and promoted some forms of human rights.

The colonial history of Nigeria is characterized by a combination of suppression of the people, and later the gradual development of human rights norms. European domination was initially characterized by discrimination in civil service and the denial of political, economic, civic and socio-cultural rights to the people. However, the introduction of constitutional governments set in motion the gradual restoration, development and promotion of the rights of the Nigerian people. The formation and activities of a number of political parties, ethnic groups and other pressure groups were also significant for the development of human rights norms in Nigeria.[392] This is also connected to the effect of the UDHR and intense international pressure on colonial rulers to end colonial rule. On the other hand, the horrific account of the Indian Resi-

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[390] Leslie's Interview, supra note206.

[391] Melodie Slabbert, "Explaining Domestic Violence in Aboriginal Communities: The Relevance of the Public/Private Dichotomy" (2003) 9 Fundamina 177 at 182.

[392] For instance, the appointment into senior civil service cadre, the election and inclusion of Nigerians in the mainstream political administration and the accordance of economic equality rights to Nigerians in the colonial era was the result of intense advocacy of the Nigerian Youth Movement (NYM) and the National Council of Nigeria and Cameroon (NCNC). See also Ubaku et al, "The Impact of National Movement on the Actualization of Nigerian Independence, 1914-1960" (2014) 2: 1 Intl J History Philosophic Research 54.

dential System and also the ongoing discriminatory treatment of Canada's First Nations people follow from the history of colonialism in Canada.[393]

In sum, the histories of human rights in both Nigeria and Canada show that there were laws, policies and activities that had a grave effect on the development of human rights norms in these two jurisdictions.

One of the major factors that inhibited the early and rapid development of human rights in Nigeria was the politics of ethnicity. Post-independent Nigerian politicians were divided along ethnic lines. This led to power struggles, discrimination, intimidation, political arrests, killing and eventually ethno-national conflict. J. O. Odeyemi observes that the post-independent regime of Abubakar Tafawa Balewa and Dr. Nnamdi Azikiwe (1960 to 1966) was "plagued by antagonistic regionalism, ethnicity, declined revenues, and bitter power struggle, and it wobbled from one crisis to another until it was overthrown by the military."[394] He further states that "[t]he virus of ethnicity has been one of the most definitive causes of social crisis, injustice, inequality and religio-political instability in Nigeria. Ethnicity has been perceived in general as a major obstacle to the overall politico–economic development of the country."[395] This plunged the country into a deep phase of corruption and poor management of the economy. Human rights and their promotion could not thrive under such conditions. The consequences of this poor political beginning have remained the bane of the Nigerian administration since, particu-

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[393] The interview of Leslie Spillett and the work of Melodie Slabbert discussed above respectively give credence to the fact that human rights were observed more in violation during colonization in Canada.
[394] Odeyemi, Jacob Oluwole, "A Political History of Nigeria and the Crisis of Ethnicity in Nation-Building" (2014) 3 Intl J Dev Societies 87 at 87. (Odeyemi)
[395] *Ibid* at 87.

larly in regard to human rights. Worse still, the 1966 coup and the counter coup in Nigeria further dwarfed the dream of some early nationalist and human rights activists for a human rights-driven society. These military coups were equally tainted with ethnic passion. According to Odeyemi, the coup generated ethnic bitterness that resulted in bloody violence.[396] This also constituted a serious obstacle to the development and promotion of human rights in Nigeria. Furthermore, this era witnessed a number of repressive laws and policies. The successive military governments churned out decrees and policies that suspended the human rights provisions of the constitution, limited press freedom and encouraged arbitrary arrest and detention of citizens.

The early history of human rights in Canada was not entirely different from that of Nigeria. Although the political environment was different, there were laws and practices in Canada that also limited the development and promotion of human rights. Canada's Chinese Immigration Act of 1885 and the Chinese Immigration Act of 1923 were among the Canadian laws that violated human rights. The laws were patently discriminatory. They are sometimes likened to laws without conscience as they denied a good number of Chinese Canadians the opportunity to unite with their family members. Also, the 1914 War Measures Act, under which the Canadian government interned Ukrainian Canadians and Japanese Canadians, is a source of considerable remorse in Canadian human rights history. While distinct in purpose, these laws were not in effect so different with Nigeria's draconic military decrees. Both legal apparatuses undermined with impunity the human rights of the people involved.

[396] *Ibid.*

The evils of the Indian Residential School System, which are described by some as genocide,[397] and the ongoing discriminatory treatment of Canada's First Nations peoples are among the practices that weaken the claim of Canada to be a human rights-friendly society. While Canada and Nigeria may have different political and cultural histories, the discriminatory treatment of the First Nations in Canada is similar to the ethnic discrimination that has undermined human rights in Nigeria. Although the principle of parliamentary supremacy that has been operative in Canada may not be likened to the supremacy of the military decrees in Nigeria, it has constituted a similar drawback. The ideological division among the early civil liberty and human rights organizations in Canada was as much a limiting factor to the primacy of human rights as the ethnically divided pressure and political groups in Nigeria.[398]

Notwithstanding the negative impact of the two countries' human rights records, the laws and practices that undermined the development of human rights norms in Canada and Nigeria have also spurred action. The activities of early Nigerian nationalists, both inside and outside Nigeria, contributed immensely to pressuring the colonial government to adopt policies that addressed human rights violations. This also gave rise to the introduction of progressive

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[397] See Anthony J. Hall, "Lighting a Candle or Exploding Bombs for Humanity?: Ethnic Cleansing and Genocide in North America and Kosovo" (4 May 1999), Department of Native American Studies, University of Lethbridge. Accessed online on 17 October, 2015: http://www.nativeweb.org/pages/legal/hall_essay.html. See also Leslie's interview, *supra* note 206.

[398] The ideological differences among the civil liberty organizations in Canada were reflected in their conceptions of rights. According to Dominique Clement, some of the groups were egalitarians while some others were libertarians. The egalitarians advocated equality of all individuals and favour positive rights (i.e., economic, social and cultural rights). The libertarians believed in individual liberties of citizens and favour negative rights (i.e., civil and political rights). The libertarian tends towards capitalist ideology while the egalitarian tends communist ideology. For discussion on the ideological differences among the early civil liberty and human rights organizations in Canada, see: Dominique Clement, *Canada's Rights Revolution Social Movements and Social Change, 1937-82*, (UBC Press: Vancouver, 2008), 261. Retrieved on 17 October, 2015: http://www.ubcpress.ca/books/pdf/chapters/2008/CanadasRightsRevolution.pdf

constitutions that included Nigerians in public administration.[399] Several political parties and pressures groups including human rights NGOs evolved as a result.[400] The results were far-reaching. In addition, the recommendations of the Willink Commission and the eventual inclusion of fundamental rights in Chapter Two of the 1960 Constitution was a big milestone in the development of human rights in Nigeria. In other words, the struggle for self-determination and political and economic independence contributed to the development of human rights norms in Nigeria. The memberships of Nigeria in the United Nations and African Union, the ratification of international human rights instruments and the intense pressure to end military dictatorship are among the factors that were instrumental to the development of human rights norms and institutions in Nigeria.

While Nigeria human rights norms and the mechanisms for their enforcement originated from the desire to end European imperialism and military rule, Canada's human rights development took a different course. International politics and Canada's strong desire to have a voice in the affairs of the United Nations, among other fora, spurred its adoption of policies and enactment of laws that promote human rights. Civil liberty organizations (notwithstanding their short-comings) and active provincial legislatures also played a great role in laying the foundations for the entrenchment of human rights in Canada. As I have demonstrated, the entrenchment of the Charter of Rights and Freedoms has contributed to the growth of human rights and

[399] Sir Hugh clifford's Consitution of 1922, Sir Arthur Richard"s Constitution of 1946, John S. marcpherson Constitution of 1951 and Oliver Lyttelton Constitution of 1954.

[400] For instance, the Nigerian National Democratic Party (NNDP) 1922, the Nigerian Youth movement (NYM) 1933, the Aba Women Association of 1939, and the National Council of Nigeria and the Cameroons (NCNC) 1944 were among the political parties and human rights NGOs formed during this era.

their enforcement in Canada. In essence, the development of human rights norms in Nigeria and Canada were both chequered.

Comparative Analysis of Human Rights Institutions in Nigeria and Canada

As I have shown, in Nigeria, the NHRC Act of 1995 established the NHRC. In Canada, the CHR Act of 1977 created the HRC and HRT. Both the CHR Act and the bodies created thereunder operated for eighteen years prior to the Nigerian NHRC Act and the body created pursuant to it. This is crucial in considering the growth, advancement and effectiveness of human rights institutions in Nigeria. The CHR Act was enacted in a democratic setting and during a period of intense pressure from growing international and domestic human rights movements. For its part, the NHRC Act was a military decree issued by an autocratic regime accused of human rights abuses.

Both the NHRC Act and the CHR Act are federal laws. However, while the CHR Act applies only to persons, establishments and institutions within the legislative competence of the federal parliament, the NHRC Act applies to all persons, establishments and institutions in Nigeria.

The main purpose of the CHR Act is to ensure equal opportunities for both private and public actors in Canada and to discourage discriminatory practices based on race, national or ethnic origin, colour, religion, age, sex, sexual orientation, marital status, family status or disability. The purpose of the NHRC Act is to deal with all forms of human rights issues. In other words, the bodies created under the CHR Act deal only with cases of discrimination. For its part, the body created under the NHRC Act deals with all forms of human rights issues and cases, including that of unlawful arrest and detention.

The comparative analysis in this section will pay particular attention to the composition of the human rights institutions, the appointment and removal of the members, the powers and functions, their funding and the enforcement of their decisions. This section will highlight the strengths and weaknesses of each human rights institution. This analysis will also be based on the guidelines and minimum standards for a national human rights institution as set out in the Paris Principles Relating to the Status of National Institutions for the Protection of Human Rights.[401] Although some international human rights scholars have expressed the view that the Paris Principles comprise an incomplete document that needs to be enlarged, these principles still represent the UN standard for an ideal national human rights institution.[402] Okafor and Agbakwa rightly state that a close reading of the Paris Principles shows that it pictures a particular kind of national human institution as an ideal type that ought to be replicated, as much as the context allows, by societies the world over.[403]

Composition

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[401] Paris Principles, *supra* note 70.
[402] See Okafor and Agbkwa, *supra* note 7.
[403] *Ibid* at 669.

According to the Paris Principles, "[t]he composition of the national institution and the appointment of its members, whether by means of an election or otherwise, shall be established in accordance with a procedure which affords all necessary guarantees to ensure the pluralist representation of the social forces (of civilian society) involved in the promotion and protection of human rights."[404] This principle is further expounded in the following way: "the composition of a national institution should, as far as possible, reflect the social profile of the community within which it operates."[405]

The NHRC Act established a governing council to discharge the responsibilities of the NHRC. According to the NHRC Act, the governing council is to be composed of a chairman, a representative from the Ministries of Justice, Foreign Affairs and Internal Affairs respectively, three representatives of registered human rights organizations in Nigeria, two legal practitioners, three representatives of the media (two of whom should be from the private sector), a representative of organized labour, two women with sufficient experience in human rights issues and the Executive Secretary of the commission.[406]

On the other hand, under the CHR Act, the HRC consists of the Chief Commissioner, the Deputy Chief Commissioner and such officers, and employees necessary for the proper conduct of the work of the commission.[407] Also, the HRT consists of a maximum of fifteen members, including the Chairperson and the Vice Chairperson.[408] The HRC Act further states that "appoint-

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[404] Paris Principles, *supra* note 70 at part II para 1.
[405] UN hand book, supra note 10 at para 84.
[406] NHRC Act (as amended), *supra* note 22, s 2(1) & (2).
[407] See CHR Act, *supra* note 238, ss 31, 32.
[408] *Ibid*, s 48.1(1).

ments are to be made having regard to the need for regional representation in the membership of the Tribunal."[409]

From the foregoing, the composition of the members of the NHRC, as set out in the NHRC Act, follows the UN guidelines for the composition of national human rights institutions contained in the Paris Principles. On the other hand, the composition of the HRC, as set out in the CHR Act, does not appear to meet the specification of the Paris Principles, at least not on its face. This is because the CHR Act does not specify that the appointment of the members of the HRC should be made in such a manner as to reflect the social forces in Canada. To meet the specification of the Paris Principles, it is expected that representatives from the Association of Native Indians, women's rights groups, labour groups, the disability rights movement, the children's rights movement, the civil rights movement, and religious groups should be considered in the appointment of the members of the HRC. Although the provisions of the CHR Act on the composition of the HRT seem to follow the Paris Principles, there is a need for clearer provisions which would state the criteria for such appointment so as to reflect regional representation.

As Linda Reif rightly noted, the viability and success of a national human rights institution does not depend solely on the legal framework but also on other social, political and economic factors.[410] Notwithstanding its adherence to UN standards, the poor performance of the NHRC and the general public outcry against ongoing human rights violations, especially extra-judicial killings, torture, arbitrary arrest and detention, lend credence to Reif's statements. For

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[409] *Ibid*, s 48.1 (4).
[410] Linda C. Reif, *supra* note 81 at 2.

its part, the HRC has been relatively impressive in its performance. Among other things, the HRC designed human rights compliance standards for employers. Between 2013 and 2014, the HRC had completed an employment equity audit with 57 employers who were unsuccessful in achieving equality in the workplace.[411] By March 2014, about 55 organizations registered for the Human Rights Maturity Model designed by the HRC.[412] In addition, the 2013-14 performance report of the HRC indicates that by March 2014 the HRC had brought to a complete resolution about 94 percent of the complaints brought to it, as against its 75 percent target.[413] It has also represented public interest in 38 percent of the complaints that were referred to the tribunal.[414]

Appointment and Removal of Members

The Paris Principles provide guidelines for the appointment and tenure of members of a national human rights institution, stating that "in order to ensure a stable mandate for the members of the national institution, without which there can be no real independence, their appointment shall be effected by an official act which shall establish the specific duration of the mandate. This mandate may be renewable, provided that the pluralism of the institution's membership is ensured."[415]

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411 See Departmental Performance Report – 2013 -14, Canadian Human Rights Commission. http://www.chrc-ccdp.gc.ca/eng/content/departmental-performance-report-2013-14 Retrieved on 30 August, 2015

412 *Ibid*.

413 *Ibid*.

414 *Ibid*.

415 Paris Principles, *supra* note 70 at partt II para 3.

Importantly, the method by which members of a national human rights institution are appointed contributes significantly to its independence and effectiveness.[416] The 1995 UN Professional Training Series No. 4 on Strengthening National Human Rights Institution states that the terms and conditions for appointing members of a national human rights institution should be set out in the law that constitutes the institution, and that such terms as the method of appointment, the criteria for appointment, the duration of appointment, whether members may be reappointed, who may dismiss members and for what reason and the relevant privileges and immunities should be clearly spelled out.[417]

Under the NHRC Act, the members of the NHRC are appointed by the President, subject to confirmation by the Senate.[418] Also, a member of the NHRC can be removed by the President subject to confirmation by a simple majority of the Senate.[419] The removal proceedings may be initiated by the President if any of the following applies to such member: if he or she becomes of unsound mind, becomes bankrupt, is convicted of a felony or any offence involving dishonesty or is guilty of serious misconduct in relation to his or her duty.[420] Moreover, a member of the NHRC holds office for a term of four years and may be reappointed for a second term of four years.[421]

In Canada, the members of the HRC are appointed by the Governor in Council. The Chief Commissioner and the Deputy Chief Commissioner are appointed for a term of seven years as

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[416] See also UN hand book, *supra* note 10 at paras 77, 79.
[417] *Ibid* at para 78.
[418] The NHRC Act (as amended), *supra* note 22, s 2(3)(b).
[419] *Ibid*, s 4(1).
[420] *Ibid*, s 4(1)(a – d).
[421] *Ibid*, s 3(1).

full-time members and can be reappointed for another term of seven years. Other members are appointed for a term not exceeding three years as part-time members and could be reappointed for another term of not exceeding three years as part-time member or in another capacity. A member of the HRC may be removed by the Governor in Council on address of the Senate and House of Commons.[422] Also, the Governor in Council has the power to appoint or remove from office the members of the HRT.

The appointment of the members of Nigeria's NHRC and Canada's HRC and HRT appears to be in line with the Paris Principles. The slight difference concerning who makes the appointment results from differences in the two countries' systems of government – the presidential system (in the case of Nigeria) and parliamentary democracy (in that of Canada). Again, while the NHRC Act clearly states the condition under which a member of the NHRC may be removed, the CHR Act leaves the discretion to the Governor in Council. This is worrisome as it could whittle down the independence of these human rights bodies. Members of Canada's HRC and HRT should be confident in their ability to discharge their duties without fear arising from their desire to retain their source of livelihood.

Powers and Functions

According to the Paris Principles, a national human rights institution should be vested with competence to promote and protect human rights.[423] The principles also stipulate that a na-

[422] See CHR Act, *supra* note 238, s 26.

[423] Paris Principles, *supra* note 70 at Part I, para 1.

tional human rights institution should be given a broad mandate and that its areas of competence should be clearly set forth in the relevant legislative text.[424]

Under the NHRC Act, the NHRC has a broad mandate. Thus, it has the powers to deal with all matters relating to the promotion and protection of human rights guaranteed under the constitution and the international human rights instruments to which Nigeria is a party. The NHRC Act sets forth in details the functions and powers of the NHRC in sections 5(a – s) and 6(a – g) respectively. The functions are investigatory, advisory and adjudicatory in form and also include research, legislative assessment and public enlightenment and so on.[425]

On the other hand, the mandate of the HRC and the HRT in Canada is specific in form and broad in means. In other words, the HRC and the HRT have the exclusive mandate to deal with all cases of discrimination prohibited by the CHR Act. However, other ancillary functions and powers set out in pursuance of the mandate of preventing discrimination are broad.[426]

It is important to note that while the CHR Act created two bodies to address the issue of discrimination, the NHRC Act, which deals with all human rights matters, created a single human rights commission to perform a large number of different functions. A system in which there are the HRC, HRT, Labour Relations Boards and other institutions with power to deal with a specific issue of human rights will generally be more efficient than a system with a single human right commission established to handle all matters relating to human rights. This is a huge advantage that Canada's human rights system has over that of Nigeria.

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[424] *Ibid* at Part I, para 2.

[425] See functions and powers of the NHRC discussed above.

[426] See the powers and functions of the Canadian Human Rights Commission and the Human Rights Tribunal discussed above.

The Funding

A national human rights institution that is adequately funded will be effective for the promotion and protection of human rights within its area of operation. In addition, a national human rights institution without the requisite financial autonomy may never be able to operate with the level of independence necessary for the successful and effective protection of human rights. In view of this, the Paris Principles recommend that a national human rights institution should be adequately funded and granted financial autonomy in order to ensure its independence.[427]

The NHRC Act expressly guarantees the financial autonomy of the NHRC. In the words of the NHRC Act, "[t]he fund of the commission shall be a charge on the Consolidated Revenue Fund of the Federation."[428] The Consolidated Revenue Fund of the Federation of Nigeria is the account into which the taxes and revenue of the state are deposited, and from which funds are withdrawn in order to defray the costs of public services. In Nigeria, some public bodies are legally shielded from undue interference by the executive arm of government. For example, to ensure this, the funds of the judiciary, the NHRC and other bodies should be independent of the control of politicians.

The CHR Act says nothing about the funding of the HRC and the HRT. There is also no mention in the CHR Act of whether the HRC or HRT are financially autonomous. However, the

[427] See Paris principles *supra* note 70 at Part II, para 2.
[428] The NHRC Act (as amended), *supra* note 22, s 12(2).

HRC and the HRT are funded by the Parliament of Canada. It is my view that adequate funding of the HRC and the HRT will guarantee their independence.

Enforcement of Decisions and Orders

There is no express mention of the enforcement of the decisions or orders of a national human rights institution in the Paris Principles. This omission may be due to the dominant emphasis of the advisory role of a national human rights institution during the conference that generated the Paris Principles. Part III the Paris Principles document sets out additional guidelines for a national human rights institution vested with “quasi-judicial competence”. Thus, it recognizes that a national human rights institution may be “authorized to hear and consider complaints and petitions concerning individual situations.”[429] It therefore stipulates that in such circumstances, a national human rights institution should seek an amicable settlement through conciliation or within the limit prescribed by law, through binding decisions.[430] In other words, there are no express guidelines under the Paris Principles in respect of enforcement of decisions of national human rights institutions.

In Nigeria, the NHRC is vested with quasi-judicial powers to hear and make binding decisions with respect to any complaint of a human rights violation that is brought before it. Thus,

[429] Paris Principles, *supra* at part III.
[430] *Ibid.*

such decisions are enforced as a judgement of a court.[431] The decisions of Canada's human rights institutions are also enforceable.[432]

Another significant fact about Canadian human rights bodies is that, out of all the rights guaranteed by the Charter of Rights and Freedoms, their functions are restricted to the prevention of discrimination. This speaks to the specialization of these bodies, which, in turn, enhances their effectiveness. The core concern of this thesis, i.e. the issue of unlawful arrest and detention, does not fall within their competence. However, it is my view that this study reveals areas of strength and weakness of both the NHRC and its Canadian counterparts, so that improvements can be made through comparative analysis. In addition, discussion of the dual human rights institutions in Canada is unavoidable, as it serves as a point of reference for restructuring Nigerian human rights institutions and the refinement of Nigeria's legal framework towards a dual system.

Comparative Review of the Judicial Approaches to Combatting Unlawful Arrest and Detention in Nigeria and Canada

The primary duty of the courts is to interpret and uphold the law. Human rights enforcement hinges more on the courts than any other human rights institution. In other words, the courts seem to be the central force in the legal system of every democratic state, in the sense that applications for judicial review of the decisions of administrative bodies/tribunals, human rights

[431] See the NHRC Act (as amended), *supra* note 22, s 22(1).
[432] See CHR Act, *supra* note 238, s 57.

enforcement and other civil and criminal matters are brought before them. Thus, the determination of whether an act or omission by any person, group, arm of government or any legal person violates human rights falls also within the competence of the courts. Specifically, section 46 of the Nigerian constitution provides that any person who alleges that any of his or her fundamental rights has or may have been violated can apply to a high court for redress. Section 24(1) of the Charter of Rights and Freedoms provides that anyone whose rights or freedoms, as guaranteed by the Charter, have been infringed or denied may apply to a court of competent jurisdiction to obtain a remedy. While a national human rights institution may be empowered to promote and enforce human rights, the courts (especially the superior courts) are seized with the overall competence to entertain all human rights-related claims, including those involving human rights bodies. Thus, under section 46(2) of the Nigerian constitution, a high court has the original jurisdiction to entertain applications for enforcement of human rights. Also, the courts (the superior courts) have both supervisory and appellate jurisdiction over human rights bodies with quasi-judicial powers such as the NHRC and the Human Rights Tribunal.

This part reviews the approaches adopted by the courts in enforcing the rights of the people against unlawful arrest and detention in Nigeria and Canada. This will be approached in two parts. First, I shall highlight and analyze the relevant portions of Canadian and Nigerian constitutional laws, which the courts interpret to protect people against unlawful arrest and detention. Second, I shall offer an analysis of the grounds upon which the courts tend to declare an arrest or detention as unlawful or arbitrary.

Review of the Constitutional/Charter Provisions against Unlawful Arrest and Detention

The principal constitutional safeguards in Nigeria against unlawful arrest and detention are contained in section 35.[433] This section provides that every person is entitled to his or her personal liberty and that no person shall be deprived of such liberty except as permitted by law.[434] The section goes on to enumerate the circumstances within which the right to personal liberty may be restricted.[435] In Canada, the rights and freedoms, including rights to personal liberty, guaranteed under the Charter are subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.[436]

Also, in Nigeria, a derogation of the rights to personal liberty is permitted during periods of emergency.[437] Such derogation must be to the extent that is reasonably justifiable for the purpose of dealing with the situation that exists during the periods of emergency. The courts consider these provisions when determining whether an arrest or detention is unlawful. Thus, any arrest or detention that does not accord with this constitutional provision or take place in manner that is not permitted by the constitution or other relevant legislation (especially those that relate to when an arrest may be made with or without warrant) will be declared unlawful by the courts.

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[433] 1999 Constitution (as amended), *supra* note 60.
[434] *Ibid*, s 35.
[435] See 1999 Constitution (as amended), supra, s 35(1)(a – f).
[436] The Charter of Rights, *supra* note 30 , s 1.
[437] According section 305(3) of the constitution, period of emergency includes a period when the federation is at war, when the federation is in imminent danger of invasion or involvement in a state of war, when there is actual breakdown of public order and public safety, or when there is an occurrence of or imminent danger, or the occurrence of any disaster or natural calamity affecting any part of the federation.

Another provision that appears to influence the decision of the courts in Nigeria on whether an arrest or detention is unlawful is subsection 35(4).[438] This subsection provides that any person who is arrested in execution of a court order or on reasonable suspicion of his or her having committed a crime should be brought before a court of law within a reasonable time for his or her trial. Subsection 35(5) defines "reasonable time" as a period of one or two days, or any other period that the court may consider reasonable under the circumstances of the case. Equally importantly, sections 3, 4 and 5 of the Nigerian Criminal Procedure Act specify the procedures for arrest as follows:

> "3. In making an arrest the police officer or other person making the same shall actually touch or confine the body of the person to be arrested, unless there be a submission to the custody by word or action.
>
> 4. A person arrested shall not be handcuffed, otherwise bound or be subjected to unnecessary restraint except by order of the court, a magistrate or justice of the peace or unless there is reasonable apprehension of violence or of an attempt to escape or unless the restraint is considered necessary for the safety of the person arrested.
>
> 5. Except when the person arrested is in the actual course of the commission of a crime or is pursued immediately after the commission of a crime or escape from lawful

[438] See *Amos Akila*.

> custody, the police officer or other person making the arrest shall inform the person arrested of the cause of the arrest."[439]

Under the Canadian Charter of Rights and Freedoms, the safeguards against unlawful arrest or detention are contained in sections 7, 9, 10 and 11. Section 7 provides, among other things, that everyone has a right to personal liberty with which they cannot be deprived except in accordance with principles of fundamental justice. Section 9 provides that everyone has the right not to be arbitrarily detained or imprisoned. Section 10 accords a person who is arrested or detained the right to be promptly informed of the reason for the arrest or detention, the right to counsel and the right to have the validity of the arrest or detention determined in court without delay. Section 11 secures the right of a person charged with an offence to be informed without unreasonable delay of the specific offence; to be tried within a reasonable time and not to be denied bail without just cause. These sections read together with other relevant sections and laws inform the decisions of the courts on whether or not any arrest or detention is unlawful.

Analysis of the Grounds which the Courts Considered before Declaring Arrest or Detention Unlawful

The courts in Nigeria and Canada have adopted a number of means for addressing cases of alleged unlawful arrest and detention. The grounds on which any case of arrest or detention may be held lawful or unlawful depend on the applicable laws and the specific circumstances of

[439] *The Criminal Procedure Act*, LFN, 1990, Cap 80.

each case. In this section, I will analyze the cases of unlawful arrest and detention discussed in the previous chapters so as to highlight the grounds on which the courts have held arrest or detention to be unlawful.

In Nigeria, there are not many cases of unlawful arrest and detention. As a result, only three cases apposite to this paper were reported in Chapter Two. Those three cases will be analyzed here to determine the grounds upon which Nigerian courts declare arrests and detentions as unlawful.

In *Abacha v Fawehinmi*,[440] the action arose during the military government of General Sani Abacha. By the Constitutional (Suspension and Modification) Decree of 1993 (Decree No. 107 of 1993), Abacha's regime suspended the fundamental rights provisions of the 1979 Constitution of the Federal Republic of Nigeria; courts were stripped of their power to consider actions that challenge the legality of any act done in pursuance of military decree and edicts. The acts complained of were carried out in pursuance of a military decree – State Security (Detention of Persons) Decree No. 2 of 1984 (as amended). Obviously, the courts were restricted by Decree No. 107 of 1993 from hearing the case. That notwithstanding, the court adopted a strict interpretation of the military decree to ensure the protection of the plaintiff/respondent against arbitrary arrest and detention. Thus, the following facts as put forth by the plaintiff/respondent were considered by the courts in holding the arrest and detention of the plaintiff/respondent to be unlawful. First, the plaintiff/respondent was neither informed of the reason for his arrest at the time of his arrest nor charged with a specific offence. Second, the plain-

[440] *Abacha v Fawehinmi*, *supra* note 184.

tiff/respondent was arrested without warrant; the arrest was not in pursuance of an order of a court. Third, the plaintiff/respondent was detained without trial within a reasonable time. Finally the court held that the arrest and detention of the plaintiff/respondent was in breach of his fundament rights guaranteed under the African Charter on Human and Peoples' Rights (Rectification and Enforcement) Act (African Charter Act). Most importantly, the court reasoned that since Decree No. 107 of 1993 did not expressly suspend the provisions of the African Charter Act, the decree was not intended to suspend the human rights provisions of the Act more so as the Act is a law with international flavour. This is one of the few cases where the Nigerian courts demonstrated some level of judicial activism to enforce the fundamental rights of the people.

In *Amos Akila*,[441] although the appellants were arrested after the execution of a search warrant upon which the appellants were found to be in unlawful possession of arms and ammunition, the court held in favour of the appellants. First, the courts held that arresting the appellants without informing them in writing of the facts and relevant grounds was in breach of their constitutionally protected rights, and therefore unlawful. Second, the court found that the continued detention of the appellants for more than two months without trial was unconstitutional and unlawful.

Finally, in *Mclaren*,[442] the court held that the arrest and detention of the plaintiff/respondent was "prima facie" unlawful because the police are not empowered to enforce a

[441] *Amos Akila & ors v DG SSS & ors*, *supra* note 188.
[442] *MClaren v Jennings*, *supra* note 189.

contract or act as recovery agents. In addition, the arrest and detention was not on the basis of the commission of any offence recognized by Nigerian law. It was held that the arrest and detention was arbitrary and constituted a flagrant abuse of power.

In Canada, the courts adopt a very strict interpretation of the relevant provisions leaning against exercise of the power to arrest or detain in an arbitrary manner. In *R. v. Mann*,[443] the court stated as follows:

> "Individual liberty interests are fundamental to the Canadian constitutional order. Consequently, any intrusion upon them must not be taken lightly and, as a result, police officers do not have *carte blanche* to detain. The power to detain cannot be exercised on the basis of a hunch, nor can it become a *de facto* arrest."[444]

In *R. v. McIntosh*,[445] Lamer C.J. elaborated on the position of the courts in cases where the liberty of a person is at issue:

> "the overriding principle governing the interpretation of penal provisions is that ambiguity should be resolved in a manner most favourable to accused persons. … [T]he special nature of the *Criminal Code* requires an interpretive approach which is sensitive to liberty interests. Therefore, an ambiguous penal provision must be interpreted in the manner most

[443] *R. v. Mann* 2004 SCC 52, 2004 CarswellMan 303, 2004 CarswellMan 304, [2004] 11 W.W.R. 601, [2004] 3 S.C.R. 59, [2004] S.C.J. No. 49.
[444] *Ibid* at para 35.
[445] *R. v. McIntosh*, [1995] 1 S.C.R. 686 (S.C.C.).

> favourable to accused persons, and in the manner most likely to provide clarity and certainty in the criminal law."[446]

In *Marcotte v. Canada (Deputy Attorney General)*,[447] Dickson J. restated the courts' position in cases involving arrest or detention of persons as follows:

> "No authority is needed for the proposition that if real ambiguities are found, or doubts of substance arise, in the construction and application of a statute affecting the liberty of a subject, then that statute should be applied in such a manner as to favour the person against whom it is sought to be enforced. If one is to be incarcerated, one should at least know that some Act of Parliament requires it in express terms, and not, at most, by implication."[448]

In general terms, the courts consider whether an arrest or detention was made in a way that is consistent with principles of fundamental justice;[449] whether the arrestee was, upon arrest, promptly informed of the reason for the arrest;[450] whether the arrestee was, upon arrest, informed that he or she has the right to retain and instruct a counsel;[451] whether the search or seizure for which a person was detained was reasonable;[452] where a person is charged with an

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[446] *Ibid* at paras 38, 39.
[447] *Marcotte v. Canada (Deputy Attorney General)* (1974), [1976] 1 S.C.R. 108(S.C.C.).
[448] *Ibid* at para 115.
[449] See *R. v. Cousins* (2009) ONCJ 481, (2009) CarswellOnt 6160, [2009] O.J. No. 4252, 85 W.C.B. (2d) 14 at para 80.
[450] *R. v. K. (A.)* [2014] CarswellOnt 11378, [2014] ONCJ 374 at paras 56, 57
[451] See *R. v. Guce* [2011] CarswellOnt 2605, [2011] ONSC 2331at para 64.
[452] See *R. v. K. (A.), supra* note 404 at para 61. See also *R. v. Hoang* [2010] CarswellBC 2483, [2011] B.C.L.D. 1440 at paras 30, 36.

offence, whether he or she was informed without unreasonable delay of the specific offence, tried within a reasonable time or denied bail without just cause.[453]

Courts in Canada also consider a number of specific grounds when examining the legality of an arrest or detention. First, courts consider the question whether an arrest or detention can be said to constitute an abuse of power. Where the law in question gives the power to exercise discretion to the arresting authority, the courts, through strict and purposeful interpretation, ensure that such discretion is exercised in a manner permitted by the law.[454] In *Dulude v. Canada,* the Federal Court of Appeal held that the plaintiff's arrest by the military police was "nothing less than an unlawful exercise of the discretionary power conferred by ss. 154 and 156 of the Act: it was nothing but a demonstration of authority and force which was as futile as it was unjustified."[455]

In Canada, detention for Charter purposes must involve substantial physical or psychological restraint and therefore not every delay, stop or keeping waiting for investigative purposes amounts to detention. Importantly, arrest should occur by warrant, except in circumstances stipulated by section 495(1) of Criminal Code. Except otherwise stipulated by law, an arrest without warrant will only be lawful if the arresting officer has reasonable and probable grounds on which to base the arrest and that the grounds are objectively justifiable.

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[453] See *R. c. Basque* [2010] NBCP 27, [2010] CarswellNB 252, [2010] A.N.B. No. 166, for trail within a reasonable time, see *R. v. MacMillan* [1991] CarswellOnt 100, [1991] O.J. No. 3386.
[454] See *Dulude v Canada supra* note 355; see also *Berketa v Niagara Regional Police Board*, *supra* note 365 at para 39.
[455] *Dulude v Canada*, *supra* note 355 at para 16.

Thus, the courts consider whether there exist objective reasonable grounds for making an arrest or detention, and if the arresting officer made the arrest on the subjective belief that such objective reasonable grounds exist at the time of making the arrest.[456] Thus, where the law requires the existence of objective grounds for the police to make an arrest without warrant, the courts strictly insist that there must be a subjective belief on the part of the arresting officer(s) that such objective grounds exist. Any arrest made in the absence of the subjective belief renders such arrest unlawful even though objective grounds may exist when the arrest is made. This was why the court in *R v. Feeney* held that the arrest made by the police in the case was unlawful.[457] The court observed that even the arresting police officers themselves acknowledged they had no subjective belief that reasonable grounds existed to arrest the accused when they proceeded to the accused's home. That very fact rendered the subsequent arrest defective in law and was therefore held unlawful.

Furthermore, the courts try to determine whether the police used excessive and unreasonable force when making arrest. In *Davidson*,[458] the court found that the police used excessive force when arresting the plaintiff. The court also found that the plaintiff was humiliated, embarrassed, intimidated, harassed and subjected to unnecessary pain and suffering at the

[456] R v Frieburg, *supra* note 352 at para 23.

[457] *R v Feeney*, *supra* note 350. Also in *R v Frieburg,* the court found that there was nothing in the evidence which shows that the police officers made the arrests on their subjective/personal belief that the accused persons committed indictable offence or that objective reasonable grounds exist for making the arrests.

[458] *Davidson*, *supra* note 358.

bottom of the exit stairs by being forced to the ground and held while being coerced into responding to demands made of him by the police.[459]

Whether an arrest was made without warrant and in circumstances which justified the arrest is also considered depending on the facts of the case. In addition, where an arrest is made in a residential home without warrant, the courts consider whether the police officer had permission to enter into the home before making the arrest. These grounds were considered by the courts in *Collins v. Brantford Police Service Board*[460] and *Hudson v. Brantford Police Service Board*.[461] In *Collins,* the second arrest of the plaintiff, which was the cause of action in the suit, was without warrant and made in circumstances that did not justify the arrest. Consequently, the arrest and detention were held to be arbitrary and unlawful. In *Hudson,* the court found that the plaintiff was arrested in his residential home without warrant, the arresting officers had no authority to enter the residential home and the officers were not in hot pursuit of the plaintiff. The court held that the police officers trespassed at the time of the purported arrest and that rendered the arrest unlawful.

Also, where an accused person alleges that he or she has been arbitrarily detained by the police in a random stop, the courts examine whether such a random stop is authorized by the relevant law. Thus, a random stop that is not permitted by law may be held to constitute arbitrary detention. In *R v. Lux*,[462] which was discussed above, the issue for determination be-

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[459] See also *Dulude v Canada, supra* note355.
[460] *Collins v Brantford Police Service Board, supra* note 364.
[461] *Hudson, supra* note 366.
[462] *R v Lux*, supra note 368.

fore Saskatchewan Court of Appeal, among others, was “whether s 209.1 of The Traffic Safety Act[463]authorizes peace officers to randomly stop vehicles in private parking areas, to check traffic or safety violations, without reasonable believe or suspicion that violation has occurred.”[464] The court held that s. 209.1 of The Traffic Safety Act does not in any way authorize peace officers to conduct random stops for traffic purposes on private property used as a parking area.[465] Consequently, the court held that the random stop of the accused person on the private parking area for the purpose of traffic checks constituted arbitrary detention that infringed the accused’s s 9 Charter rights.[466] The court reasoned that the objective of the Traffic Safety Act is to provide for safe operation of motorized vehicles on a highway and that the Act excludes from its definition of “highway” privately or publicly owned areas that are primarily intended to be used for parking vehicles.[467] Importantly, the court noted that any law that tends to encroach upon a person’s privacy or take away a right should be interpreted strictly.[468] The Canadian cases cited and reviewed above demonstrate that the courts in Canada, a bit more than their Nigerian counterparts, adopt a strict interpretation of any law which permits acts that invade privacy, or that take away or limit peoples’ rights. The courts seek more jealously to protect accused Charter rights except in circumstances where, upon thorough scrutiny, the act or acts that derogate from these rights are within “such reasonable limits prescribed by law as can be demon-

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[463] The Traffic Safety Act, SS 2004, CT 18.1.
[464] *R v Lux,* supra note 368 at para 2.
[465] *Ibid* at para 31.
[466] *Ibid* at para 56.
[467] *Ibid* at paras 32, 33.
[468] *Ibid* at 22.

strably justified in a free and democratic society."[469] The stance of the Canadian courts against arbitrary arrest and detention was further demonstrated in *R v. K (A)*,[470] where the court held that unduly prolonged investigative detention arising from unreasonable suspicion constituted arbitrary detention. The court noted that the police suspicion of the accused and his group triggered off by the fact that the group was black males running towards their parked car – a high-end SUV, was unfounded and unreasonable. The court found that those were no reasonable grounds to justify the suspension of the accused's Charter rights. The court further stated that admission of evidence obtained in contravention of the accused's Charter rights would bring the administration justice into disrepute.[471]

Finally, both the Nigerian and Canadian courts have demonstrated some level of judicial activism in enforcing human rights, specifically the right not to be arrested or detained arbitrarily. However, *Abacha v. Fawehinmi* and *Amos Akila* reveal the limitations in Nigerian law. Notably among them are the provisions of a few Nigerian laws which circumscribe the powers and jurisdiction of the courts as revealed in *Abacha v. Fawehinmi*; and the constitutional permission to detain accused persons for up to two months as revealed in *Amos Akila.* I want to add that as much as the Canadian courts cannot be said to be infallible, the cases reported and analyzed in this paper reveal that the Canadian courts have gone further than their Nigerian counterparts.

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[469] Charter of Rights and Freedom, supra note 30, s 1.
[470] *R. v. K. (A.)* (2014) ONCJ 374, (2014) CarswellOnt 11378, [2014] O.J. No. 3908, 116 W.C.B. (2d) 138, 13 C.R. (7th) 75.
[471] *Ibid* at para77.

The courts in Nigeria may, in addition to the adoption of strict cannon of interpretation, take the following measures to further discourage arbitrary arrest and detention. First, the courts should exclude or refuse to admit any evidence which the police obtained against an accused person in an unlawful arrest or in a manner that is in breach of the accused's fundamental rights. This measure will compel the police to adhere strictly to the law when contemplating making an arrest or detention, knowing that any evidence obtained in a manner that is in breach of an accused's rights will be rejected by the courts. Second, the courts may, in favour of an accused person, award exemplary, aggravated or punitive damages against the police and any person who assists the police in making unlawful arrest or detention. Finally, the courts should always, in any case of unlawful arrest or detention, make an order that the police should tender or make a public apology to any person unlawfully arrested or detained by the police. This measure is particularly in line with the provisions of section 35(6) of the Nigerian constitution which provides that any person who is unlawfully arrested or detained shall be entitled to compensation as well as a public apology from the appropriate authority or person.

On the other hand, section 24(1) of the Canadian Charter of Rights and Freedoms provides that anyone whose rights or freedoms have been infringed or denied may apply to a court of competent jurisdiction to obtain such remedy as the court considers appropriate and just in the circumstances. The Canadian cases discussed above reveal that Canadian courts do not only adopt strict interpretation against unlawful arrest and detention but also award damages (including moral, exemplary and punitive damages) against the police where any arrest or detention is found to be unlawful. For example, in *Dulude*,[472] the court awarded $10,000 moral damages in favour of the appellants. Similarly, in *Davidson*,[473] the plaintiff was awarded damages including $50,000 in aggravated damages and $125,000 in punitive damages. The court also awarded $25,000 in damages in favour of the plaintiff. Put succinctly, the courts in Canada often employ measures such as the award of damages and exclusion of evidence (that could bring the administration of justice into disrepute) in order to deter arbitrary arrest or detention.

In conclusion, the historical development of human rights in Nigeria and Canada reveal the importance of constant reassessment of human rights laws and the legal frameworks of human rights institutions to ensure their pragmatic and progressive improvement. Save for the few areas that were identified above, the legal frameworks of the human rights institutions in Nigeria and Canada are ideal for effective and efficient promotion of human rights. What is crucial and much-needed in Nigeria now is the amendment of certain human rights-related provisions of the constitution and other laws relating to the issue of arrest and detention, which could encourage arbitrary arrest or detention. In Nigeria, the issue of unlawful arrest and detention falls within the competence of both the NHRC and the courts. While the NHRC needs to be reinforced so that it may be able to use the powers at its disposal in dealing with human rights issues, particularly unlawful arrest and detention, the courts should, among other things, seek to deter unlawful arrest and detention through the exclusion of evidence obtained in violation of human rights and the award of moral, punitive and aggravated damages.

[472] *Dulude v Canada*, *supra* note 355.
[473] *Davidson v Toronto Blue Jays Baseball Ltd*, *supra* note 358.

Conclusion and Recommendations

As noted in the Introduction, the principal objective of this thesis is to demonstrate that the NHRC is sufficiently empowered under the enabling law to tackle the issues of unlawful arrest and detention in Nigeria and to make recommendation for improvement. While noting that the identified pitfall in the Canadian human rights system be addressed, the underlying goal of this thesis is to identify those aspects of the Canadian human rights system that could be borrowed and recommend them for the improvement of the Nigerian human rights system. The critical analysis of human rights norms and the framework of human rights institutions in Nigeria and Canada reveal a number of legal and administrative pitfalls, particularly in Nigeria, that need to be addressed in order to tackle effectively the problem of unlawful arrest and detention.

The following issues were identified and should be addressed to ensure an effective human rights system capable of tackling, among other things, unlawful arrest and detention. First, the NHRC Act created a single body with enormous duties, including the duty of dealing with all matters relating to human rights guaranteed under the Nigerian Constitution and the international and regional treaties to which Nigeria is a party. Thus, the administrative, investigative and quasi-judicial functions specified by the NHRC Act are performed by a single body – the NHRC. Having only a single human rights body handle such wide-ranging duties gravely limits its effectiveness. In this respect, it would be worth borrowing from the Canadian human rights system, in which one aspect of human rights – the issue of discriminatory practices prohibited under law – is handled by two human rights bodies.

Second, there are a number of laws in Nigeria that derogate from the right not to be arbitrarily arrested or detained in an unnecessary and unjustifiable way. These include the provisions of section 35(4)(a & b) of the Nigerian Constitution and section 10 (1)(i & j) of the Nigeria Criminal Procedure Act ("CPA"). Section 35(4)(a & b) permit the police to arrest and detain a person for a period of two months without trial if that person is arrested on the reasonable suspicion of having committed a criminal offence. Section 10(1)(i & j) of CPA empowers the police to arrest without warrant any person who has no "ostensible means of subsistence" and cannot give a satisfactory account of himself, as well as any person taking precautions to conceal his or her presence in circumstances that suggest that such precaution is with a view to commit criminal offence.

Third, the critical analysis of the framework of the NHRC and the pattern of unlawful arrests and detentions in Nigeria reveal a certain lack of will power on the part of the NHRC to invoke its quasi-judicial powers in dealing with human rights issues in Nigeria.

In addition, under the CHR Act, the procedure for the appointment and removal of the members of the HRT is unsatisfactory and worrisome. The law empowers the Governor-in-Council to appoint and remove from office members of the HRC without allowing such power to be checked by the Parliament of Canada. The silence of the CHR Act on the conditions under which the members of the HRC and HRT may be removed from office also calls for serious attention. The lack of robust provisions for pluralist representation in both the HRC and the HRT under the CHR Act gives rise to a grave concern in regard to their capacity to protect and promote human rights.

Recommendations: Establishment of Dual Human Rights Bodies under the NHRC Act

To deal effectively with human rights issues in Nigeria, particularly the grave issues of extra-judicial killings, torture and unlawful arrest and detention, there should be established pursuant to the NHRC Act a human right tribunal to work alongside the NHRC. The tribunal should be known as the National Human Rights Tribunal ("NHRT"). This calls for the amendment of the NHRC Act and the reorganization of the existing NHRC. The major challenge of the NHRC is the enormity of the duties and functions set out in the Act. The statutory duties of the NHRC under the NHRC Act, which include dealing with all matters relating to human rights guaranteed by the Nigerian Constitution, international and regional human rights instruments to which Nigeria is a party, is too enormous for one body to effectively handle. The administrative, investigative and adjudicative duties as well as duties of research, public enlightenment and several other ancillary duties are placed on the NHRC in a multi-tribal and multi-linguistic country of approximately 170 million. As shown in this thesis, the Canadian human rights system is a good point of reference in terms of the need for dual human rights bodies. The CHR Act established the HRC and HRT to deal with a single human rights issue, namely discriminatory practices prohibited by law. Apart from handling a single human rights subject, both bodies have distinct functions that are assigned to them under the CHR Act. Thus, the HRC focuses on the administrative and investigatory matters, while the HRT is seized with quasi-judicial matters. The establishment of dual human rights bodies to deal with human rights issues in Nigeria will not only ensure effectiveness but will also promote expertise. Presently, the NHRC seems to focus on public education of individuals, groups and institutions in the best human rights practices and research, paying little or no attention to its investigatory and quasi-judicial functions. Given the provisions of the NHRC Act, the establishment of a human tribunal to work with the NHRC would greatly improve the investigation and determination of human rights violations in Nigeria. Importantly, I also recommend that the governments of the thirty-six states of the federation of Nigeria should borrow a leaf from the provinces of Canada by establishing similar human rights commissions and tribunals in their respective states.

Recommendations: The Review and Amendment of S. 35(4)(a & b) of the Nigerian Constitution

Section 35(4)(a & b) of the Nigerian Constitution is obviously in conflict with prevailing human rights norms. It amounts to an unreasonable and unjustifiable derogation from the right to personal liberty. The provisions are reproduced here for clarity and convenience:

> "35(4) Any person who is arrested or detained in accordance with subsection (1) (c) of this section shall be brought before a court of law within a reasonable time, and if he is not tried within a period of –
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> (a) two months from the date of his arrest or detention in the case of a person who is in custody or is not entitled to bail; or
>
> (b) three months from the date of his arrest or detention in the case of a person who has been released on bail, he shall (without prejudice to any further proceedings that

> may be brought against him) be released either unconditionally or upon such conditions as are reasonably necessary to ensure that he appears for trial at a later date."[474]

Subsection 1(c) states as follows:

> "(1) Every person shall be entitled to his personal liberty and no person shall be deprived of such liberty save in the following cases and in accordance with a procedure permitted by law –
>
> (c) for the purpose of bringing him before a court in execution of the order of a court or upon reasonable suspicion of his having committed a criminal offence, or to such extent as may be reasonably necessary to prevent his committing a criminal offence."[475]

In *Amos Akila & Ors v Director General Security Services & Ors*,[476] one of the reliefs sought by the appellants was a declaration that their continued detention for more than two months without trial was unlawful. In interpreting section 35(4)(a), the court held, *inter alia*, that the continued detention of the appellants for more than two months without trial in a court of competent jurisdiction was unlawful. The necessary implication of this interpretation is simply that law enforcement agents in Nigeria are permitted to detain a person under investigation for two months without trial. This provision is manifestly unjustifiable. It clearly encourages arbitrary arrest and detention. It is also an obstacle in the struggle against unlawful arrest and detention. It should be reviewed and amended without delay.

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[474] The 1999 Constitution (as amended), *supra* note 60, s 35(4)(a)(b).
[475] *Ibid*, s 35(1)(c).
[476] *Amos Akila*, *supra* note 188.

Recommendations: Review of Section 10(1)(i & j) of the Criminal Procedure Act ("CPA")

A good number of cases involving indiscriminate arrest and detention in Nigeria are justified by the police under section 10(1)(i & j) of the CPA. The section states as follows:

> "10. (1) Any police officer may, without an order from a magistrate and without a warrant, arrest
>
> (I) any person who has no ostensible means of subsistence and who cannot give a satisfactory account of himself, and
>
> (j) any person found in the State taking precautions to conceal his presence in circumstances which afford reason to believe that he is taking such precautions with a view to committing an offence which is a felony or misdemeanour."[477]

The law does not set out the standard for measuring who may be said to be a person without "ostensible means of subsistence." This is left for the police officers to decide. This is particularly worrisome since the police are permitted under section 35(4)(a & b) of the Nigerian Constitution to arrest and detain a person for two months without trial. The current age of technology, in which a lot of legitimate transactions are carried on through the internet, renders the law somewhat obsolete. The poverty rate and other circumstances in Nigeria make the law harsh on the people. In Nigeria, there are a lot of property agents. A good number of these agents are people who are unemployed or who lost their jobs, people who do not have the means to register and carry on businesses or who do not have well-defined means of subsistence. Yet they are

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[477] *The Criminal Procedure Act*, *supra* note 172, s 10(1)(i) & (j).

typically harmless. Thus, considering the level of corruption among police officers in Nigeria, this law permits the police to arbitrarily arrest and extort money from harmless citizens. Paragraph (j) of section 10(1) is equally worrisome. The indiscriminate arrest of people by the police is a sufficient reason for a person to take precautions to conceal his or her presence, especially when he or she sees patrolling police officers. This could be misinterpreted by the police to mean that such precaution is taken with a view to committing an offence. It is my view that, considering the circumstances in Nigeria, section 10(1)(i & j) should either be amended or completely expunged from the CPA. It is capable of encouraging arbitrary arrest or detention.

Recommendations: Adoption of Stricter Cannon of Interpretation, General and Punitive Damages by the Courts to deter Arbitrary Arrest and Detention

The courts have a greater duty in the promotion and protection of human rights. While it is acknowledged that the Nigerian courts have employed strict interpretation in some human rights cases, the adoption of a stricter canon of interpretation of the police powers of arrest or detention will go a long way to deter unlawful arrest and detention. The Canadian system is also a good point of reference. The stricter canon of interpretation has been employed by the Canadian courts in a number of cases. For example, in *R v Feeney,*[478] the Supreme Court of Canada insisted that even where objective grounds exist to make an arrest without warrant, an arrest made in the absence of a subjective belief that such objective ground exists will be de-

[478] *R v Feeney*, *supra* note 350.

clared unlawful.[479] A similar decision was handed down by the Manitoba Court of Appeal in *R v Frieburg*,[480] where it was found that the reason for the arrest of the accused was to keep her away from her residence and not that there was a reasonable ground to believe that she committed an offence. The above interpretation helps to keep the police strictly within the law when contemplating making an arrest.

Furthermore, the courts could employ deterrent measures to check and forestall human rights violation, particularly unlawful arrest and detention. It is my view that the award of general and punitive damages against the police for arbitrary arrest or detention will serve as a potent deterrent measure. A leaf could be borrowed from cases decided by the Canadian courts where damages have been awarded to deter arbitrary arrest and detention. For example, in *Davidson v Toronto Blue Jays Baseball Ltd*,[481] the court awarded in favour of the plaintiff $50,000 in aggravated damages and $125,000 in punitive damages for his unlawful arrest. Also, in *Dulude v Canada*,[482] the court awarded $10,000 moral damages in favour of the appellant for his unlawful arrest and detention. The issue of unlawful arrest and detention in Nigeria could be minimized if the Nigerian courts would employ the above measures in similar cases.

Recommendations: The Will Power to Exercise Quasi-Judicial Powers

479 *Ibid* at para 29.
480 *R v Frieburg*, *supra* note 352.
481 *Davidson, supra* note 358.
482 *Dulude*, *supra* note 355.

The legal framework of the NHRC, as demonstrated in this thesis, is relatively sufficient for effective promotion of human rights. One of the major challenges of the NHRC in dealing with unlawful arrest and detention is the lack of the necessary will power to invoke its quasi-judicial powers. The *Global Rights* case demonstrates that the NHRC is sufficiently empowered under the law, especially with quasi-judicial powers, to carry out its statutory duties.[483] After the *Global Rights* case, the NHRC has never invoked similar powers to deal with issues of unlawful arrest and detention. What I discovered in the course of my research is that the NHRC acts more as a rapporteur than as an institution endowed with the requisite investigative and quasi-judicial powers to tackle rampant cases of human rights violation in Nigeria. In view of this, it is my recommendation that the NHRC should reevaluate its performance vis-à-vis the enabling law and put to use its quasi-judicial powers in addressing the problem of unlawful arrest and detention in Nigeria.

Conclusion

In this thesis, I have examined human rights norms and the legal frameworks of human rights institutions in Nigeria and Canada, especially as they concern the issue of unlawful arrest and detention. This has been done through the examination of the historical development of human rights norms in the respective jurisdictions, the critical analysis and comparative review of the NHRC Act and CHR Act, and most importantly, the review of cases of unlawful arrest and detention. The focus has been on the powers of the NHRC under the NHRC Act to tackle unlaw-

[483] *The Global Right, supra* note 140.

ful arrest and detention by the Nigerian police and also the judicial approaches to cases of unlawful arrest and detention. The critical analysis of human rights institutions in Canada and the review of judicial pronouncements by Canadian courts on cases of unlawful arrest and detention provided the substructure for the comparative analysis. The Canadian system offered a second perspective on structure of human rights institutions for greater efficiency and preferable judicial approaches to cases of unlawful arrest and detention.

The thesis has demonstrated that, considered in light of the Paris Principles, the NHRC is empowered under the NHRC Act to deal with human rights violations, particularly issues of unlawful arrest and detention. It has shown that the NHRC has the legal personality, financial autonomy, institutional independence and requisite powers, including quasi-judicial powers, to effectively carry out its mandate.

The thesis has further demonstrated that the courts will be positioned to deter and minimize unlawful arrest and detention more effectively if they adopt a stricter canon of interpretation, and award punitive and general damages to victims of arbitrary arrest or detention. In particular, it has argued that the amendment of section 35 (4) of the Nigeria Constitution and section 10(1)(i and j) of the CPA will substantially discourage arbitrary arrest and detention and aid a judicial interpretation that deepens the full enjoyment of the right to personal liberty.

Finally, I have also suggested that given the nature and enormity of the functions of the NHRC, the establishment of a separate human right tribunal, like the Canadian HRT, could ensure effective and efficient promotion and protection of human rights. This calls for the amendment of the NHRC Act and the reorganization and restructuring of the NHRC in Nigeria.

Since legislative amendment takes a longer time, the NHRC should assume and exercise its investigative and quasi-judicial powers to deal with unlawful arrest and detention without delay.

In addition to the insights offered in this thesis, further research and action on such areas as the political and socio-economic factors that impede the NHRC and the courts in the protection of human rights in Nigeria could enrich the literature on this subject. It is hoped that this thesis will contribute to scholarship and help spur the effective protection of the right not to be arbitrarily arrested or detained.