

**THE CHANGING FACES OF PUBLIC INQUIRY: TOWARDS A REGULATORY
FRAMEWORK FOR TASK FORCES IN KENYA**



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DECLARATION

I, ELIZABETH WANJIRU WAMBIRI, do hereby declare that this is my original work and has not been submitted to any institution for the award of a diploma, degree or post-graduate qualification.

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This project has been presented for examination with my authority as the University Supervisor.

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Signature.....

Date.....

DEDICATION

This work is dedicated to my parents Daniel Wambiri and GladwellWambiri for their continued support and whose immense dedication to educate us continues to inspire me.

ACKNOWLEDGEMENTS

I thank the Almighty God for the privilege, opportunity, strength and grace and grace to undertake my studies in a relatively short period of time. I have truly experienced His faithfulness.

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I wish all of you, God's blessings.

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LIST OF ABBREVIATIONS

AfriCOG-	African Centre for Open Governance
AG-	Attorney General
CAJ-	Commission on Administration of Justice
COK-	Constitution of Kenya
CS-	Cabinet Secretary
CIIs-	Commissions of Inquiry
DPP-	Directorate of Public Prosecution
DCI-	Directorate of Criminal Investigation
EACC-	Ethics and Anti-Corruption Commission
GOK-	Government of Kenya
ICC-	International Criminal Court
ICCPR-	International Convention on Civil and Political Rights
ICJ-	International Court of Justice
ICTJ-	International Centre for Transitional Justice
IPOA-	Independent Policing Oversight Authority
KNCHR-	Kenya National Commission on Human Rights
KNDR-	Kenya National Dialogue and Reconciliation
OAG & DOJ-	Office of the Attorney General and Department of Justice
ODM-	Orange Democratic Movement

TORs-	Terms of Reference
PEV-	Post-Election Violence
PNU-	Party of National Unity
SAPs-	Structural Adjustment Programmes
TJRA-	Truth Justice and Reconciliation Act
TJRC-	Truth Justice and Reconciliation Commission
TRCs-	Truth, Reconciliation Commissions

ABSTRACT

This project examines the changing faces of public inquiry in Kenya. It demonstrates the transformation of the models of public inquiry in Kenya through different legal and political regimes.

This study makes three key arguments. The first argument is that Kenya has had a long history of establishing ad hoc commissions of inquiry to look into matters of public and national concern; nevertheless, in the post-2010 period the government shifted to the use of task forces and other mechanisms. The study argues that this is the case because the Constitution introduced significant structural changes and redesigned institutions that carry out functions incidental to public inquiry. The reconfiguration of these institutions has further diversified and strengthened the practice of public inquiry.

Secondly, the study argues that the model of public inquiry employed resonates with the existing legal and political order. The impetus behind the various models of public inquiry is largely motivated by the regime in power and the legal order in place. Thirdly, the study argues that task forces in the Uhuru Kenyatta regime mirror commissions established during Jomo Kenyatta's regime in that they focus on policy.

The study illustrates this by employing a mixed methodological approach incorporating historical and doctrinal research methods. The study employs doctrinal research methodology in interpreting and analyzing legal concepts, principles, and guidelines using reasoning in order to deduct conclusions. The historical method aids in interrogating whether the history of Kenya within the public inquiry sphere has had any normative force in shaping the current trends.

The existing literature fails to address the reduction in the use of commissions of inquiry and the increasing trend of employing task forces in carrying out public inquiry in the post-2010 dispensation. This project helps the reader understand the history of public inquiry in Kenya through various legal and political regimes. The study also intervenes in addressing the departure from the dominant use of CIs to employing task forces and other mechanism of public inquiry.

The study reveals that in the post 2010 regime, the government has predominantly used task forces as a tool of public inquiry for legal and policy reform. The study also reveals that task forces as currently constituted are mandated to study legal problems and make recommendations on reforms as well as probe into issues of public concern. This study reveals that there are two main types of task forces; policy implementation task forces and investigative task forces.

To strengthen the value of task forces, the study proposes legal and policy frameworks that govern the establishment and operation of task forces. It proposes a detailed criterion for setting up task forces, strict timelines and publication of the findings by the task forces.

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CHAPTER ONE: INTRODUCTION

1.0 Introduction

This study investigates the changing faces of public inquiry through the different legal and political regimes. Historically, Kenyan governments have predominantly resorted to using Commissions of Inquiry to probe into matters of public and national interest.¹ However, in the post-2010 period, the Government has shifted to invoking the use of task forces, parliamentary committees, and boards as the preferred mechanism for public inquiry.² The study examines this new trajectory in the practice of public inquiry.

Public inquiries are vehicles for truth-finding.³ Public inquiries, through research, engage in the business of fact-finding to establish the truth and consequently create leverage for meaningful changes.⁴ The quest for truth and answers to the many questions has seen the government invoke the use of these unique investigative mechanisms for fact-finding.⁵ Public inquiries have often been conducted world over to public service delivery and put a stop to the recurrence of mistakes that would lead to crisis.⁶ Diverse instruments such as commissions appointed by the government, special assignment task forces, statutory investigative and advisory agencies,

¹African Centre for Open Governance (AfriCOG) First Report on A study of Commissions of Inquiries in Kenya (2007) p. 2

²Macharia J. Kaburu, 'Towards effective Commissions Of Inquiry in Kenya: A review of the Commission of Inquiry Act in view of the Constitution of Kenya,2010' (Masters Research Project, University of Nairobi 2018) 59

³Nathalie Des Rosiers, 'Public Inquiries and Law Reform Institutions "Truth Finding" and "Truth Producing" (2016) 28 Canadian Journal of Women and the Law 37<<https://www.utpjournals.press>> accessed on 26th January 2019

⁴Ibid 375

⁵Simiyu, E Chiloba, "An inquiry into Commissions of Inquiry," (Masters Dissertation, Central European University2008) 7

⁶Tor-Butler Cole 'Public inquiries: a waste of time and money or a useful adjunct to the legal process?', (*The Telegraph* 22nd April 2004) <https://www.telegraph.co.uk/news/uknews/1459945/Public-inquiries-a-waste-of-time-and-money-or-a-useful-adjunct-to-the-legal-process.html> accessed on 16th February 2019

parliamentary committees among other institutions, perform tasks incidental to inquiries.⁷ Notably, Kenya has engaged in public inquiries through all these instruments as discussed in Chapter two and three.

The inquiries are constituted for various purposes based on the different arising circumstances. The circumstances which lead Governments to appoint public inquiries are as varied as the exigencies of political life.⁸ Joseph Kaburu observes that the first three post-independence governments engaged the use of commissions of inquiry for fact finding and investigation to probe into matters of substantial public importance.⁹ He however notes a departure from the use of CIs to employing the use of task forces and other inquiry mechanisms.¹⁰

Previously, the first three post-independence regimes often resorted to the use of CIs to probe into matters of public and national concern.¹¹ CIs are preferred tools of investigation in diagnosing problems and proposing recommendations on the way forward.¹² CIs are ad hoc advisory bodies that are set up by the government to obtain information.¹³ The Commissions conduct independent investigations, make an assessment of the emerging facts and make put forward suggestions to Government on the way forward. It is with no doubt that many CIs have been set up to investigate and uncover matters that are of substantial public importance with a promise to resolve the problems.¹⁴ CIs have a significant place in the aftermath of a crisis, seeing

⁷ Nathalie Des Rosiers, 'Public Inquiries and Law Reform Institutions "Truth Finding" and "Truth Producing" (2016) 28 Canadian Journal of Women and the Law 37 <<https://www.utpjournals.press>> accessed on 26th January 2019

⁸ H. O. Clokie and J. W. Robinson (Stanford University Press, 1973) 123

⁹ Supra (n1) p. 4

¹⁰ Ibid

¹¹ Macharia (n.2) p.60

¹² Morokhovets Diana 'The Role of Judicial Discourse in Distorting the Public Inquiry Image: Is inquiry becoming an endangered species?' (Masters Dissertation, York University 2016) 12

¹³ African Centre for Open Governance (AfriCOG) First Report on A study of Commissions of Inquiries in Kenya (2007) p. 2

¹⁴ Ibid

that they engage for purposes of accountability and policy learning.¹⁵ Some have described CIs of inquiry as channels that create leverage so that meaningful changes can be effected by putting forward recommendations that pave way for change.¹⁶ Jeffrey R. Sturz, observes that public inquiries are a preferred mechanism when governments decide to rethink their approaches to significant issues.¹⁷

Peter Aucoin, depicts a picture of CIs having the object of investigating matters for public interest and ensuring accountability.¹⁸ He, however, goes ahead to point out that CIs are preferred by governments seeing that their establishment allows decision-makers to delay or postpone decisions without being criticized. Additionally, within the Kenyan context, CIs are seen as tools to quell public anger and protect the interests of the political class.¹⁹ Some view CIs as a step towards finding proposals and solutions by the public. However, for others, they are seen as a pretentious move by the government, seeing that they are politically motivated and lack independence.²⁰

¹⁵KenanSulitzeanu-R, "Reflection in the Shadow of Blame: When Do Politicians Appoint Commissions of Inquiry?" (2010) 40 *British Journal of Political Science* 613

¹⁶ Nathalie Des Rosiers, 'Public Inquiries and Law Reform Institutions "Truth Finding" and "Truth Producing"' (2016) 28 *Canadian Journal of Women and the Law* 374-<<https://www.utpjournals.press>>accessed on 26th January 2019

¹⁷ Jeffrey R.Stutz, "What gets done and why: Implementing the recommendations of public inquiries" 2008 51(3) *WOL* <<http://citeseerx.ist.psu.edu/viewdoc/download?doi=10.1.1.537.9130&rep=rep1&type=pdf>>accessed on 25th January 2019 p.509

¹⁸Aucoin Peter 'Contributions of Commission of Inquiry to policy analysis: An evaluation,' 1990 HO 43(1) <<https://heinonline.org/HOL/LandingPage?handle=hein.journals/dalholwj12&div=45&id=&page>>accessed on 25th January 2019 p.12

¹⁹ Ibid p.54

²⁰ Roderick Alexander Macdonald, 'An analysis of the forms and functions of commissions of inquiry (Royal Commission) in Canada' (2011) *Mc Gill Faculty of Law Montreal, Quebec* <https://www.mcgill.ca/roled/files/roled/roled_commissioninquiries_en_-roderick_macdonald.pdf>accessed on 26th January 2019

The period preceding the promulgation in 2010 saw the government resort to the use of CIs in seeking to answer questions and provide solutions for many situations and crisis.²¹ Despite the CIs working to unearth the truth and producing useful and meaningful reports to fuel change and resolution of problems the reports often remained unimplemented and in some cases unpublished.²² There were calls by various actors to critically consider and take stock of specific actions taken by the executive in resolving and investigating significant occurrences. PravinBowry observed that the recommendations by the various commissions, taskforces and investigative agencies are useful but remain unimplemented while some remain unpublished.²³ Some dismissed the use of commission of inquiry sighting that they were "cover-ups" for Kenyans to "forget and move on"²⁴

The apprehension by Kenyans was not unfounded given the past conduct and reaction of the government to outcomes and recommendations of public inquiries.²⁵ For instance, the Ndung'u Commission²⁶ was constituted to probe into the illegal/irregular allocation of public land. The commission inquired into the distribution of land which was initially public land or reserved as public land to private individuals and corporate entities in Kenya and presented its

²¹EliudKibii, 'Commissions or omission of inquiry? Why Kenya has failed to address historical and other injustices?' *The Elephant (Nairobi 5th April 2018)*><https://www.theelephant.info/features/2018/04/05/commissions-or-omissions-of-inquiry-why-kenya-has-failed-to-address-historical-and-other-injustices/>> accessed on 26th January 2018

²² Ibid

²³PravinBowry, 'An inquiry into the commission of inquiry' *Standard Digital (Nairobi 13th January 2010)*><https://www.standardmedia.co.ke/article/2000000823/an-inquiry-into-commissions-of-inquiry>> accessed on 26th January 2018

²⁴ Supra n.17

²⁵ S. Abdi Sheikh, 'Blood on the Runway: The Wagalla Massacre of 1984', (2010) 20 Northern Publishing House 1 observes that the government appointed the TJRC for example as a flawed commission that was meant to flounder and perhaps capsize. States that the appointment of Amb.BethuelKiplagat was done to allow the tradition of impunity to flourish in Kenya.

²⁶ Commonly referred to as the Ndung'u Report after the name of its chair of the commission, PaulNdung'u.

findings to the President.²⁷ The commission also gave recommendations to the Government for the restoration of the irregularly and illegally acquired lands for their intended purpose or other suitable solutions by policy means and institutional framework.²⁸ The recommendations which were educative and eye-opening have remained unimplemented despite being integral to solving land questions in Kenya.²⁹ The government is the main actor in the implementation of the Ndung'u report has remained silent despite being the initiator of the commission.³⁰

Another example is the judicial commission set to probe ethnic conflicts in the country (Akiwumi Commission).³¹ The findings of this commission ascribed the fuelling of such conflicts to several state agencies and politicians. The report recommended the investigation and investigation of the persons and bodies concerned during the 1991 and 1994 tribal conflicts. The recommendations remained unimplemented, and subsequently, what followed was the post-election violence in 2007/2008.³²

The establishment of CIs has however declined in the new constitutional order and also following the accession to power of a new political regime in 2013. In the post-2010 period, the government has resorted to using other fact-finding mechanisms in matters of public and national

²⁷Report of the Commission of Inquiry into illegal/irregular allocation of public land <http://kenyalaw.org/kl/fileadmin/CommissionReports/A_Report_of_the_Land_Commission_of_Inquiry_into_the_Illegal_or_Irregular_Allocation_of_Land_2004.pdf> accessed on 20th January 2019, Report of the Land Commission of Inquiry into the Illegal or Irregular Allocation of Land - 2004 Annexes Volume I <http://kenyalaw.org/kl/fileadmin/CommissionReports/A_Report_of_the_Land_Commission_of_Inquiry_into_the_Illegal_or_Irregular_Allocation_of_Land_2004_Annexes_Volume_I.pdf> accessed on 20th January 2018 and Report of the Land Commission of Inquiry into the Illegal or Irregular Allocation of Land - 2004 Annexes Volume II <http://kenyalaw.org/kl/fileadmin/CommissionReports/A_Report_of_the_Land_Commission_of_Inquiry_into_the_Illegal_or_Irregular_Allocation_of_Land_2004_Annexes_Volume%20II.pdf> accessed on 20th January 2019

²⁸ Report of the Commission of Inquiry into illegal/irregular allocation of public land <http://kenyalaw.org/kl/fileadmin/CommissionReports/A_Report_of_the_Land_Commission_of_Inquiry_into_the_Illegal_or_Irregular_Allocation_of_Land_2004.pdf> accessed on 24th January 2019

²⁹ African Centre for Open Governance (AfriCOG) 'Mission Impossible? Implementing the Ndung'u Report,' <www.africog.org> accessed on 20th January 2018

³⁰Njoroge Stephen Chege, 'Limitations of the current land laws addressing the squatter problem in Kenya,' (Masters Thesis, University of Nairobi 2013) P.7

³¹ The commission is named after the chairman Justice Akiwumi.

³²Kibii n 17

interest. President Uhuru Kenyatta's regime has predominantly employed the use of task forces, presidential commissions, and parliamentary committees for fact-finding.³³ The shift can be attributed to the fact that the government was more actively involved in implementing constitutional provisions. Ben Sihanya, observes that several task forces have been formed by the government to implement constitutional requirements administratively.³⁴ Additionally, he notes that task forces are used to review the existing structures in policy, legislation as well as institutional frameworks to evaluate how well they respond to the problem.³⁵

The formation of the task forces is motivated by a myriad of reasons. In some instances judicial directives by courts call for the establishment of ad hoc task forces to address lacunas in law. A case in point is the task force set to investigate the procedure of renewing and extending leases in Kenya, formed in 2017.³⁶ The formation of the task force was informed by Justice Onguto's directive in the landmark case of Anthony Otiende Otiende v Public Service Commission & 2 others.³⁷ In this matter, the court directed the Ministry of Lands to initiate meaningful engagement with the public and to consider the advisory opinion of the National Land Commission on the regulations and forms. The task force was formed and given the mandate to analyze and review the existing legal and structural framework dealing with processing of leases inter alia.³⁸

³³ Supra n. 6

³⁴ Ben Sihanya 'The Presidency and Public Authority in Kenya's new Constitutional order,' (2011) Society for International Development <http://sidint.net/docs/WP2.pdf> accessed on 16th February 2019

³⁵ Ibid p. 20

³⁶ Evans Habil 'Ministry sets up task force to solve land leases problems' Daily Nation (Nairobi, March 8, 2017) <https://www.nation.co.ke/news/lands-ministry-task-force-kenya/1056-3841780-format-xhtml-8krb3e/index.html> accessed on 16th February 2019

³⁷ [2016] eKLR

³⁸ Report task force to investigate the handling of extension and renewal of leases in Kenya (September 2010) <https://www.africalegalnetwork.com/wp-content/uploads/sites/22/2017/11/Report-of-the-Task-Force-Investigating-the-Renewal-and-Extension-of-Leases-October-2017.pdf> accessed on 16th February 2019

Executive directives have also yielded in the establishment of task forces. For instance, the drought experience in 2018 resulted in the formation of a task force to probe into the management of forests and forest activities in Kenya.³⁹ The task force was mandated to establish the level of illegal logging, destruction, and encroachment by human life into public forests and other water catchment areas. It was also expected to assess the impact associated with these activities.⁴⁰

This study, therefore, investigates the new trajectory that public inquiry has taken in the post-2010 dispensation. Task forces are increasingly being used for governance and fact finding investigating matters of public interest. Besides, unlike the CIs where their formation was solely a prerogative of the president, task forces have been formed by the respective Cabinet Secretaries of the various concerned Ministries. This trend has introduced a new dynamic that was not previously while employing the use of CIs. The study will examine the reasons behind the shift to the use of task forces and other channels of inquiry, unlike previous administrations that more predominantly used CIs.

1.1 Historical Background

The concept of public inquiries emerged from English law and dates back to the 12th century.⁴¹ Kenya was by fact declared a British protectorate in 1920⁴² and was under British rule until attainment of independence on 12th December 1963.⁴³ The concept of public inquiry having

³⁹WahomeGitonga ‘Government bans logging’ Citizen Digital (Nairobi, February 24, 2018) <https://citizentv.co.ke/news/government-bans-logging-191860/> accessed on 16th February 2019

⁴⁰Ministry of Environment and Forestry Kenya, Report of the task force on forests resource management and logging activities in Kenya (April 2018) http://www.friendsofkarura.org/wp-content/uploads/2018/05/Final-Report_29Apr2018_17h.pdf accessed on 16th February 2019

⁴¹ Thomas J. Lockwood ‘A history of Royal Commissions,’ (1976)5(2) Osgoode Hall Law Journal p 1721< <https://digitalcommons.osgoode.yorku.ca/cgi/viewcontent.cgi?referer=https://www.google.com/&httpsredir=1&article=2383&context=ohlj>> accessed on 25th January 2019

⁴²WaruguruKaguongo ‘Introductory Note on Kenya’ (2012) International Centre for Non-profit law 1 http://www.icla.up.ac.za/images/country_reports/kenya_country_report.pdf accessed on 19th February 2019

⁴³ Winnie Mitullah, Morris Odhiambo&OsogoAmabani ‘Kenya’s Democratisation: Gains or Losses? Appraising the post KANU state of affairs’ (Centre for Law and Research International &ClariPress , Nairobi, 2005) p.5

emerged from England the British colonialist automatically introduced inquiries in Kenya during the colonial experience.⁴⁴ Subsequent post-independence governments adopted the use of CIs to inquire into matters touching on public policy. The concept of the public inquiry was a colonial legacy inherited by other subsequent post-independence governments.

Previously, inquiry into matters of public interest in Kenya has predominantly been conducted using commissions of inquiry. All CIs in the country are established in accordance with the Commissions of Inquiry Act.⁴⁵ The Act in Section 3 empowers the President to issue a commission whenever he deems advisable to investigate the conduct of public officers, public bodies or into any other matter which he deems to be of public interest. Historically the government has invoked the powers vested upon the president to appoint CIs to inquire into a myriad of public interest matters and investigation into the conduct of public officers and bodies.

Notably, in the post-2010 era, there is a new tendency by the government to invoke the use of alternative mechanisms of public inquiry. The change from the use of CIs as a public inquiry to the task force is very conspicuous. More conspicuously is the emerging trend of using taskforces to make inquiry on matters that are of public or national interest. Some have attributed the use of task forces to implementation of constitutional requirements administratively.⁴⁶ The task forces formed have been motivated by various reasons ranging from policy review matters to investigatory issues.

Outstandingly, despite task forces being common instruments of public inquiry in the 2010 era there exist no legal framework to regulate the establishment of task forces and their operation.

⁴⁴AfriCOG (n 3) p.2

⁴⁵ Chapter 102 Laws of Kenya

⁴⁶ Ben Sihanya (n. 35) p.20

Unlike the CIs that are regulated by the Commissions of Inquiry Act⁴⁷ the establishment of task forces, their powers, privileges, duties and matters thereto is not regulated under any legislative or policy framework. Legislation underpins the relationship between the State and the various actors of the state throughout the world and defines the rights and responsibilities of the various actors.⁴⁸ There is a need to examine the preference to employing task forces and parliamentary commission in the practice of public inquiry in Kenya in the post 2010 era.

1.2 Problem Statement

Although historically Kenyan Governments have often resorted to the use of CIs to inquire into matters of public and national interest, nevertheless in the post-2010 the Government has shifted to employing task forces to carry out public inquiry. This study interrogates the reasons that have motivated the shift from using CIs to other public inquiry mechanisms.

1.3 Research Questions

The study addresses the following questions:

- a. Why has the Government resorted to the use of task forces in the post-2010 regime?
- b. What is the history of public inquiry in Kenya?
- c. What legislative and institutional frameworks govern the practice of public inquiry in Kenya?
- d. What is the nature and typology of task forces in Kenya?
- e. What recommendations can this study offer to fortify the practice of public inquiry in Kenya through the use of task forces?

⁴⁷Cap 102 Laws of Kenya

⁴⁸ OECD Guidelines at p.78 The Organization for Economic Co-operation and Development. The guidelines are available at <http://www.oecd.org/corporate/corporateca/corporategovernanceofstate-ownedenterprises/34803211.pdf> accessed on 20th February 2019

1.4 Research Objectives

This study is guided by the following objectives:

- a. To examine why the Government has resorted to the use of task forces in the post-2010 regime.
- b. To investigate the history of public inquiry in Kenya.
- c. To analyze the legislative and institutional framework on public inquiry in Kenya.
- d. To analyze the nature and typology of task forces in Kenya.
- e. To offer recommendations that will enable and fortify the effective use of task forces for public inquiry in Kenya.

1.5 Hypothesis

Although historically the government has preferred commission of inquiry to conduct probes into matters of public and national interest nevertheless, in the post-2010 era the government has shifted to using other public inquiry mechanisms because of the structural changes in the Constitution.

The study hypothesizes that the new constitution restructured and redesigned several institutions, expanding and expounding their mandates to carry out functions incidental to public inquiry. Further, the constitution enlarged the scope of public and national interest matters which then widened the public inquiry sphere.

This study also hypothesizes that the use of task forces in the post 2010 regime largely mirrors the use CIs during President Jomo Kenyatta's and Moi's era in that they address policy issues of national and public interest.

The study also hypothesizes that there exists no regulatory framework that governs the establishment, operation and relationship between the task forces and other state organs.

The significant change in public inquiry in Kenya is a point of interest because:

- 1) Public and national interest matters form a significant part of the new constitution.⁴⁹
- 2) Public inquiry serves the function of liberalizing the concept of public interest through carrying out inquiries, investigations and finally giving recommendations to address teething issues affecting the public.
- 3) Unlike historically when the government predominantly invoked the use of CIs to probe matters of public and national interest, this has significantly changed with the prominent use of task forces in the post-2010 as the preferred model of public inquiry.
- 4) Following the promulgation of the 2010 constitution, the government has prominently invoked the use of task forces to ensure smooth implementation of the constitution. The use of task forces for public inquiry has introduced new dynamics in governance in Kenya seeing that some task forces have been established by Cabinet Secretaries unlike the appointment of CIs which is a prerogative of the president.⁵⁰
- 5) Despite the prominent application of task forces there exists no legal or policy framework to regulate the establishment, powers, privileges, and matters relating to the use of task forces in Kenya.

1.6 Theoretical Framework

The CoK, 2010 has been theorized as an attempt to redesign the Kenyan State, systems of governance and institutions. It reviewed the State structure by redesigning institutions and state

⁴⁹ Willy Mutunga, 'The 2010 Constitution of Kenya and its implementation: Reflections from the Supreme court's Decisions,' (2015) ISPECJU 6

⁵⁰ Section 3, Commissions of Inquiry Act Chapter 102

agencies and introducing structural changes in the policies of governance. The coming into force of the new constitutional order in 2010 remodeled and restructured the practice of public inquiry. The current constitutional order introduced new institutions and redesigned some pre-existing institutions to carry out functions incidental to public inquiry. The practice of public inquiry in Kenya was restructured and transformed as a result of the remodeling and reinforcement of institutions. Since the constitution took effect, only three CIs have been commissioned. The new constitutional dispensation birthed new institutions and reinforced other pre-existing institutions to conduct functions akin to public inquiry.

This study is anchored on three main theories primarily because they help answer the research questions. First, the study heavily relies on historical jurisprudence theory. This theory propounds that societies go through predictable stages, and the community laws and rules reflect the community's changes in development. The study traces the historical timeline of a public inquiry to establish the shape and models public inquiry has over the various legal and political regimes. Additionally, the historical timeline locates the functional significance of public inquiry in Kenya's politics and reform agenda.

Secondly, the research relies on critical legal studies (CLS) to critique the use of task forces in the current trend of public inquiry in producing just outcomes for the public. It is in particular used to challenge the impetus behind the formation of task forces in serving the interests of the public. To counter the gaps that are brought out by the CLS theory the study relies on the structural functionalism theory. Structural functionalism theory, challenges that society and functions of the various organs in society is as a result of behaviors and interactions. The theory articulates that society has complex expectations and when these expectations are entrenched and

institutionalized, the results are the formation of results into the formation of certain functional roles.⁵¹

1.6.1 Historical Jurisprudence

Historical jurisprudence theory claims that there is a correlation between society, history, and the law. Historical jurisprudence theorists argue that communities go through stages that are predictable. Further, the community's laws reflect these stages of development and evolution. One of the proponents associated with the movement is Sir Henry Maine. Maine argued that law changes to reflect and facilitate social and cultural change over time.⁵² One of the most prominent theorists Fredrich Von Carl Savigny argued that law reflects a community's stage of development, hence the trends of law as they are fit into the position the society currently is.⁵³ Historical jurisprudence suggest that history has a normative force meaning that what has come before, and the way that we have dealt with circumstances before permeates the current trends and has a bearing on the current trends. Historical jurisprudence explains how and why the legal doctrines and principles develop the way they do.

The practice of public inquiry in Kenya has seen the application of various models and mechanisms of conducting inquiry. CIs have been predominantly used by previous government regimes to hold public inquiry. This practice can be attributed by the post-colonial Kenyan experience seeing that CIs were an inherited from the British colonial rule. Previous administrations predominantly used CIs as a response mechanism to the many serious economic, social and political problems in Kenya. The tradition of using CIs as public inquiry mechanism has revolutionized with the application of task forces to investigate and respond to the

⁵¹John Holmwood, 'Functionalism and its Critics' in Harrington Austin (ed), *Modern Social Theory: an introduction* (Oxford University Press, 2005).

⁵²Brian Bix, 'Jurisprudence: Theory and Context' (7th edition, Sweet and Maxwell, 2015) p. 277

⁵³Ibid

momentous problems and arising issues. The public inquiry mechanism is a creation of the state to respond to emerging societal issues. To this end, the adoption of task forces can be seen as merely reflecting the proclivities of society's realities and changes in a bid to create a better responsive mechanism. It is therefore important to investigate the use of task forces by President Uhuru Kenyatta's regime of power and in the post 2010 era. In this case, the historical jurisprudence theory interrogates the force historical events have had in shaping the trajectory of public inquiry in Kenya.

1.6.2 Critical Legal Studies

The CLS movement is a self defined group of scholars who challenge traditional legal theory on the neutrality of law and mediates ways of understanding the formalistic approach to legal regimes.⁵⁴ CLS largely extends and elaborates the more radical aspects of the American legal realism. Theorists associated with this school of thought propound the idea of the political nature of law and the theme that law advances the interests of those in power. In addition, it rejects the notion that the law is aimed at protecting the public good.⁵⁵

According to the CLS proponents, the neutrality in language and institutions operated through law masks the relationship between power and control.⁵⁶ This school tries to expose how the legal culture mystifies outsiders and work to make legal results legitimate. Law is used as a tool by those in power to maintain a certain status quo. To this end, law is seen as politics with no neutrality or value free. CLS questions how the law is so tilted to favour the powerful, departing from neutral principles.

⁵⁴ Peter Fitzpatrick and Alan Hunt, *Critical Legal Studies* (Blackwell Oxford, 1987)

⁵⁵ Duncan Kennedy, "The Critique of Rights in Critical Legal Studies", in W. Brown and J.Halley eds., *Left legalism /Left Critique* (Duke University Press, 2003) pp. 213-220

⁵⁶ James Boyle, ' The politics of reason: Critical legal theory and local social thought' (1985) 4 University of Pennsylvania Law Review 685.

Unger goes ahead to critique the objectivism of law in the traditional legal thought and practice. According to him, the making of the law and the process of its application differ in reference to its working and justification of results. He opines that the system of laws, legal ideologies and statutes represent and argue for a self-protective scheme of human behavior while displaying an intelligible moral order.⁵⁷ The existence of a legal order cannot stand on its own ground. To him, there is some normative theory extrinsic of the law that influences legal order. Political underpinnings and prophecy which represent an essential part of the formalist creed forms an essential part of doctrinal creed and ideology.⁵⁸ In summary, CLS theorists posit that there are other hidden structures that influence trends in law.

This study borrows heavily from the theory in arguing despite public inquiry being a creation of law it is highly politically skewed and serves to protect certain political interests. Commissions of inquiry and task forces for example are creatures of the executive arm of government. They are created within the prerogative power of the executive. The task forces are constituted and mandated to look into matters that touch on public interest and, as such are launched for the good of the citizenry. The determination of what amounts to a matter of public interest or public good is left to the appointing authority to determine. As such, political underpinnings and structures of power determine the formation of these institutions and public inquiry channels.

1.6.3 Structural functionalism

The structural functionalism theory is founded on the sociological school of thought and emphasizes on the placing law within a social context.⁵⁹ It views society as an intricate system

⁵⁷ Roberto Mangabeira Unger, 'The Critical Legal Studies movement' 1983 96 (3) *The Harvard Law Review* 565

⁵⁸ *Ibid* at 566

⁵⁹ Structural-Functional Theory in Sociology: Definition & Examples-Video & Lesson Transcript' *Study.com*
<http://study.com/academy/lesson/structural-functional-theory-in-sociology-definition-definition-examples-quiz.html>
accessed on 8th July 2019

with parts that work together to actualize stability. The theory explains why structures and institutions exist in society for the purpose of ascertaining their role and purpose.

Herbert Spencer, a proponent of this theory, depicts that society is continually facing pressure to make choices that compel it to adjust its internal structures by elimination. He explains that adaptation of these internal structures through differentiation is a departure from consolidation of authority which leads to stagnation. The adaptation of these internal structures that respond to societal pressures is often a reaction to functional needs. To explain the need for new structures Spencer puts forward that there is constant struggle among the various bodies and organs where the stronger structures survive and thrive while the weaker structures diminish.

This study argues that public inquiry mechanisms indeed play an important role in ensuring accountability and responding to societal needs outside the recognized institutional scope. The CoK has created new institutions that diversify the practice of public inquiry. This is a depiction of the differentiation from the centralization of power in public inquiry to respond to societal pressures. The study borrows heavily from the theory in examining the reason behind the diminishing role of CIs and the increased use of other models of public inquiry.

1.7 Literature Review

The literature review is presented in three sections. The first one addresses the concept of public inquiry generally in the Kenyan context and international practice. The second section discusses the efficacy of public inquiries generally to examine the need for public inquiry. Lastly, the Kenya's post-2010 experience examining the various institutions is presented.

1.7.1 Public Inquiry

Joseph KaburuMacharia,⁶⁰ discusses CIs as public inquiry mechanisms that have been used predominantly by previous Kenyan governments. The main argument the author makes is that the enabling legislative framework for establishment of CIs the Commission of Inquiry Act is inconsistent with provisions of the COK 2010. The author points out that the inconsistency is with regards to provisions on the national values and principles such as devolution, independent commission and offices, public participation and leadership and integrity principles. The study carefully studies the CIs within the colonial period and the four government regimes that have been in existence. The historical timeline that the author uses reveals the reasons behind the establishment of the commissions at the different times and in the old constitutional order.⁶¹ The author observes that President Uhuru Kenyatta's regime has however shifted to using task forces as a mechanism for public inquiry. The study also reveals best practices that Kenya can borrow from the United Kingdom's model. This study does not however discuss the use of task forces in Kenya as a public inquiry mechanism.

Prof. MigaiAketch and Prof. KameriMbote⁶² conceptualize public inquiry in Kenya using the CIs model. The authors' main argument is that CIs have often been instruments used by the executive arm of government and therefore tend to take a political orientation. The authors present a situation where the executive has been accused of using the CIs to realize short term political goals rather than to resolve the problems that prompt their formation.⁶³ CIs are merely tools to contain volatile political situations. Further, CIs have been established under legislation and although the commissions come up with useful reports and recommendations they remain

⁶⁰ Supra note 14 (p. 3)

⁶¹ Supra note 3(p. 59)

⁶²Mbote, Patricia Kameri and MigaiAkech, Kenya: Justice Sector and the Rule of Law (2011) The open Society initiative for Eastern Africa

⁶³ Ibid p 54

unimplemented. The authors argue that the CIs are set up as a means of quelling public anger with no intention to implement the recommendations.⁶⁴ They propose amendment of the CIs legislation to enhance the autonomy, transparency and accountability of the commission. However, the research does not discuss the use of task forces in Kenya as a model of public inquiry.

Chiloba,⁶⁵ interrogates the question how the commission of inquiry in Kenya have influenced reforms on corruption in Kenya. The focal point of the study is the Bosire Commission which was established in 2003 to investigate fraudulent payments in the government for gold purchases. The study observes that CIs are an important tool in policy reform through their findings. Moreover, he observes that the political class sometimes draws on the CIs to protect their political interests and inhibit accountability. While acknowledging the positive impacts CIs have had on the reform process in Kenya, he identifies shortcomings in the process that impede the full realization of the objects of the commission. This study focuses on task forces which have been the predominant public inquiry mechanism in application after the promulgation of the constitution and in President Uhuru Kenyatta's regime. Moreover, the study was conducted in 2008 prior to the promulgation of the present constitutional order and hence fails to take into account provisions under the new regime that may influence the findings of the study.

The African Centre for Open Governance (AfriCOG)⁶⁶ examines the workings of CIs in Kenya over the years and identifies flaws that need to be addressed. The report points out that the legislation on CIs in Kenya does not make provision for qualification of commissioners eligible for appointment. In pointing out the deficiencies of the legislation on CIs the report makes a

⁶⁴ Ibid p 10

⁶⁵ Simiyu, E Chiloba, "An inquiry into Commissions of Inquiry: A case study of the Bosire Commission in Kenya," (Masters Dissertation, Central European University 2008)

⁶⁶ African Centre for Open Governance (AfriCOG), "A study of commissions in Kenya," (2007) AfriCOG

comparison with Australia and England. However, this report was published in 2007 before the promulgation of the 2010 constitution. It, therefore, does not take into consideration the bearing the constitution has on the practice of public inquiry and the accession to power of a new presidential era.

Nathalie Des Rosiers,⁶⁷ focuses on public inquiry based on the use of CIs. She views a public inquiry as a law reform body.⁶⁸The author's main argument is that the exercise of public inquiry can fuel change through the implementation of the findings. The author observes that establishment of any public inquiry body is done for the purposes of unearthing the truth and as such make necessary reforms informed by the findings of such bodies. The article justifies this position by pointing out that public inquiries are established within a framework and as such are done within a recognized framework and within certain set and recognized parameters.⁶⁹ Within the Kenyan context, task forces have been used by the government in recent times to conduct public inquiries. However, there exists no legislative framework to regulate the establishment and operation of task forces as public inquiry avenues. This study seeks to investigate the use of task forces in public inquiry and the lack of a regulatory framework to standardize application of task forces as commonly used for public inquiry in Kenya.

Jeffrey R. Stutz⁷⁰ conceptualizes the term commission of inquiry as broad array of devices that includetask forces, commissions appointed by the government, parliamentary committees, statutory investigative bodies and advisory agencies. He observes that these bodies are

⁶⁷ Nathalie Des Rosiers, 'Public Inquiries and Law Reform Institutions "Truth Finding" and "Truth Producing"' (2016) 28 Canadian Journal of Women and the Law 37<<https://www.utpjournals.press>> accessed on 26th January 2019

⁶⁸Ibid 375

⁶⁹Ibid 377

⁷⁰ Jeffrey R. Stutz, "What gets done and why: Implementing the recommendations of public inquiries" 2008 51(3) WOL<<http://citeseerx.ist.psu.edu/viewdoc/download?doi=10.1.1.537.9130&rep=rep1&type=pdf>>accessed on 25th January 2019 501

responsible for undertaking the inquiry or are engaged in a fact finding mission. Jeffrey writes that CIs are independent and often viewed as entities that are credible as such winning trust among the public.⁷¹ The article mainly focuses on the performance of CIs in terms of their implementation mechanism. The article is written with the Canadian context and does not take into account the Kenyan perspectives.

Michael A. Becker⁷² begins by tracing the post-cold war era as the time when there was a significant increase in the use bodies of inquiry. He defines CIs as bodies that are adhoc in nature and that seek to establish facts and conduct legal analysis to generate findings and propose recommendations.⁷³ Michael further states that CIs are a preferred channel since they are perceived as being impartial, independent assessors of various crises. The author's main argument is that CIs yield better results seeing that they are created as impartial investigative bodies. However, within the Kenyan context the use of CIs seems to have been abandoned in the post 2010 era with establishment of numerous task forces as well as parliamentary committees to perform the investigative role.

Peter Aucoin,⁷⁴ in his article, states that CIs are appointed to probepublic interest matters and are important instruments in governance. He first points out that CIs are often a preferred tool by the executive or policy implementing body because their establishment allows decision makers to delay or postpone decisions without being necessary criticized. The author's main argument is that CIs He first acknowledges that there could be inaction of the said situation under investigation by the government pegged on awaiting the findings of the inquiry. The author argues that the use of public inquiry mechanism such as CIs takes into consideration a wider

⁷¹ Ibid 502

⁷² Michael A. Becker, 'Commissions of Inquiry: Problems and Prospects,' 2017 EJIL28

⁷³ Ibid at 30

⁷⁴ Peter Aucion, 'Contributions of Commissions of Inquiry to policy analysis: An evaluation,' 1990IRPP29

spectrum of representation of opinions during the information gathering process. As such the findings generated from the process of public inquiry are representative of a broad range of society's interest. The article mainly focuses on the dynamics CIs as public inquiry mechanism and does not investigate the use of task forces in Kenya as a mechanism of conducting public inquiry.

RaanaSultizeanu⁷⁵ considers commission of inquiry as bodies that play an instrumental role in the aftermath of a crisis. In light of this, the findings of the commission of inquiry should be carefully considered and executed to resolve the crisis and prevent reoccurrence of the same. The running theme in the article is that of accountability that is yielded through the establishment and workings of independent and impartial commissions of inquiry that yield accountability. In considering the important accountability role played by the commission of inquiry, Raana highlights that the very object of accountability presents a threat to possible perpetrators and politicians. The study does not take into consideration Kenya's account of account and experiences. In addition, the article does not consider accountability as the existence of a framework establishing the CIs as a measuring rod to ensure accountability which would work to ensure that the objectives of the public inquiry are realized.

1.7.2 The efficacy of public inquiries

Jeffrey R. Stutz,⁷⁶ conceptualizes implementation within diverse contexts from an announcement that the government accepts the recommendation, declaring policy change, passing legislation, allocating funds, establishing new programs or institutions to the verification that change has

⁷⁵Sultizeanu-Kenan R, "Reflection in the Shadow of Blame: When Do Politicians Appoint Commissions of Inquiry?" (2010) 40 *British Journal of Political Science* 613

⁷⁶ Jeffrey R. Stutz, "What gets done and why: Implementing the recommendations of public inquiries" 2008 51(3) *WO* <<http://citeseerx.ist.psu.edu/viewdoc/download?doi=10.1.1.537.9130&rep=rep1&type=pdf>>accessed on 25th January 2019

been made. He also emphasizes on the need to draw a connection between implementation of any form and the action that follows.⁷⁷ He examines the problems that exist in the implementation of the CIs recommendations. The author identifies the challenges through a careful study of eleven commission established in Canada. The challenges are drawn from a context which is not Kenyan which is the focal point of this study.

Robert Centa and Patrick Macklem,⁷⁸ consider the need for securing accountability of CIs through effective implementation of the recommendations of CIs. The authors point out that CIs uncover matters concerning substantial public importance with the intention of informing and sensitizing the public on such matters. The CIs conduct this mandate in ways that are unique and superior to other mechanism available to the judiciary and legislative arm of government. The authors examine the role that the Law Commission of Canada plays in securing accountability of CIs in the Canadian context. While acknowledging the important role that is played by CIs in ensuring accountability the study falls short of examining other mechanisms employed for purposes of public inquiry. Furthermore, the study is done considering the Canadian situation fails to address the role played by the Kenyan actors and agencies.

1.7.3 The Kenyan Post 2010 Experience

Dr. Willy Mutunga⁷⁹ brings into perspective the post 2010 Kenyan experience with regards to the judiciary. He observes that the Kenyan people choose the route of transformation through a new constitution motivated by among other needs was the desire to create institutions that

⁷⁷ Ibid 512

⁷⁸ Robert Centa and Patrick Macklem 'Securing Accountability of the Commission of Inquiry: A role for the Law Commission of Canada,'(2001)39(1)OHLJ
<<https://digitalcommons.osgoode.yorku.ca/cgi/viewcontent.cgi?referer=https://www.google.com/&httpsredir=1&article=1483&context=ohlj>> accessed on 25th January 2019

⁷⁹Willy Mutunga, 'The 2010 Constitution of Kenya and its implementation: Reflections from the Supreme court's Decisions,' (2015) 1SPECJU 6

provide democratic checks and balances.⁸⁰ The author main argument is that there is need for the Kenyan judiciary to shake off the vestiges of the colonial era and the old judiciary. He suggests that this should be done in a way that judges develop and interpret the law to address the needs of the people and national interests through robust and patriotic jurisprudence.⁸¹ The article also demystifies the role of the judiciary⁸² as being purely interpretative but also points out that judges can also make laws.⁸³ The author points out that the constitution should not be seen to be a legal centric letter text.⁸⁴ This study explores the concept of task forces some of which have emanated from judicial decisions as not only a demystification of the traditional role of the judiciary as an organ that interprets the law but also an organ that expands the legal text to create institutions for national and public interest in the spirit of transformative constitutionalism.

Migai Aketch evaluates the democratic character of the legislature and what can be done in the future to build a democratic legislature in Kenya.⁸⁵ The author discusses the strengthening of the democratic character of the legislature within four main limbs namely: decision making in the legislature's to enhance views of all citizens, re-examination of the powers of the senate vis-à-vis the National Assembly, establishment of clear procedures of public participation and accountability in legislative processes and compliance to the law in remuneration for legislators.⁸⁶ The author's main argument is that the aforementioned reforms are necessary to enhance democracy in the law making arm of government. The author focuses on the procedure of law making taking into consideration aspects captured under the constitution such as public

⁸⁰ Ibid p.2

⁸¹ Ibid p. 5

⁸² Ibid p.6

⁸³ The author explains this from a human rights framework with regards to Article 20(3)(a) of the Constitution that states that a Court in interpreting a rights shall develop jurisprudence within a scope that gives effect to a right or freedom.

⁸⁴ Mutunga (n.75) p.13

⁸⁵ Migai Akech, 'Building a democratic legislature in Kenya,' (2015) East African Law Journal 100

⁸⁶ Ibid 101

participation, devolution and accountability. This study on the other hand examines the need to have a regulatory framework for task forces. The study argues that the people own power, and parliament only exerts this power as an agent of the people.⁸⁷ The legislature works as an agent of the people. As in any agency relationship, the agent has the duty to act in the primary interest of his principal. The legislative arm exercises oversight over other government agencies and institutions. More importantly, the legislative arm is involved in the public inquiry through the committee system in exercise of its oversight mandate.

Austin Ouko, in his article presents a case of the findings of the Task force on Parastatal Reforms.⁸⁸ The author analyzes the findings and considers the recommendations of the task force. The author notes that the Ndegwa committee made recommendations relating to parastatals and their performance which were not fully implemented.⁸⁹ The author argues that there needs to be a defined role and relationship between the government vis-à-vis parastatals and government owned entities.⁹⁰ This study seeks to examine the use of task forces, their establishment and operation.

1.8 Justification

The function of public inquiries is to inform the governments on the outcomes of investigations into matters of public interest through findings and recommendations. CIs have been a favored tool in under the old constitutional dispensation and by previous presidential regimes that preceded the President Uhuru Kenyatta regime. However, in the post 2010 era and during President Uhuru Kenyatta's regime of power the government has often resulted to the use of task forces, committees and boards to investigate matters of public interest.

⁸⁷ Constitution of Kenya 2010, Article 94

⁸⁸ Austin Ouko, 'The Presidential Taskforce on Parastatal Reforms: The case for a review,' (2016) LSK Journal 101

⁸⁹ The CI on Public Service Structure and Remuneration, commonly known as the Ndegwa Committee.

⁹⁰ Austin (n.85) p.115

Many task forces have been established during this period to investigate on matters of public interest through public and stakeholder inquiries. This shift is so conspicuous seeing that the use of CIs has been criticized as not yielding any fruits. It is therefore a focal point to study the emerging trends in public inquiry and why there is a departure from using CIs. Additionally, there exists no law governing the establishment of task forces, their mandate, powers and privileges, and to govern other matters relating thereto. A legislative framework will underpin the relationship between the appointing organ and the task force and lay down the rights and obligations as well as the duties of the actors involved.

1.9 Methodology

This study employs a mixed methodological approach incorporating historical and doctrinal research methodologies. Doctrinal research methodology involves interpreting and analyzing legal concepts, principles and guidelines using reasoning in order to deduct conclusions.⁹¹ It entails the synthesis of the law and legal concepts to make coherent justification for the law or a segment of the system of law.⁹² The study will analyze the existing institutional and legal framework for public inquiry and task forces in Kenya with a view of deciphering the need to have a regulatory framework for task forces in Kenya. Historical research methodology on the other hand involves examination of past events with a view of making conclusions. The use of the historical research methodology is useful in establishing the pattern of public inquiry in Kenya and the implications of the trend in the current use of task forces. The study traces whether there is interrelationship between the use of CIs as a public inquiry mechanism and the use of task forces in Kenya.

⁹¹ Duncan, N. J. & Hutchinson, T., 'Defining and describing what we do: Doctrinal legal research,' (2012) 17(1) Deakin Law Review 83

⁹² Ibid p. 85

The study makes use of primary data in the form of, statutes, case law, official documents including inquiry reports, parliamentary reports and secondary data in the form of relevant literature and web based materials.

1.10 Scope and Limitations

Needless to say, this study acknowledges that there exist a number of public inquiry channels through ad hoc bodies and legally established institutional frameworks. However, the focal point of this study is the application of task forces in the post-2010 regime for purposes of probing into matters of public and national concern.

1.11 Chapter Breakdown

This study is presented in five chapters.

Chapter One

This introductory chapter presents the context and background of the study. It sheds light on the issues necessitating the study, research questions that the study seeks to answer, justification of the study, the hypotheses upon which the study is premised and literature review.

Chapter Two

This chapter provides a historical timeline of the various public inquiry mechanisms that have been employed in Kenya to establish the rationale of using a particular mechanism of inquiry through the periods.

Chapter Three

This chapter constitutes a comprehensive study of the legal framework upon which the public inquiries in matters of public interest is anchored on. The legal framework entails an in-depth examination of national laws and international laws that provide for and justify the need to come up with public inquiries in public interest matters. This chapter also examines the existing institutions that are in place to ensure and oversee public inquiries.

Chapter Four

This Chapter constitutes an investigation into the use of task forces in Kenya over the post 2010 period. This entails a study of the typology and nature of task forces.

Chapter Five

This chapter summarizes the findings of the study. It also presents the conclusions of the study and makes proposals on the use of task forces as a mechanism of public inquiry in Kenya.

1.11 Conclusion

This chapter has introduced the study in general, outlining the issues necessitating the study, the research questions and general objectives of the current study. It also sheds light on what other authors and scholars have written about the subject under investigation. Lastly it outlines the roadmap of the various chapters. The next chapter examines the historical background of public inquiry in Kenya, examining the various inquiry mechanisms that have been employed historically and the rationale behind their preferred use.

CHAPTER TWO: HISTORY OF PUBLIC INQUIRY IN KENYA

2.0 Introduction

The previous chapter sets the pace and direction the research taken in this research. This chapter traces the historical timeline of public inquiry in Kenya, demonstrating the pattern of the inquiry through different legal and presidential regimes. It responds to the second research question on what is the history of the public inquiry practice in Kenya. Cumulatively, this chapter responds to the question on the shift witnessed from the use of CIs to the application of task forces.

The chapter is presented in six sections namely: the pre-colonial era, colonial era, Jomo Kenyatta, Daniel Arap Moi, Mwai Kibaki, and Uhuru Kenyatta's presidential administrations. This chapter looks into the establishments, operations, and implementation of the public inquiry reports through the different regimes. Besides, this chapter keenly delves into the various mechanism of public inquiry adopted through the different regimes of power. In this chapter the researcher argues that the application of a particular model of inquiry resonates with the existing legal and political order.

2.1 Pre-Colonial Era

The study of Kenya's political system and structure in the pre-colonial era is fundamental in determining the metamorphosis of public inquiry in Kenya. R. La Porta *et al.* observe that pre-colonial legal institutions continue to manifest in the post-colonial societies.⁹³ Before the onset of colonialism, communities in Kenya were organized among the indigenous groupings.⁹⁴ The communities exhibited their own distinct rules with well-organized systems of government and

⁹³ R. La Porta, F. Lopes de Silanes, A. Shleifer and R. Vishny, 'Law and Finance' (6) 106 *Journal of political economy* 1113

⁹⁴ Charles O. Omondi, 'Towards Constitutional Legitimacy: A study of the Principles and Processes of Constitutional Development and Constitutional Making in Kenya since Colonial Times to 2010' (PhD Thesis University of Nairobi 2013)

adjusted themselves to their ecological niches.⁹⁵ Council of elders or the apex of the political leadership in a given community made the rules.⁹⁶

The Kalenjin community, for example, was known to have an egalitarian society with no semblance of a centralized form of government.⁹⁷ The senior members of the community made all major decisions touching on the welfare of the community.⁹⁸ The levels of government started with the family as the most basic unit of governance, which then progressed to the clans, which later grew into more robust systems that governed the entire community.⁹⁹ In some instances, individuals would be appointed to ad hoc offices¹⁰⁰ including those of ritual leaders, medicine men, circumcision leaders among other positions. The Abawanga community also preoccupied the Kenyan territory before the British invasion.¹⁰¹ The Abawanga, like all other communities, had structures of power and a model of leadership led by a King called NabongoMumia.¹⁰²

2.2 Colonial period

The investigation of the colonial rule in Kenya is of paramount importance in this study as the colonial experience profoundly influenced the shaping of Kenya's history and successive events. The advent of imperial control in Kenya can be traced to 1876 when the scramble and partition for Africa took place.¹⁰³ It was later followed by the Berlin Conference of 1884-1885 which laid

⁹⁵Ochieng, R.W., A History of Kenya, London and Basingstoke' (Macmillan, 1985)

⁹⁶ Moses Onyango , 'Post-colonial politics in Kenya: The crises of post coloniality' 3(5) African Journal of History and Culture, pp. 65 available on http://erepo.usiu.ac.ke/bitstream/handle/11732/3070/chap_10_onyango_the_crises_of_postcoloniality.pdf?sequence=1&isAllowed=y accessed on 26th February 2019

⁹⁷KiplangatChelelgo, 'Pre Colonial Organization of the Kalenjin of Kenya: An overview ,' (2016) 5 IJIRD 6

⁹⁸ Ibid

⁹⁹ Ibid p. 7

¹⁰⁰ Ibid p. 8

¹⁰¹Kakai Pius Wanyonyi 'Social Concepts in the initiation rituals of the Abatchoni: A historical study' (Masters Thesis, Kenyatta University) p.3

¹⁰² Godwin Siundu, 'Strategic Submission as Resistance? NabongoMumia in the Struggle for Post-Colonial Kenya's Histories,' (2009) 17 CODESTRIA 45

¹⁰³JuhaniKoponen 'The Partition of Africa? A scramble for a mirage?' (1993) 2(1) Nordic Journal of African studies 117

down the rules of colonial control in Africa and after that the partitioning of Africa.¹⁰⁴ British interests in Kenya became more profound with the granting of the royal charter to the Imperial British East African Company.¹⁰⁵ At the centre of the geopolitical disputes over the African colony, came the Anglo-German Agreement commonly referred to as the Helgoland-Zanzibar treaty of 1890 that overtly settled colonial boundaries disputes in East Africa.¹⁰⁶ Following this agreement, the British would control the Northern part while Germany would control the South. In 1895 Kenya became a British East African Protectorate marking the onset of colonial rule.¹⁰⁷

The coming of Europeans disrupted the African way of life in structure and economic activities. The British executed imperial control was asserting sovereignty over governance structures in Kenya.¹⁰⁸ The British exercised control in Kenya by introducing and superimposing English based laws that enabled the successful administration of the Kenyan colony.¹⁰⁹ The British colonialist used laws in the form of ordinances to entrench their rule in Kenya and establish their presence. The use of English laws had the impact of the adoption of structures in government administration that were akin to those used in Britain.¹¹⁰

This section examines public inquiry in the colonial era considering the public inquiry mechanism put in place during the British colonial rule.

¹⁰⁴ Ibid p.119

¹⁰⁵ Ibid p.122

¹⁰⁶ Arthur M. Njagi 'The Colonial Legacy in British Military Relations: 1963-2005' (Master of Arts in Political Science Thesis, Kenyatta University)p.45

¹⁰⁷ Ibid

¹⁰⁸ OkothOgendo 'Tenants of the Crown: Evolution of Agrarian Law and Institutions in Kenya' (Acts Press Nairobi, 1991)

¹⁰⁹ Rose TolonyRuto 'The treaties that rendered the Maasai Landless' (Masters Research Project, University of Nairobi)p.8

¹¹⁰ Ibid

2.2.0 Commission of Inquiry Ordinance, 1912

The British colonial rule in Kenya revolved around establishing regulations and governance structures that would entrench British rule in Kenya.¹¹¹ In 1912, the then Governor in charge of the Kenyan colony enacted the first legislation that would govern commission of inquiry in Kenya vide Notice No. 28 of 1912. The Ordinance empowered the governor as the supreme head of the colony to issue a commission of inquiry with special powers.¹¹²

The Ordinance gave the Governor the prerogative power to appoint a commission in a matter dealing with public welfare whenever he deemed fit.¹¹³ The authority to issue a commission was on the Governor in the circumstances he considered appropriate.¹¹⁴

Colonial rule in Kenya was characterized by a Legislative Council that would legislate directly for the colony of Kenya and an Executive Council led by the Crown that implemented policies.¹¹⁵ For this purpose, therefore, the Crown would direct the Governor of the colony to investigate any matter he regarded to be of public interest. Additionally, the Governor was required to submit annual reports detailing the appointment of a commission, its findings, and implementation of the same to the Crown.¹¹⁶

The British colonial rule through the Governor appointed several CIs to investigate various matters in the Colony of Kenya. The CIs that were issued are discussed in the subsequent sections.

¹¹¹ Michael S. Coray 'The Kenya Land Commission and the Kikuyu of Kiambu' (1978) 52 Agricultural History Society 179

¹¹² Commission of Inquiry Ordinance, Preamble

¹¹³ Ibid, s.2

¹¹⁴ Ibid

¹¹⁵ Peter O. Ndege 'Colonialism and its Legacies in Kenya' Lecture delivered during Fulbright – Hays Group project abroad program: July 5th to August 6th, 2009 at the Moi University Main Campus available at <http://africanphilanthropy.issuelab.org/resources/19699/19699.pdf> accessed on 4th March 2019

¹¹⁶

2.2.1 The Native Labour Commission 1912

The British Colonial rule introduced the settler and corporate production as the backbone of running the economy.¹¹⁷ The Crown forcibly seized livestock, land and other indigenous resources on behalf of the white settlers. Notably, up to 1912, the State played a crucial role in procuring labor for the private sector.¹¹⁸ To achieve this, the government introduced policies that would secure and control African labor for the benefit of the settlers.

First, there was the delineation of boundaries into the "white highlands" for settlers and "African reserves" for the native Africans.¹¹⁹ The African reserves were too small and lacked sufficient resources forcing the Africans to move to white highlands in exchange of provision of labor for the settlers. The Crown also introduced the hut tax and poll tax a measure that pushed the Africans into the labor markets.¹²⁰ The colonialist prohibited African natives from cultivating crops such as coffee and sisal as a measure of reducing competition with the white settlers.¹²¹ These mechanisms employed by the British rule to procure labor were neither systematically structured nor legal. On the other hand, the pressure by the settlers for labor was mounting.¹²²

The then Governor of the Kenyan Colony Edward Northey appointed the Native Labour Commission to delve into labor recruitment, and regulation in the Colony of Kenya vide gazette notice no. 67 of 1912 .¹²³ The Commission was convened on 19th September 1912 and published

¹¹⁷ Caroline Elkins 'Imperial Reckoning: The untold story of Britain's Gulag in Kenya' p.15

¹¹⁸ Ibid p. 16

¹¹⁹ Peter Kagwanja, Daniel Muthee and Thomas Kimaru 'Ethnicity, land and conflict in East Africa: The cases of Kenya, Uganda, and Tanzania" (Africa Policy Institute & International Development Research Centre Nairobi, 2011)p.38

¹²⁰ Ibid p.40

¹²¹ Caroline Supra n. 3 p.21

¹²² OpolotOkia 'Communal Labor in Colonial Kenya: The Legitimization of coercion, 1912-1930" (Springer, 2012)p.16

¹²³ Ibidp.17. The gazette notice is available on <https://books.google.co.ke/books?id=xv--GIaxVl4C&pg=PA183&lpg=PA183&dq=COMMISSION+OF+INQUIRY+ORDINANCE+1912+kenya&source=bl&ots=nx> accessed on 4th March 2019

its filed findings on 1st October 1912.¹²⁴ The prompt conclusion of the commission's work was because the then acting governor appointed the commission to look into a white settlers problem.

2.2.2 Education Commission, 1919

Christian missionaries arrived in Kenya intending to spread Christianity and training converts in the 19th and 20th century.¹²⁵ Education was a tool for expanding and enlarging the missionary's sphere of influence.¹²⁶ The European settlers demanded better education for their children, which led to the opening of the first school for European children in 1902.¹²⁷ As a result, in 1908 the then Governor Charles Elliot appointed the Fraser Commission. The commission recommended the introduction of education along racial lines and the establishment of a department of education in 1911. Missionaries managed both settler and African education with very minimal assistance from the government.

In 1919, the government constituted a commission to look into the status of education with reference to all racial groups in the colony.¹²⁸ The commission's report altered the education sector, making the government the main actor in streamlining the industry.¹²⁹ Additionally, the probe concluded that Africans were not educable. The commission noted that the education offered to Africans was too literal and deemed it impractical for the envisioned peasant-based reality of African societies.¹³⁰ The ongoing debate on the educability of African natives inspired the introduction of new policies. The discussion gave rise to a new system of education system

¹²⁴ Ibid

¹²⁵ Mactatiani Caleb, Mercy Imbova, Navin Imbova & Daniel Gakunga 'Development of Education in Kenya: Influence of the Political Factor Beyond 2015' (2016) 7(11) Journal of Education and Practice 55-60.

¹²⁶ Ibid p. 56

¹²⁷ Macrina Lelei & John Weidman, Education Development in Kenya: Enhancing Access and Quality (Clementina Acedo, Don Adams & Simona Popatrs, Sense Editors 2012) p. 145

¹²⁸ Mactatiani Supra note.33

¹²⁹ Ibid p.146

¹³⁰ Ibid

that allowed Africans to provide labor for agricultural production and get involved in missionary activities. This system focused on technical skills in artisan and industrial works as opposed to academic education for Africans hence deemed inferior.¹³¹ What followed were continued deliberations aimed at redefining the best education for Africans.

2.2.3 Food Shortage Commission of inquiry, 1943

With the coming of European settlers, there was a rapid expansion of European maize production in the country.¹³² Notably, in 1922 the Bowring Committee had recommended that the colony of Kenya should concentrate of maize growing and production to increase the value of the goods exported from the territory.¹³³ Moreover, there was a growing need to increase the freight for the railway. There was the commercialization of African grown maize. To this end, the African farmers were encouraged to produce superior quality maize for export, making the maize variety very common among the African natives.¹³⁴

However, in 1942 the government was more emphatic on European grown maize, which was yielded quick results, as opposed to African cultivated maize.¹³⁵ This protracted production drive resulted in a severe maize shortage.¹³⁶ Consequently, the Governor appointed the Food Shortage Inquiry to investigate the food shortage problem and provide recommendations on the way

¹³¹Macrina Supra note. 35

¹³² Annual Colonial Reports 'Report for 1922 Colony & protectorate of Kenya' (1940) p.9 Available at http://libsysdigi.library.illinois.edu/ilharvest/Africana/Books201105/5530244/5530244_1922/5530244_1922_opt.pdf accessed on 7th March 2019

¹³³ Ibid p.10

¹³⁴ Masao Yoshida 'The Historical background to maize marketing in Kenya and its implications to future marketing reorganization' (1966) p.4 Available at <https://opendocs.ids.ac.uk/opendocs/bitstream/handle/123456789/1502/EDRP91-329711.pdf?sequence=1> accessed on 7th March 2019

¹³⁵ Ibid

¹³⁶ Ibid p.5

forward.¹³⁷ The commission's findings attributed the shortage to several reasons, including low pricing of African grown maize and an increase in maize consumption.¹³⁸

The commission recommended that the government should stress on European grown maize emphasizing that European cultivated maize is indispensable to the colony's requirements. It was also recommended to set limits on the minimum price for maize in every season as a guarantee. Moreover, the report recommended that these guaranteed prices should not be substantially more than the returns obtainable on agricultural products.¹³⁹ Remarkably, the government implemented these recommendations into policy.

2.2.4 Findings

Public inquiry during the colonial rule was used a mechanism to entrench colonial policies on the colony of Kenya. The Governor who represented the Queen of England in the Kenyan colony constituted CIs in a bid to entrench colonial rule and policies.

2.3 President Jomo Kenyatta Regime

The build-up to Kenya's independence saw the convening of three important constitutional conferences commonly referred to as the Lancaster House Conferences held in London.¹⁴⁰ The Lancaster House conferences discussed the handing over of power to the post-independence government as well as the successive relations between Kenya and Britain. There was sharp division among the political elites along ideological differences. KADU on one hand advocated for a new constitutional ideal of regionalism or *majimbo* while KANU, on the other hand,

¹³⁷ Ibid p.4

¹³⁸ Ibid

¹³⁹ Ibid p.6

¹⁴⁰ Arthur Supra n.14 p. 63

wanted a unitary system.¹⁴¹ The second Lancaster house conference held in 1962 marked the first comprehensive negotiation between the British government and the leaders of Kenya political unions.¹⁴² In 1962 the then Secretary of State (SOFs), Reginald Maulding visited Kenya to try speed up the constitution-making process. The SOFs forced the factions to agree after realizing the apparent divisions, with a condition that if the two factions failed to agree, he would impose a decision that would be final and binding.¹⁴³

The climax of the third Lancaster House was Kenya's independence constitution. The country thus gained independence and Jomo Kenyatta became the first president of the newly independent Kenya on 12th December 1963.

2.3.1 Maize Inquiry, 1965

The maize question in Kenya is and has always been an emotive topic from the colonial era. Maize is the main staple in the diet of a majority of Kenyan households.¹⁴⁴ The first maize inquiry to be appointed in Kenya was appointed in 1943 to investigate the crisis of maize shortage.¹⁴⁵ The post-independence era was not devoid of rampant maize problems that had the ripple effect on food shortage in Kenya. Maize production, distribution, and marketing have a peculiar history in Kenya's pre-independence and post-independence era. Paul Ngei was appointed the Minister for Cooperatives and Marketing by the then president Mzee Jomo Kenyatta.

¹⁴¹ Robert Maxon 'Constitution-making in contemporary Kenya: Lessons from the Twentieth Century' (2009) 1(1) Kenya Studies Review 11p. 14

¹⁴² Ibid p.15

¹⁴³ Ibid

¹⁴⁴ Perez Ayieko Onono, Nelson W. H Wawire and Charles Ombuki 'The response of maize production in Kenya to economic incentives' (2013) 2(2) International Journal of Development and Sustainability 1 p.1

¹⁴⁵ Annual Colonial Reports supra n. 33

As earlier discussed, in 1943, the Food shortage Commission, in its findings noted that there was a need to control the distribution, regulation, and exportation.¹⁴⁶ The same story but a different script would replay once again in Kenya when there was acute maize shortage. The government once again faced a food shortage problem for local consumption. In 1965 the then president bowed to public pressure and appointed a maize inquiry according to the Commissions of Inquiry¹⁴⁷ to investigate the maize shortage at the time.¹⁴⁸ The commission also had the mandate to investigate other incidental factors surrounding the maize shortage crisis such as distribution and marketing of maize in Kenya.¹⁴⁹

In 1966 the commission presented the report on its findings to the president Mzee Jomo Kenyatta. The commission had observed that there was poor record-keeping and statistics of maize produced vis-à-vis the Kenyan consumer population.¹⁵⁰ The commission also noted that export of maize pre-maturely before satisfying the locals had led to the shortage.¹⁵¹ The report blamed this on the poor management and planning in the relevant government ministry. The commission proposed that the policy of maize self-sufficiency in Kenya before production should continue. With regards to export, the commission cautioned that to cushion the country from similar problems, the government should lean towards overproduction as opposed to ensuring sufficient internal consumption. Furthermore, the commission advised the expansion of the variety of

¹⁴⁶ Masao supra n. 35 at p.4

¹⁴⁷ Chapter 102 Laws of Kenya

¹⁴⁸ Kenya Gazette, Gazette Notice no. 4370 of 1965 Available at <https://books.google.co.ke/books?id=5XAS27sgw30C&pg=PA1425&lpg=PA1425&dq=1965+maize+commission+kenya&source=> accessed on 7th March 2019

¹⁴⁹ Government of Kenya, Report of the Maize Inquiry Commission 1966, Government Printers Available at <http://kenyalaw.org/kl/fileadmin/CommissionReports/Report-of-the-Maize-commission-of-Inquiry.pdf> Accessed on 9th March 2019

¹⁵⁰ Ibid p. 19

¹⁵¹ Ibid

maize grown to make the crop more profitable as an export.¹⁵² Interestingly, despite the earlier suspension of the then Minister Paul Ngei, he was later on reinstated back to the Cabinet despite the evident flaws witnessed in the Ministry of Cooperatives and Marketing under his watch.¹⁵³ This presents two issues of concern: the value of the momentous CI appointed to investigate a pressing need in Kenya and recommendations given by the CI.

2.3.2 Marriage and successions laws commissions

On 6th April 1967, the president appointed a commission to look into the existing marriage, divorce and succession laws in Kenya. The commission was mandated to come up with a uniform code that would comprehensively cover the subject of marriage and divorce applicable to persons living in Kenya. During this time the plight of women had begun to gain traction with the spirited feminist movement in the West. Among the recommendations given by the commission was that of the prescribed minimum age of marriage. The commission recommended eighteen (18) years as the specified age for males and sixteen (16) years for the females.¹⁵⁴ The commission came up with the proposed Marriage Bill, 1967 that consolidated all recommendations of the commission.

Attempts to enact the bill failed with those in opposition citing reasons that the bill was westernized and accorded women numerous rights.¹⁵⁵ The commission presented a detailed report citing reasons for the recommendations they gave. The commission's efforts were a big

¹⁵² Ibid

¹⁵³ Kamau Ngunjiri, Paul Ngei the rogue minister who respected no law, Daily Nation (Nairobi 17th September 2017) <https://mobile.nation.co.ke/news/Paul-Ngei--the-rogue-minister-who-respected-no-law-/1950946-4099010-10lr7pe/index.html> accessed on 9th March 2019

¹⁵⁴ Government of Kenya, 'Report of the Commission on the Law of Marriage and Divorce,' August 1968 p. 17 para.64 Available at kenyalaw.org/kl/fileadmin/CommissionReports/Report-of-the-Commission-on-the-Law-of-Marriage-and-Divorce-1968.pdf accessed on 24th April 2019

¹⁵⁵ Eugene Cotran 'Marriage, Divorce and Succession Laws in Kenya: Is Integration or Unification Possible?' (1996) 40(2) Journal of African Law 194 p. 202

step in the Kenyan legal and regulatory framework in promoting and advancing the rights of women. Regrettably, three attempts to enact the bill into law were unsuccessful despite amendments being made to incorporate the criticism.¹⁵⁶

2.3.3 Public Service Structure and Remuneration Commission, 1970

At independence and with a new legal and administrative order in the country, the public service structure had significant alterations. The immediate successive post-colonial government inherited a British modeled public service designed according to the Westminster-Whitehall tradition.¹⁵⁷ However, some aspects of the public service structure remained the same. To this end, there was a need to reappraise the Kenyan public service structure in light of the emerging national consciousness and needs. The president appointed the commission by an order made on 9th January 1970 vide Gazette Notice No. 131 of 1970.

The commission was mandated to investigate into issues affecting both structure and remuneration of personnel in the public service including daily workers, teachers, Local government staff, Judiciary, and other statutory bodies.¹⁵⁸ Prior to this, the governments had in 1967 vide Sessional Paper no. 10 of 1967 presented suggestions for to review public service salaries.¹⁵⁹

The commission presented its findings to the president recommending a change of structure in public service. It noted that the structure manifested the British model in a number of areas. For instance, the commission recommended a system of job evaluation where the then-existing

¹⁵⁶ Ibid

¹⁵⁷ C. Odhiambo-Mbai, 'Public Service Accountability and Governance in Kenya Since Independence' (2003) 8(1) African Association of Political Science 113, 114

¹⁵⁸ Government of Kenya Report of the Commission of Inquiry (Public Service Structure and Remuneration Commission) 1970 p. iv

¹⁵⁹ Ibid p.25 para 55

seventy-eight civil service grades would be reorganized and crystallized into fifteen(15) job groups.¹⁶⁰

2.3.4 Findings

The independence government came face to face with the post-colonial challenges of running a government that had been preceded by colonial rule. For this reason, the structures and policies in place were a reflection of the British colonial rule. It was, therefore, essential to adjust specific policies to reappraise the same with the realities of a young post-independence nation. The CIs and mainly mirrored an urge to revolutionize the previous systems and make provision for the policies of the new post-independence governance. CIs were employed as engineers in the legal and policy reform agenda.

Notably, the value of the CIs was questionable from these very early stages of an independent Kenya with recommendations of the CIs mostly remaining in the shelves with minimal or no implementation of the same. The problems or crisis that the inquiries were meant to resolve persisted or in some cases reoccurred later.

2.4 President Daniel Arap Moi's Regime

The second president of the Republic of Kenya, Daniel Moi served from 1978-2002. Before he took over the helm of the presidency, he had served as Jomo Kenyatta's Vice President from 1967 to 1978.¹⁶¹ Some analysts argue that President Moi's era of leadership was a continuation of President Jomo Kenyatta's ideologies having been a close ally to the former president.¹⁶² It is

¹⁶⁰ Ibid p.54 para.115

¹⁶¹ The Presidency Website available at <http://www.president.go.ke/former-presidents/> Accessed on 10th March 2019

¹⁶² Korwa G. Adar 'The external and internal contexts of human rights practice in Kenya: Daniel Arap Moi's operational code' (2000) 4(1) African Sociological Review 74

noteworthy that Moi began acceded to the office without ever previously having been elected to the government office.

2.4.2 Miller Commission

Charles Njonjo had since the colonial period curried favor with the Europeans and transnational interests in Kenya and quickly filled the role of their ‘man on the spot.’¹⁶³ Consequentially, Njonjo had great command in government circles and through his manipulations was able to ensure execution of repressive policies.¹⁶⁴ Njonjo represented the Kikuyu constituency citizenry and served as the Minister for Constitutional and home affairs.

Njonjo expressed dissenting opinions with a number of political decisions. The 1982 attempted coup bred acrimony between Moi and Njonjo. His power increasingly became a threat to Moi's administration, and in 1983 President Moi dismissed him from his Ministerial position hence. Njonjo was alleged to have conducted himself in a way that contradicted security of the state during the coup attempt. The president appointed a judicial inquiry popularly referred to as Miller Commission under Gazette Notice No. 2749 of 1983 and Gazette Notice No. 4051 of 1983. The commission was charged with the mandate of probing allegations involving the former Minister for Constitutional Affairs Charles Njonjo.¹⁶⁵

The commission was seen as a last resort politically motivated to stop Njonjo's dissenting opinion. Despite the judicial inquiry finding Njonjo guilty of the accusations leveled against him,

¹⁶³ Index on censorship ‘Arrest and detention in Kenya: Background of the 1986 arrests and detentions’ (1986)p.25 Available at <https://journals.sagepub.com/doi/pdf/10.1080/03064228708534191> Accessed on 24th March 2019

¹⁶⁴ Ibid p.26

¹⁶⁵ Government of Kenya, Report of Judicial Commission appointed to inquire into allegations involving Charles Mugane Njonjo (Former Minister of Constitutional Affairs and Member of Parliament for Kikuyu Constituency, 1984 <http://kenyalaw.org/kl/fileadmin/CommissionReports/Report-of-Judicial-Commission-Appointed-to-Inquire-into-Allegations-Involving.pdf> Accessed on 9th March 2019

The president pardoned him citing his outstanding long public service.¹⁶⁶ This was seen as the subjective use of power by the executive, given that another suspect, Didacus Okello,¹⁶⁷ was charged in court under provisions of the Penal Code¹⁶⁸ and convicted.

2.4.1 Structural Adjustment Policies in Kenya

The first decade of Kenya's independent saw Kenya make significant progress in economic development.¹⁶⁹ The late 1970s and early 1980s was a difficult period for many developing countries. Many economies were experiencing increased inflation, stunted economic growth rates and declined exports. Short and long-term adjustment measures were introduced to help salvage the status quo.¹⁷⁰ Structural adjustment policies in developing countries entailed changes in macroeconomic policies to make the economies adaptable to the changing economic realities and economic expansion. Structural adjustment policies (SAPs) were introduced in 1980/1981 fiscal year. The publication of Sessional Paper No. 1 of 1986 rubber-stamped management economic through the SAPs. International organizations gave some conditionalities. These harsh conditions made SAPs unpopular.

The SAPs which were initially meant to address economic problems shifted the focus to resolving political issues by introducing western models.¹⁷¹ The World Bank and International Monetary Fund (IMF) changed goalposts and now focused on political issues as part of the conditions for SAPs. With the vigorous implementation of the SAPs in the 1990s, the policy decision taken by the governments were not only a political necessity but also a moral obligation.

¹⁶⁶Mbote, Patricia Kameri and Migai Akech, Kenya: Justice Sector and the Rule of Law (2011) The open Society initiative for Eastern Africa p. 68

¹⁶⁷Didacus Ollack Diego V Republic Criminal Appeal No. 1079 Of 1983

¹⁶⁸ Section 42 Penal Code, Chapter 63 Laws of Kenya

¹⁶⁹Joseph Kipkemboi Rono 'The impact of structural adjustment programs on Kenyan Society' (2002) 17(1) Journal of Social Development in Africa 81, 82

¹⁷⁰ Ibid p. 84

¹⁷¹ Ibid p.85

The SAPs ushered in major political and policy reforms, including pluralism, respect for human rights, democracy, and accountability.¹⁷² It had considerable impact on policy decisions and actions taken by the government.

As part of compliance with the requirements of the SAPs the government commissioned a number of public inquiries including a task force to review laws relating to women and the land systems commission.

2.4.2 Task Force to review laws relating to women 1993

In 1979 United Nations General Assembly (UNGA) adopted the Convention on Elimination of All Forms of Discrimination against Women (CEDAW). Kenya became a signatory to CEDAW on 9th March 1984. Article 2 of the treaty required signatory states to among other requirements, come up with measures including reviewing legislation that undermined the course to abolish discrimination against women.¹⁷³ These implications necessitated the appointment a task force to look into the existing legal, regulatory and policy framework that touched on the plight of women in Kenya. Additionally, the task force was mandated to provide insight on how customary issues were to be handled and reflected in a modern legal regime. The task force observed that the 1963 and 1969 constitutions had veered off so sharply from gender inclusion.¹⁷⁴

2.4.3 Davy Koech Commission

Education was a point of concern in the post-independence administration. The segregated system of education during the colonial era had adversely affected the education system in

¹⁷² Ibid p.94

¹⁷³ Convention on Discrimination Against Women (CEDAW), 1979 Article 2(f)

¹⁷⁴ Kivutha Kibwana "Constitutional development in Kenya (Kivutha Kibwana and Peter CM eds Constitutionalism in East Africa: Progress, challenges and prospects in 1999, Fountain Publishers, Kampala, 2001) p.2

Kenya. Furthermore, with the attainment of independence by many colonized states, international institutions like the World Bank, International Labour Organization (ILO) and World Bank had joined the education reform campaign. In a bid to streamline and appraise education in Kenya with international standards, the government had come up with several policies. For instance, there was introduction of the 8-4-4 education system in the 1980's departing from the old system of 7-4-2-3. However, this shift was described as politically driven, seeing that there no flaws in the old system at the time. The 8-4-4 system was demanding and required the involvement of the private sector as well in the provision of education due to increased demand for education and dwindling resources. The resistance and shortfalls in the 8-4-4 system necessitated the government to appoint a Commission of Inquiry into the Education system of Kenya in 1999 to come up with proposals on ways that could be used to provide quality education.¹⁷⁵ The commission that the shortfalls in education as a consequence of colonialism in Kenya. The commission recommended adoption of a Totally Integrated Quality Education and Training (TIQUET) which reflected the values and substance that characterized the education system. The system was focusing on quality delivery and outcome of the education process.¹⁷⁶ The commission proposed deeming it as comprehensive and multi strategic. The recommendations by the Koech commission were lauded as exhaustive, comprehensive, and timely to resuscitate the education sector.

2.4.4 Land Systems Commission

The land question has remained a politically sensitive and culturally complex issue in Kenya. Land is the mainstay of Kenya's economy, given that Kenya is mostly an agrarian society and

¹⁷⁵ Ibid p.59

¹⁷⁶ Ibid

heavily depends on land as a means of production for wealth creation.¹⁷⁷ Land and land-based resources are critical resources in the development process and are essential in securing livelihoods. Historically, land has provided the *raison d'etre* for wars, struggles for liberation, and many times has been a key fault line in clashes.¹⁷⁸ Land related disputes have loomed in Kenya's history and continue to persist to-date. There have been various attempts to correct the quagmire on ownership, allocation, distribution, and utilization of land in Kenya. To this end, the president appointed the Presidential Commission of Inquiry into the Land Law System in November 1999. Gazette Notice No. 6593 and 6594 operationalized the commission's mandate and terms of reference. The commission is commonly referred to as the Njonjo Commission named after the chairman of the commission Charles Mugane Njonjo who had previously been a victim of an investigation by a commission of inquiry. The commission was mandated to undertake a review of land issues in Kenya and recommend the main subject areas of a land policy framework to review the land tenure system in Kenya.¹⁷⁹

The commission concluded that the land problem in Kenya was as a result of the increased population, rural-urban migration, and increasing demand for arable land.¹⁸⁰ The commission recommended the formulation of a land policy in Kenya that would foster an economically efficient and sustainable land tenure in Kenya. The commission traced the genesis of the land problem in Kenya to the colonial era when the British government introduced land policies

¹⁷⁷ Humphrey K. Njuguna & Martin M Baya 'Land Reforms in Kenya: An Institution of Surveyors of Kenya (ISK) Initiative,' available at https://www.fig.net/resources/proceedings/fig_proceedings/korea/full-papers/pdf/session7/njuguna-baya.pdf Accessed on 16th March 2019

¹⁷⁸ Peter Kagwanja, Daniel Muthee & Thomas Kimaru (trs) *Ethnicity, Land and Conflict in Africa* (Africa Policy Institute & International Development Research Centre 2011) p.309

¹⁷⁹ Government of Kenya; Report of the Commission of Inquiry into the Land Law Systems of Kenya on Principles of a National Land Policy Framework, Constitutional Position on Land and a New Institutional Framework for Land Administration (Government Printers 2002)

¹⁸⁰ *Ibid* p. 46-50

to entrench colonial rule in Kenya.¹⁸¹ Ultimately, the commission recommended the amendment of the constitution and the existing land regimes at the time to overhaul the existing policies that further suppressed the land problem in Kenya.¹⁸² Commendably, the recommendation largely shaped the land reform process in Kenya and the current land regimes.

2.5 President MwaiKibaki's Regime

In 2002 a general election was held when Kenyans voted out KANU that had led since independence in 1963. The change in the regime of power in Kenya was viewed by some as an era of real democracy the NARC government bringing new ideologies, rationale, and philosophy.¹⁸³ President MwaiKibaki would succeed a twenty-four-year KANU regime following a peaceful transition of power through a swearing-in ceremony on Monday, 30th December 2002.¹⁸⁴

2.5.1 Task Force on the Truth Justice and Reconciliation Commission

The walk towards transitional justice in Kenya begun in April 2003. The then Minister of Justice Honorable KiraituMurungi appointed a task force for a Truth Justice and Reconciliation Commission. This taskforce was a milestone to the quest for transitional justice coming only four months after NARC'S ascension to power. It indeed demonstrated the NARC's government aspiration to reform the country. President Kibaki's government inherited a government marred with massive looting of public funds and gross human rights violations. The task force was established to find out if a truth and justice commission was necessary and if so, the type of

¹⁸¹ H.W.O OkothOgendo 'Tenants of the crown: Evolution of Agrarian Law and institutions in Kenya' (ACTS Press, Nairobi 1991)p.12

¹⁸² Ibid p. 71

¹⁸³ C. OdhiamboMbai, *The Politics of Transition in Kenya from KANU to NARC*(Walter O. Oyugi, Peter Wanyande and C. OdhiamboMbaitrs Heinrich Boll Foundation 2003) p.89

¹⁸⁴ Ibid 92

commission that would be ideal for Kenya.¹⁸⁵ The chairman of the defunct Kenya Human Rights Commission Professor Makau Mutua headed the task force.

The task force conducted public inquiries, and in its report presented to the Minister on 26th, August 2003 recommended a truth commission be established by a presidential order not later than June 2004.¹⁸⁶ The rationale behind this recommendation was that this was a popular and practical route towards transitional justice. The commission was to be established under the Commission of Inquiry Act and given powers akin to commissions established under the Act. The recommendations of the task force were neither made public nor implemented by the government of the day.

2.5.2 Goldenberg Commission

The Goldenberg scandal was hatched during President Moi's reign in power in 1991. At around this time, the Government of Kenya had begun a promotion policy known as the Export promotion Programme Office (EPPO) through fully refunding import taxes paid on inputs used in the production of exports.¹⁸⁷ However, the scheme came to a sudden halt in 1993. David Munyakei who was working at the Central Bank of Kenya as a clerk, brought to light the illegal payments for alleged payments of exports in gold and diamond.¹⁸⁸ At the centre of the scandal was the Goldenberg International Company owned by businessman Kamlesh Pattni.¹⁸⁹ The Goldenberg scandal is said to have cost Kenya the equivalent of more than ten percent (10%) of

¹⁸⁵ Special Gazette Notice of 17th April 2003.

¹⁸⁶ Government of Kenya, Report of the task force on the establishment of a truth, justice and reconciliation commission, Government Printers 2003 p.39

¹⁸⁷ Geoffrey Gertz 'Kenya's trade liberalization of the 1980's and 1990s: Policies, Impacts and Implications' (2008) Available at https://carnegiendowment.org/files/kenya_background.pdf Accessed on 12th March 2019 p.4

¹⁸⁸ Transparency International 'Constable Naftali Langat, Police Officer and David Munyakei clerk at Central Bank –Kenya Integrity Award' 7th October 2004 Available at https://www.transparency.org/getinvolved/awardwinner/naftali_lagat_and_david_munyakei Accessed on 12th March 2019

¹⁸⁹ Henry Kemoni 'The Goldenberg Scandal and Records Management in Kenya' (2009) 2(2) EAJLS 65 p. 69

the country's Gross Domestic Product (GDP). Interestingly, money was siphoned from the Treasury in a compensation scheme to promote export of gold and diamond which Kenya has very little. Consequently, the International Monetary Fund and World Bank withdrew foreign aid to the tune of \$500 million in 1997, citing that the Kenyan government had failed to end corruption.¹⁹⁰

The Goldenberg scandal was an emotive subject seeing that it nearly brought Kenya to the brink of economic depression.¹⁹¹ Subsequently, when the NARC administration ascended to the reign of power the Judicial Commission of Inquiry into the Goldenberg Affair was appointed in 2003 to probe into the Goldenberg scandal. The commission is popularly referred to as the Bosire Commission named after its chairman Honorable Justice S.E.O Bosire. The then-Attorney General Amos Wako, in his speech during the official opening of the inquiry noted that:

*"...My Lords what has become the Goldenberg Affair or Goldenberg Scandal has been and remains the most emotive concern in the minds of Kenyans. One can think of no other matter which has engaged the time of all organs of Government: The Executive, Legislature and Judiciary as much as the Goldenberg Affair. The Goldenberg Affair has epitomized corruption in the public perception..."*¹⁹²

The commission's report was submitted to the President in October 2005. The report implicated some influential government officials in both the Moi and Kibaki regime.¹⁹³ Kaguru, notes that like many other CIs the Goldenberg Commission could be viewed as a mechanism employed in

¹⁹⁰ Ibid p.67

¹⁹¹ Hewitt S 'The economic and business report' (2003) Africa Review 163

¹⁹² Government of Kenya, Report of the Judicial Commission of Inquiry into the Goldenberg Affair (Government Printers) 2005 p.5 Available at <http://kenyalaw.org/kl/fileadmin/CommissionReports/Report-of-the-Judicial-Commission-of-Inquiry-into-the-Goldenberg-Affair.pdf> Accessed on 12th March 2019

¹⁹³ Republic V Judicial Commission of Inquiry into the Goldenberg Affair & 2 others Ex-parte George Saitoti [2006] eKLR

legitimizing the government's actions.¹⁹⁴ He explains that the government had already initiated most of the recommendations. Conspicuously, minimal or none of the remaining recommendations of this commission appear to have been implemented.

2.5.3 Ndung'u Commission

The two previous regimes of power were known to circumvent the rule of law in a bid to consolidate power and establish a set of loyalist around the presidency.¹⁹⁵ These regimes of power in Kenya exhibited characteristics of loyalty and allegiance to the presidency. The President used rewards such as land and appointment to positions of power were used to recompense political faithful.¹⁹⁶ The NARC administration in its commitment to fight corruption and restore constitutional values constituted the Ndung'u Land Commission,¹⁹⁷ to probe the irregular and illegal allotment of land belonging to the public.

This commission investigated allocation of such land to private individuals and other corporate entities in Kenya. The commission presented its findings to the President.¹⁹⁸ The findings of the commission revealed that previous regimes of power had created a system of presidential hegemony in structures and institutions of governance to fortify their power. It smoothly paved the way for impunity to permeate into the system through grabbing and illegal allocation. The

¹⁹⁴ Joseph Kaguru 'Towards effective commissions of inquiry in Kenya: A review of the Commissions of Inquiry Act in light of the Constitution of Kenya 2010' (Master's Thesis University of Nairobi, 2018) p.54

¹⁹⁵ Maurice N. Amutabi, Beyond Imperial Presidency in Kenya: Interrogating the Kenyatta, Moi and Kibaki Regimes and Implications for Democracy and Development' (2009) 1(1) Kenya Studies Review 55

¹⁹⁶ Muna K, Leadership and Political Corruption in Kenya (2010) Journal of Social, Political and Economic Studies 6

¹⁹⁷ Commonly referred to as the Ndung'u Report after the name of its chair Paul Ndung'u.

¹⁹⁸ Government of Kenya, Report of the Commission of Inquiry into illegal/irregular allocation of public land (Government Printers)

http://kenyalaw.org/kl/fileadmin/CommissionReports/A_Report_of_the_Land_Commission_of_Inquiry_into_the_Illegal_or_Irregular_Allocation_of_Land_2004.pdf>accessed on 20th January 2019., [Report of the Land Commission of Inquiry into the Illegal or Irregular Allocation of Land - 2004 Annexes Volume I](#)

http://kenyalaw.org/kl/fileadmin/CommissionReports/A_Report_of_the_Land_Commission_of_Inquiry_into_the_Illegal_or_Irregular_Allocation_of_Land_2004_Annexes_Volume_I.pdf> accessed on 20th January 2018 and [Report of the Land Commission of Inquiry into the Illegal or Irregular Allocation of Land - 2004 Annexes Volume II](#)http://kenyalaw.org/kl/fileadmin/CommissionReports/A_Report_of_the_Land_Commission_of_Inquiry_into_the_Illegal_or_Irregular_Allocation_of_Land_2004_Annexes_Volume%20II.pdf> accessed on 20th January 2019

commission's findings dedicated extensive parts of its reports to a long list of irregularly or illegally parcels of land. The commission also proposed the restoration these lands for their intended purpose or other suitable solutions by way of policy and institutional framework.¹⁹⁹ The robustly, educative and eye-opening recommendations remain at the centre of the land debate and largely unimplemented.²⁰⁰ Interestingly the government, despite being the key authority in the implementation of this report, has remained silent notwithstanding being the initiator of the commission.²⁰¹

2.5.4 Kriegler Commission and Waki Commission

The general elections conducted on 27th December 2007 were hotly contested between two main contenders Mwai Kibaki running and Raila Odinga. On 30th December 2007, after a delayed and protracted announcement, the chairman of the defunct Electoral Commission of Kenya declared the incumbent president reelected. This declaration sparked violence that spread across the country. The pronouncement of the results literally polarized the country. Violence, killing, and destruction of property broke out in various parts of the country. The international community and persons of goodwill moved in to attempt and restore peace in the country. A team led by the late former UN Secretary-General, Kofi Annan, regional leaders from Tanzania, Uganda, Rwanda, and the regional blocs the EAC and IGAD moved to help in broker peace in the country. The mediation talks involved the abovementioned actors as well as representatives

¹⁹⁹ Government of Kenya, Report of the Commission of Inquiry into illegal/irregular allocation of public land (Government Printers)
<http://kenyalaw.org/kl/fileadmin/CommissionReports/A_Report_of_the_Land_Commission_of_Inquiry_into_the_Illegal_or_Irregular_Allocation_of_Land_2004.pdf> accessed on 24th January 2019

²⁰⁰ African Centre for Open Governance (AfriCOG) 'Mission Impossible? Implementing the Ndung'u Report,' <www.africog.org> accessed on 20th January 2018

²⁰¹ Njoroge Stephen Chege, 'Limitations of the current land laws addressing the squatter problem in Kenya,' (Masters Thesis, University of Nairobi 2013) P.7

of the Party of National Unity candidate Mwai Kibaki and representatives of the then ODM candidate Raila Odinga.

The mediation talks yielded into two significant results:

1. **The signing of the National Peace Accord:** where the two main warring functions agreed to end violence and foster the maintenance of peace among their supporters and the country at large. The Peace Accord became operational, and there was the subsequent enactment of the National Accord and Reconciliation Act, 2008.²⁰²
2. **Power Sharing Deal:** This led to the creation of the position of a Prime Minister, Deputy Prime Ministers, and division of cabinet positions between PNU and ODM.

The African Union Panel of Eminent African Personalities chaired by Mr. Kofi Annan negotiated an agreement between the two factions. The two principles signed an agreement that entailed the principles of the partnership in the Coalition Government. In Kenya National Dialogue and Reconciliation (KNDR) framework it was agreed that the parties would work towards ending the political crisis. This agreement was further cemented by the enactment of the National Accord and Reconciliation Act. It laid the foundation for the sharing power and ending the political crunch.

The aftermath of the peace talks and signing of the peace National Peace Accord and Power sharing deal saw several initiatives by the government to probe into the just-ended violence. One such initiative was the Commission of Inquiry into Post Election Violence (CIPEV) established in February 2008. High Court Justice Philip Waki chaired the commission. The commission that came to be referred to as the Waki Commission was tasked to conduct investigations on the

²⁰²“Agreement on the Principles of Partnership of the Coalition Government.” February 28, 2008. The agreement was entrenched in law through adoption by Parliament of the National Accord and Reconciliation Bill, 2008.

clashes in Kenya following the disputed Presidential Election in 2007 submitted its findings on October 17, 2008. The Waki Commission, in its report, listed suspects who were named in the probe. It also recommended institutionalised prosecution of the suspects through the establishment of an independent Tribunal involving participation by relevant international community. This report outlined two main issues:²⁰³

- i. It provided a comprehensive report of the post-election violence and included named suspects. It implicated several sitting Ministers and Members of Parliament (MPs).
- ii. The Commission called on the Coalition Government to put in place a tribunal with international participation to bring the alleged perpetrators to trial.

In December 2008, the government agreed that it would accept the findings of the Commission and implement the same. Parliament was mandated with the task of passing legislation to establish the tribunal by the month of March 2009. By July 2009, the legislation had not been enacted. Kofi Annan submitted the list of names of persons suspected of having orchestrated the violence, as presented by the Waki Commission, to the ICC.²⁰⁴

The disputed 2007 presidential election marred with grim irregularities and delays was at the centre of the 2007-2008 crisis.²⁰⁵ To avert the reoccurrence of election instigated violence in Kenya, the government on 14th March 2008 appointed an Independent Review Commission (IREC) to probe the 2007 elections.²⁰⁶ South African Judge Johann Kriegler chaired the commission. The commission focused on the legal gaps as well as institutional and structural

²⁰³ Musambayi Katumanga (2010) "Militarized spaces and the post-2007 electoral violence," in Karuti Kanyinga and Duncan Okello (eds) *Tensions and Reversals in Democratic Transitions: The Kenya 2007 General Elections* Society for International Development (SID) and Institute for Development Studies (IDS), University of Nairobi, Nairobi, pp. 559

²⁰⁴ Alexis Arieff, Rhoda Margesson, Marjorie Ann Browne and Mathew C Weed "International Criminal Court Cases in Africa: Status and Policy Issues," (2011) Congressional Research Service. Pp 10

²⁰⁵ *Supra* note 85 p. 601

²⁰⁶ Gazette Notice No. 1983 of 2008

flaws of the election system along with the election environment generally. The commission conducted an investigation and presented findings aimed at improving the election process in Kenya. It concluded the probe in 2009 and reported its findings to the president. The recommendations by the IREC profoundly influenced the electoral process in Kenya and subsequent laws that were enacted to govern elections in Kenya.²⁰⁷

2.5.5 Truth Justice and Reconciliation Commission

The political history and governance of the Kenyan state was characterized by an index of disregard to human rights, imperialistic presidency, and rampant economic crimes.²⁰⁸ The Truth Justice and Reconciliation Commission (TJRC) was established as per the Truth Justice and Reconciliation Act²⁰⁹ as one of the reactions to the post-election violence and as a product of the Kenya National Dialogue.²¹⁰

The Commission was mandated to probe violation of human rights by the government, collectively or individually. The mandate included hostility, killings, displacement of communities, and evictions that were politically or otherwise motivated. It was also required to look into other issues that inquire into major corruption, economic crimes, historical land injustices, and the land problem. Cumulatively, the Commission was aimed at bringing the people together, advancing peace, championing restorative justice, unity and reconciliation.

²⁰⁷ AfriCOG 'Ready or not? An assessment of Kenya's preparedness for the general elections , September – December 2012' (2012) Available at http://africog.org/new/wpcontent/uploads/Ready%20or%20Not%20Election%20Report%20Revised_0.pdf Accessed on 12th March 2019

²⁰⁸ Government of Kenya, Task Force on the establishment of a Truth, Justice, and Reconciliation Commission, 'Report on the task force of the establishment of a Truth, Justice and Reconciliation Commission ' (2003) <http://www.knchr.org/Portals/0/Transitional%20Justice/Kenya_Report_of_the_Task_Force_on_the_Establishment_of_a_Truth_Justice_and_Reconciliation_Commission_August_26th_2003.pdf?ver=2018-06-08-100201-947> accessed on 25th January 2019

²⁰⁹ Act No 6 of 2008

²¹⁰ Katiba Institute, Kenya National Dialogue Framework <<https://reliefweb.int/report/kenya/kenya-national-dialogue-and-reconciliation-building-progressive-kenya-background-note>> accessed on 24th January 2019

The TJRC appointment of the TJRC was flawed and was meant to flounder and perhaps capsize. The appointment of Ambassador Bethuel Kiplagat was seen as an exhibition of lack of political and was done to allow the tradition of impunity to flourish in Kenya.²¹¹ The credibility of the chairperson was in question seeing that he had served in a powerful and influential position during President Moi's regime.²¹² Conflict of interest was evident which led to calls for the chairman's resignation²¹³ and disbandment of the commission. Besides, the operations were characterized by internal wrangles, judicial processes and resignation of some of the commissioners.²¹⁴ The Vice Chairperson's resignation partially destabilized the functioning of the commission to deliver the truth within reasonable time.

2.4.5 Amendment of the Commission of Inquiry Act

In 2009 the members of parliament expressed concern over CIs reports that are never made public. The members of parliament lobbied for the release of the reports of findings of CIs. On 29th July 2009,²¹⁵ it became apparent that the MPs could not compel the president to release the reports of the various CIs by the president seeing that this was not provided under the Act.²¹⁶ On 8th June 2010, Honorable Olago Aluoch moved the Commissions of Inquiry (Amendment) Bill. The Bill sought to compel future CIs submit reports to the President and National Assembly in their oversight role capacity.²¹⁷ The amendment was passed on 13th August 2010 and came into force on 30th August 2010. Interestingly, around this time, Kenya ushered in a new constitution

²¹¹ S. Abdi Sheikh, 'Blood on the Runway: The Wagalla Massacre of 1984', (2010) 20 Northern Publishing House 1

²¹² Lanegan Kimberly, 'The Kenyan Truth, Justice and Reconciliation Commission: The importance of commissioners and their appointment process' (2015) 1(3) Transitional Justice Review

²¹³ In the case of Augustine Njeru Kathangu & Nine Others v TJRC and Bethuel Kiplagat [High Court Misc App No. 470 of 2009] the applicant questioned the process of nominating the commissioners to the TJRC

²¹⁴ In April 2010, the Vice Chairman Commissioner Betty Kaari Murungi resigned leaving the commission to operate with only eight out of the nine commissioners.

²¹⁵ Parliament of Kenya Debate 29th July 2009, Column 4561

²¹⁶ Section 7 Commission of Inquiry Act, Chapter 102 Laws of Kenya stipulated that the Commissioner(s) could only submit the outcomes of an inquiry to the appointing authority exclusively.

²¹⁷ Section 2 of the Commissions of Inquiry (Amendment) Act No. 5 of 2010 amended Section 7 of Cap 102

that embedded national values and principles of accountability, the rule of law, transparency *inter alia*.²¹⁸

2.4.6 Concluding Remarks

President Mwai Kibaki's regime of power inevitably started with the need and pressure to resolve scandals that occurred during his predecessor's regime of power. Notably, President Kibaki inherited a government characterized by twenty-four years of authoritarian rule. During the campaigns, the NARC administration promised Kenyans radical changes in all spheres. Public inquiry during this regime of power can be viewed as corrective measures for inherited scandals, as demonstrated by the first two inquiries. Moreover, inquiries were also instituted to try resolve and unearth the truth behind various emerging crisis during President Kibaki's rule.

2.6 President Uhuru Kenyatta's regime

President Uhuru Kenyatta's administration began in 2013 after the general elections and the supreme court upheld the reelection.²¹⁹ President Uhuru Kenyatta was the first elected president under the new constitutional order. He began his regime under the 2010 constitutional dispensation and hence pegged his legacy on implementing the constitution. Three months into Uhuru Kenyatta's administration, the TJRC presented its report to the president on 3rd May 2013.

On 21st May 2013, there was a terror attack at Westgate led to the death of 67 people and that left several injured victims. In response to this devastating attack, the president promised to constitute a CI to investigate the attack. This was never realized. Plans to establish a CI were shelved because of the sensitive nature of the security system details which would have left the

²¹⁸ Article 10 Constitution of Kenya, 2010

²¹⁹ Raila Odinga & 5 Others v Independent Electoral and Boundaries Commission & 3 Others (2013)eKLR

country's security details too exposed and vulnerable.²²⁰ Conspicuously, inquiries under President Uhuru Kenyatta's administration has taken the form of presidential commissions, committees and task forces. Another notable development presented is that task forces to look into public interest matters have also not necessarily been constituted by the president. Other offices under the executive such as Cabinet Secretaries and the office of the Attorney General have increasingly appointed task forces to look into a myriad of issues that affect the public. The latter task forces have been constituted to examine and review laws in a bid to implement provisions to reflect provisions of the new constitution administratively.

2.6.1 Receipt of the Truth Justice and Reconciliation Commission Report

The TJRC report was submitted in May 2013 and tabled in the National Assembly in July 2013.²²¹ In a bid to re-energize the process, President Uhuru Kenyatta in an address on the state of the nation to parliament in 2015²²² urged the National Assembly to fast track the implementation of this report.

He further directed the establishment of a 10 Billion Kenya Shillings Restorative Fund. This was to be utilized over a three year period in providing relief to the past victims of human rights violations.²²³ The government demonstrated a good gesture in the process of reparations.²²⁴ This is because in the report the TJRC has recommended the setting up of an initial Ksh 500 million

²²⁰ Daily Nation, 'Commission of inquiry that never was' Daily Nation (Nairobi 20th September 2014) Daily Nation Available at <https://mobile.nation.co.ke/news/Commission-of-inquiry-that-never-was/1950946-2460374-format-xhtml-dxe2a9z/index.html> Accessed on 22nd March 2019

²²¹ Government of Kenya, Truth, Justice and Reconciliation Commission, Final Report Volume IV (Government Printers 2013) p. 11 <<https://www.jfjustice.net/downloads/1460970274.pdf>> accessed on 19th March 2019

²²² The Presidency Website Kenya <<http://www.president.go.ke/>> accessed on 19th March 2019

²²³ Ibid

²²⁴ Tom Maliti, Kenyan President and Chief Justice apologize for past injustices,' International Justice Monitor (Nairobi 2018)> <https://www.ijmonitor.org/2015/04/kenyan-president-and-chief-justice-apologize-for-past-injustices/>> accessed on 24th January 2019

for reparations.²²⁵ For this fund to operationalize a proper legal and institutional framework to administer the fund ought to be set up. Section 4 of the Public Finance Management Act²²⁶ requires that a fund has to have systems in place so as to ensure that the fund is managed well.

A public petition filed in December 2015 during the fourth session of the National Assembly triggered the prioritization of the TJRC report.²²⁷ In addition, the TJRC recommended for the prosecution of the perpetrators of historical injustices. The report implicated several government officials who are yet to be²²⁸ Since then, no substantive progress has been made by way of creating an implementation mechanism for the recommendations in the report. The implementation process of the findings of the report has taken long.²²⁹

Kenya has over the years sought answers through commissions of inquiry, perhaps in a quest to display somewhat willingness to resolve the phenomena. Regrettably, in the long run, there is inaction to implement the findings of the commissions.²³⁰ The TJRC delivered to its terms of reference and proposed recommendations which were presented through its report in May 2013. Subsequently, two general elections have been held with very minimal implementation of the TJRC report. The report depicted a sense of urgency for implementation which still remains unimplemented. It is noteworthy that very minimal implementation has been seen despite the fact that the enabling Act the TJRA mandated the TJRC to come up with proposals for implementation of the findings of the commission.

²²⁵ Supra n.35

²²⁶ Act No. 18 of 2012

²²⁷ National Assembly Hansard for Thursday, December 3, 2015 at 2:30 pm<<http://www.parliament.go.ke/the-national-assembly/house-business/hansard>>accessed on 2 4th March 2019

²²⁸ prosecuted. Supra (note 35) p.75

²²⁹ Kenya National Human Rights Commission “ Report on TJRC monitoring and post TJRC Strategies,” <http://www.knchr.org/Portals/0/Transitional%20Justice/REPORT%20ON%20TJRC%20MONITORING%20AND%20POST%20TJRC%20STRATEGIES%20.pdf?ver=2018-06-08-100100-433>> accessed on 25th January 2019

²³⁰ Commissions or Omissions of Inquiry? Why Kenya has failed to address historical or other injustices, Elephant Volume 1 at page 2

2.6.2 Task Force to Implement 2010 Endorois Ruling

The Endorois community is an indigenous pastoralist community that occupied the Lake Bogoria region of Kenya. Lake Bogoria is of great cultural and religious significance to the Endorois. In the period between 1973 and 1986 the Kenyan government evicted the indigenous community from the area to establish a protected conservation area. This led to their displacement from their ancestral land, destruction of their material livelihood, loss of their traditional knowledge culture, and disconnection from their religious bond with their ancestral territory. In 1998 the Endorois community sought legal redress in the high court. The ruling of this petition favored the government. By 2003, efforts to resolve the matter at a national level were futile. The Endorois with the aid of other local and international players lodged the matter at the African Commission on Human and Peoples' Rights (ACHPR).²³¹ In 2010 the court delivered a landmark ruling. This ruling recognized the Endorois' rights over their indigenous land in Lake Bogoria. Subsequently, this ruling was adopted by the AU during its Addis Ababa summit. This implied that the Kenyan government had to take positive measures and steps towards implementation of the court decision.²³²

To this end, in September 2014 the president established a task force to further advise on the implementation of the ruling.²³³ This task force was mandated to advise the government on how to reconstitute the land to the Endorois, compensate them for losses resulting from their eviction. It was also mandated to propose the way forward on the division of royalties derived from lucrative

²³¹Center for Minority Rights Development and Minority Rights Group International -v- Kenya, Africa Commission on Human and People's Rights, Communication No. 276 of 2003

²³² Secretariat Resolution calling on the republic of Kenya to implement the Endorois decision ACHPR/Res.257(LIV)2013

²³³ Gazette Notice No. 6708 of 2014 Vol.

bio enzymes and rubies found on the land.²³⁴ The task force was mandated to propose provisional proposals to the President and a final report. Remarkably, as a result of the recommendations presented by the taskforce, both parties have since agreed on a co-management arrangement of the natural resources found in the area. Moreover, the parties agreed on a benefit sharing mechanism from the proceeds of tourism activities with the county government.

2.6.3 Presidential Task Force on Parastatal Reforms, 2013

The adoption of a new constitution in 2010 was heralded as a transformative catalyst for reform. It introduced a broad array of changes in the structure in several institutions in Kenya. Previously, parastatals were taken as a patronage reward system for loyalty through appointment to government positions.²³⁵ As a result, there was a proliferation of State Corporations and a lot of duplication of roles across the institutions. The entities were used as avenues of corruption. With the promulgation of the new constitution, county governments were bestowed some of the functions performed by these parastatals.

Upon accession to power in 2013 the President Uhuru Kenyatta's administration commenced on a state restructuring process to ease the tax burden. In this light, the President set a conversation on parastatal reforms to avoid duplication of powers and remove overlaps. The President appointed a ten-member task force comprised of representatives from government and the private sector. The task force secretariat consisted of State Corporations Advisory Committee(SCSC) and Economic and Political Advisors. The task force was mandated with the responsibility to look into an institutional arrangement in line with the new constitution, separate

²³⁴ Minority Groups International Website Available at <https://minorityrights.org/2014/09/29/kenyan-task-force-formed-to-implement-the-2010-endorois-ruling/> Accessed on 22nd March 2019

²³⁵ Supra note.82 p. 57

of parastatals into categories, types, sizes and relevance/viability and conduct a review of human capital to establish the professional and technical needs. .

The task force submitted its findings on October 2013.²³⁶ The task force recommended the consolidation, reclassification, and transfer of roles and rationalization of Government Owned Entities (GOE). This was aimed at avoiding the overlap of mandates and enhance the ability of public agencies to perform their core regulatory and developmental mandates.²³⁷ Moreover, the task force recommended reduction in the number of board members with specified term limits in a bid to reduce public funds wastage. Policy changes recommended by the task force are largely yet to be implemented. In an interesting turn of events in September 2018 named new chairpersons and members to boards of parastatals that featured names of several politicians as well as renewal of terms for some members of boards.²³⁸

2.6.4 Task Force to Review of Legal, Policy and Institutional Framework for Fighting Corruption in Kenya, 2015

The corruption menace in Kenya has become a teething problem and long-standing battle of all administrations in Kenya. The country had faced grand corruption scandals that have impacted on development programs and in some instances threatened to obliterate Kenya's economy.²³⁹ On 26th March 2015, when addressing the nation the President instructed the Office of the Attorney

²³⁶ Republic of Kenya, Report on the Presidential Task Force on Parastatal Reform, 2013 Available at <https://www.cofek.co.ke/Report%20of%20The%20Presidential%20Task%20force%20on%20Parastatal%20Reform.s.pdf> Accessed on 22nd March 2019

²³⁷ Ibid p. 18

²³⁸ Business Daily, 'Uhuru makes key parastatal appointments' Business Daily(Nairobi 7th April 2018) Available at <https://www.businessdailyafrica.com/news/539546-539546-n19y6s/index.html> Accessed on 23rd March 2019

²³⁹ Hewitt Supra note. 85

General in collaboration with the National Council on Administration of Justice (NCAJ) to coordinate effective and expeditious trial of the pending corruption-related cases.²⁴⁰

The task force was mandated to review the existing framework for combating corruption. Ultimately, the task force was to offer solutions and interventions on dealing with corruption.²⁴¹

The then AG Professor Githu Muigai formed the task force vide Gazette Notice No. 2118 of 30th March, 2015. The task force completed its assignment in a period of four months and submitted an interim report to the National Assembly. Among the numerous recommendations given by the task force was the need to amend various provisions in the Ethics and Anti-Corruption Commission Act.²⁴² The task force presented a report of its findings on 20th November, 2015.

2.6.5 Task force on building bridges to unity advisory, 2018

Kenya held its second election under the new constitutional dispensation on 8th August 2017. The presidential elections were hotly contested between the incumbent President Uhuru Kenyatta running on a Jubilee Party ticket and Raila Odinga candidate for the National Alliance Movement. Upon voting, tallying and declaration by the electoral body's chairman Wafula Chebukati that the incumbent had been reelected by garnering the requisite number of votes Raila Odinga the closest contender filed a petition challenging the outcome and exercise of the elections.

In a historic ruling on 1st September 2017 the highest court in the land nullified the just concluded presidential election and ordered a new vote to be held within 60 days. The repeat

²⁴⁰ Speech by his Excellency Hon. Uhuru Kenyatta G.G.H, President and Commander in Chief of the armed forces of the Republic of Kenya during the State of the Nation address at parliament buildings Nairobi, on Thursday 26th March 2015 Available at <http://www.president.go.ke> Accessed on 24th March 2019

²⁴¹ State Law Office, Report of Task Force on the Review of Legal, Policy and Institutional Framework for Fighting Corruption in Kenya (2015 Government Printer)

²⁴² The task force recommended an amendment to address the policy and internal operations within the structure of the EACC aimed at addressing the constant wrangles that grappled the anti-corruption agency.

election exercise was conducted on 26th October 2017. By this time the NASA coalition which was demanding electoral reforms had asked their supporters to boycott the election exercise and made an announcement that he had withdrawn from the presidential election race. The election exercise proceeded albeit the low voter turnout in areas where the NASA supporters heeded to the calls to boycott the election. The incumbent President once again stood reelected having garnered the highest number of votes cast and meeting the requisite threshold.²⁴³ The scourge of divisive elections was once again being felt and left the country very volatile.²⁴⁴

On 9th March 2018 the country was taken by surprise when President Uhuru Kenyatta and opposition Chief Raila Odinga announced a surprised political seize fire deal popularly known as the handshake. The two principals came up with a nine-point agenda that anchors the March 9th handshake.²⁴⁵ On 29th April 2018, Uhuru Kenyatta and Raila Odinga unveiled a fourteen-member advisory panel to spearhead their unity deal comprising of seasoned long-serving politicians and moderates. The task force was appointed to assess the issues outlined in the Joint Communique for building bridges in the nation.

The task force was expected to put forward proposals for amendment and implementation modalities. The task force was gazette on 31st May 2018 vide gazette notice No. 5154 of 2018 Vol.CXX-No.64. The task force has since begun to collect views and hold talks with stakeholders and citizens on the unity process.

The gesture towards uniting Kenya has been lauded locally and internationally. However, this initiative has been criticized as being problematic and amorphous with no legal framework to

²⁴³ IEBC, final Presidential election results for the election held on 26th October 2017
<https://www.iebc.or.ke/uploads/resources/A1wUI9EnMM.pdf> Accessed on 22nd March 2019.

²⁴⁵ The nine-point agenda includes; Ethnic antagonism and competition, lack of national ethos, devolution, safety and security, corruption shared prosperity and rights and responsibilities.

operate on. There have been calls to have the initiative anchored in law and enable it to work with legitimacy.

2.7 Conclusion

The preceding discussion reveals that public inquiry is a common feature in governance throughout the different regimes of power. Public inquiry was a practice adopted by the colonial government to entrench colonial rule and policies in the Kenyan colony. Other successive post-independence governments adopted some colonial structures of government and administration. The practice of public inquiry through CIs, which was deeply rooted in Britain found its way into the independent Kenya administrative system. Previous presidential regimes have preferred appointing CIs to inquire into matters that touch on public interest.

This trend can be attributed to the nature of institutions of governance and the existing legal order. Before the 2010 constitution took effect, the executive arm of government through the President had unfettered power. Additionally, institutions responsible for protecting public interest, such as the legislative organ and judicial organ had limited power to enforce the same.

Notably, President Uhuru Kenyatta's government has only appointed one CI to probe into the affairs of Makueni County Government following a petition filed by Makueni Governor. This CI was formed in accordance with the prescription of the Constitution and County Governments Act on the procedure of dissolution of a county government. President Kenyatta's regime has largely invoked the use of presidential commissions, task forces, and committees. The new constitutional dispensation introduced new bodies and agencies with powers akin to a public inquiry. The practice of checks and balances as captured under the new constitution created a form of public inquiry mechanism within the three organs of government.

In the post-2010 regime the government has often preferred to employ the use of task forces. These task forces play mirror CIs set up under the colonial rule, during the Jomo Kenyatta regime and some of those set up during President Moi's regime in that they focus on legal reform and policy formulation. However, some task forces formed in the post-2010 period have been constituted as investigative tools to provide answers to occurrence of disasters.

Outstandingly unlike CIs that are governed by the Commissions of Inquiry Act, there exist no legal and regulatory frameworks for the task forces. Therefore, there exist no legal substructures that underpin the relationship between the government and the task forces.

CHAPTER 3: LEGISLATIVE AND INSTITUTIONAL FRAMEWORK GOVERNING PUBLIC INQUIRY IN KENYA

3.0 Introduction

The historical development of public inquiry in Kenya was presented in the previous chapter. It outlines the historical timelines since pre-colonial Kenya, colonial Kenya, and post-colonial Kenya through the regimes of power that have been there in the practice of public inquiry.

This chapter will examine the legal and institutional frameworks that govern the practice of public inquiry in Kenya. It addresses the third research question that seeks to look at the framework governing the practice of public inquiry in Kenya. In order to situate the practice of public inquiry locally and internationally, it examines the existing legal and policy frameworks as well as the various institutions and authorities that conduct mandates that are incidental to public inquiry. The researcher argues that the practice of public inquiry has evolved following the coming into effect of the 2010 constitution. The new legal order introduced new structures and redesigned institutions for purposes of public inquiry. Similar functions are carried out by inquiries, agencies, departmental co-coordinating committees, parliamentary committees, and advisory bodies in the practice of public inquiry. This chapter discusses the restructuring of the COK and how this has expounded and expanded the institutional framework in the public inquiry sphere.

3.1 National Legal Framework

3.1.1 Constitution of Kenya, 2010

In 2010 Kenyans ushered in a new constitution that is hailed and acclaimed by many as being exemplary and progressive.²⁴⁶ The constitution vests sovereignty in the people of Kenya. All institutions derive their power and authority from the constitution promulgated by the people.²⁴⁷ The Constitution of Kenya emphasizes the importance of the national values and governance principles as entrenched in Article 10 of this Constitution. The Constitution provides a value based system that governs all organs and institutions of governance and administration in application and interpretation of the constitution.²⁴⁸ The Constitution mandates that the exercise of public authority should conform to the national values and principles of governance including rule of law, transparency openness, public participation, good governance, and integrity.²⁴⁹ Article 10 is one of the provisions that introduce a paradigm shift between the retired constitution and the Constitution of Kenya, 2010.²⁵⁰ This Article introduced a value-oriented Constitution in contrast to a more structurally designed constitution. It introduced a value-based interpretation and application guided by this ingrained intention of the Constitution.

In furtherance to this Chapter six focuses on leadership and integrity. It guides the conduct of state officials in discharging their duties. The Constitution assigns authority to a state officer as a watchdog of the public and as such must be exercised within the set down precepts of law and in

²⁴⁶ Winnie Narasha Molonko 'Legislative drafting in law making: An analysis of challenges in light of the Constitution of Kenya 2010' (Masters Research Project, University of Nairobi, 2013) p.4

²⁴⁷ Article 1, Constitution of Kenya, 2010

²⁴⁸ Ibid Article 10(1)(a) (b)

²⁴⁹ Ibid Article 10(2) (c)

²⁵⁰ Republic V Cabinet Secretary, Ministry of Agriculture, Livestock & Fisheries & 4 Others Ex Parte Council of Governors & another (2017) eKLR

a manner that protects dignity of the office; respect and ensures public confidence.²⁵¹ In addition, there is a detailed bill of rights that must be protected, respected and applied by all state organs.²⁵²

3.1.1.2 Independent commission and offices

Amongst other radical changes, the Constitution of Kenya 2010 introduced Chapter fifteen dedicated to the independent offices and commissions. The establishment of these organizations within government altered the institutional framework of governance and administration in Kenya. The establishment of these commissions with autonomy in operation, altered governance and administration process significantly. The Constitution Review process through the CKRC revealed that the independent commissions were borne out of a need to distinguish functionalities of institution and enhance autonomy. The constitutionalisation of these commissions was aimed at controlling the centralization of powers in the presidency whereby the President directed all sectors.²⁵³

The Constitution envisages that each of these Commissions would safeguard the intention of the Constitution by defending the “sovereignty” of Kenyans, adhering to “democratic values” and upholding the spirit of “constitutionalism.”²⁵⁴ Further, the commissions have expert membership, distinguished functions and are constituted as politically independent to ensure they perform their functions devoid of any influence. The Commissions have played important roles in legislative reform.

²⁵¹ Ibid Article 73(1)(a)iii, iv

²⁵² Ibid Article 21(1)

²⁵³ Hilda Atusimiire ‘The Implementation of the Public Procurement and Asset Disposal Act, 2015, and the performance of independent constitutional commission in Kenya’ Masters Research Project (University of Nairobi 2018)

²⁵⁴ Nkatha Kabira and Jill Cottrell Ghai, ‘Independent commission and offices’ Katiba Institute (2019)

The Human Rights commission the KNHRC and Commission on Administration of Justice (CAJ) were intended to provide a cheap, simple and speedy way for complaints to be registered by the public. These commissions have produced valuable investigative reports and educational materials on various aspects of human rights. Other bodies such as NGEK and the KNCHR have acted as watchdogs for the public. These two bodies have instituted proceedings to protect rights under the Constitution, including on the two-thirds gender issue and on the Security Laws Amendment Act.

3.1.1.3 Devolution

In August 2010 Kenya experienced a constitutional moment in governance, reconfiguring the balance of power by introducing devolved units. Chapter eleven of the Constitution yielded a devolved system of government creating forty seven counties. The fourth schedule of the constitution distinguishes the responsibilities assigned to the central government and devolved units. Devolution transferred decision-making, supervisory and managerial mandates and resources to elected local governance structures.

Devolution created the county assembly constituting of elected members of the county assembly (MCA) as the legislative organ for every county. The Assembly legislates of functions that are spelt out under Schedule Four in each respective county. The executive arm of the counties mandated to implement policies that fall under the devolved functions scope.

3.1.2 Commissions of Inquiry Act, Chapter 102 Laws of Kenya

The Commissions of Inquiry Act is the legal authority for the establishment, conduct, and management of CIs in Kenya. The Act sets out the appointing authority for CIs, circumstances for issuing a CI, conduct of the commission's business as well as a reporting system.

3.1.2.1 Issuance of Commissions of Inquiry

The President reserves all the power to issue a commission.²⁵⁵ Notably, as earlier discussed, the President heads the executive branch and plays a pivotal role in appointment of public officers. Under the old constitutional order, the Presidency was highly imperial with a range of unfettered powers.²⁵⁶ The various regimes of power have sanctioned CIs to probe matters as a result of mounted public pressure. Secondly, the reports produced by these CIs are highly secretive, and on numerous occasions, the reports have remained unpublished even though they touch on matters of public interest. This inaction impeded accountability, transparency, and the implementation of the findings. This inaction was the most considerable impetus towards amendment of the Act in 2010. The amendment introduced an obligation to table the reports before Parliament as part of the reporting process.

3.1.2.2 Appointment of a CI

The Act contemplates three instances when the President may issue a CI for purposes of probing into an issue. The overarching standard is that in all three instances, the President must opine the issue at hand as being that of public interest. First, the legislation empowers the President to

²⁵⁵ Commission of Inquiry Act, s.3

²⁵⁶Emmanuel Kibet& Kimberly Wangeci, 'A perspective on the Doctrine of Separation of Powers based on the response to court orders in Kenya,' (2016) Strathmore Law Review 220, 222.

issue a commission to probe into the behavior of a public officer.²⁵⁷ The Act does not, however, define a public officer in relation to the Act. The Constitution makes reference to any individual holding a public office.²⁵⁸ The most notable instance when the President appointed a Commission of Inquiry to inquire the conduct of a state officer is the Miller Commission (1984). This was the only instance when the President appointed a CI to probe the conduct of a public officer. The commission had the mandate of probe into allegations involving the former Minister for Constitutional Affairs Charles Njonjo.²⁵⁹ The State accused Njonjo of acting in a way that contradicted the state's security. The commission was a last resort political mechanism to stop Njonjo's persistent dissenting opinion. Despite the judicial inquiry finding Njonjo guilty of the accusations leveled against him, President Moi pardoned him for his outstanding long public service.²⁶⁰

Secondly, the Act empowers the President to appoint a CI to probe the conduct of a public office. Again, the legislation falls short of defining what a public office with reference to the Act.

Lastly, the Act makes a provision where the President is given the discretion to issue a CI in any matter which he deems to be of public interest. It is in the President's discretion to determine whether a matter is of public interest or not. There are no parameters that qualify a public interest matter in the Act leaving the President with unlimited discretion when issuing a CI. A myriad of establishment of CIs have been pegged on this ground. Additionally, in appointing the CI, it is

²⁵⁷ Commissions of Inquiry Act, s. 3

²⁵⁸ Constitution of Kenya, 2010 Art. 260

²⁵⁹ Government of Kenya, Report of Judicial Commission appointed to inquire into allegations involving Charles Mugane Njonjo (Former Minister of Constitutional Affairs and Member of Parliament for Kikuyu Constituency, 1984 <http://kenyalaw.org/kl/fileadmin/CommissionReports/Report-of-Judicial-Commission-Appointed-to-Inquire-into-Allegations-Involving.pdf> Accessed on 9th March 2019

²⁶⁰ Mbote, Patricia Kameri and Migai Akech, Kenya: Justice Sector and the Rule of Law (2011) The open Society initiative for Eastern Africa p. 68

the President's prerogative to decide the number of persons who should constitute a commission.²⁶¹

3.1.3 County Governments Act, No. 17 of 2012

The Act envisions the establishment of a CI for the suspension of a County Government.²⁶² Upon the submission of the petition, to suspend a county government, to the President, he then constitutes a CI. The CI then conducts a probe into the county government concerned and makes recommendations to the President on the suspension.²⁶³ Section 123(5) of the Act outlines the criteria in which the members of the commission are selected. In 2015, the President formed a commission of inquiry to probe into the affairs of Makueni County Government following a petition filed by Makueni Governor.²⁶⁴ The Mohammed Nyaoga led commission submitted its findings to the President recommending the dissolution of the county government citing irreconcilable differences and wastage of public funds.²⁶⁵

3.1.4 National Coroners Service Act, No. 18 of 2017

The Act establishes the National Coroners Service for the purpose of holding inquests into violent, sudden or suspicious deaths. The coroner service offers among other the services of investigation into reportable deaths, in order to identify the deceased persons, the manner and cause of their deaths. Additionally, the Service participates in inquests to advice on matters

²⁶¹ Commissions of Inquiry Act, s. 3(1)

²⁶² Section 123 County Governments' Act, No.17 of 2012.

²⁶³ Ibid Section123(7)

²⁶⁴ KTN News Kenya 'President Uhuru commission of inquiry on Makueni County wrangles' (2015) <https://www.youtube.com/watch?v=RS6F_mIe6ww> accessed on 12th September 2019, Diana Ngila, 'Team to probe Makueni row gets nod' <<https://mobile.nation.co.ke/news/Makueni-Commission-Senate-Approval/1950946-2642962-format-xhtml-w4evsoz/index.html>> *Daily Nation(Nairobi, 4th March 2015)* accessed on 12th September 2019

²⁶⁵ K24 Kenya' Nyaoga commission recommends dissolution of Makueni County Government ' (2015) <<https://www.youtube.com/watch?v=H50ueMtb8U>> accessed on 12th September 2019

connected with reportable deaths. Interestingly, the operation of the Act to with regards to conduct of inquiries is dependent on the provisions of the Commissions of Inquiry Act.²⁶⁶The Service relies on inquest and probes into suspicious cases of death to unearth facts and report to the Coroner General.

3.1.5 Independent Police Oversight Authority, No. 35 of 2011

The Kenya Police Service has had an interesting history dating from the pre-colonial era. Previous inquiries established by subsequent post-independence governments adversely mentioned the Police Service as a catalyst to tribal clashes and civil strife. In 2008 the CI into Post-Election Violence (CIPEV) constituted to investigate the 2007/2008 post-election violence concluded that the police among other things lacked proper equipment and professionalism and impartiality when dealing with the situation. This subsequently gave rise to the formation of the National Task Force on Police Reform led by Honorable (Retired) Phillip Ransley to look into, the existing institutional structures and policies of the police, and make comprehensive proposals for reform. The proposals presented were steered towards enhancing service delivery in the police service.²⁶⁷ The task force recommended the restructuring of the service, community oversight and modernization of the policing mechanisms.

The Independent Policing Oversight Authority was birthed as a result of the recommendations to reform the police service. The IPOA Act establishes IPOA as an independent body that among other functions receives complaints and investigates the complaints either on its motion or upon

²⁶⁶ Section 5(2) National Coroners Service Act, No. 18 of 2017

²⁶⁷ Government of Kenya, Report of the National Taskforce on Police Reforms, 2009, Government Printers and Press, Nairobi Kenya

receipt of a complaint.²⁶⁸ The Authority conducts investigations on any disciplinary or criminal offences that are as a result of any police action.

3.2 National Institutional Framework

The functioning and operation of institutions under the old constitutional dispensation was characterized by strict political patronage and influence. Institutions were gagged through bottlenecks created in the appointment and dismissal in these institutions at will making them heteronomous. The Constitution 2010 ushered in a strong system of governance in Kenya, seeing that it reflected aspirations of Kenyans on how they would like to govern themselves. The Constitution restructured institutions of governance, making them autonomous and independent while establishing other new institutions for purposes of conducting probes of public nature. The constitution recalibrated the exercise of power as a balance between the three organs of government.

There are formal organizational structures that conduct a public inquiry by dint of their mandate and functions as established in Statute. The functions of these institutions do not necessarily expressly speak to public inquiry but conduct business and mandates that are incidental to probing matters touching on public interest.

3.2.1 Parliament

In 2010 at the peak of a new constitutional dispensation, there was the creation of a bicameral parliament. The Constitution of Kenya vests legislative authority on Parliament which power to

²⁶⁸ Section 6(a) IPOA Act, No. 35 of 2011

make laws originate the Kenyan citizenry.²⁶⁹ The legislature is categorically the prevailing law-making organ. It is bestowed with the preserve role of enacting legislation in the form of statute law.²⁷⁰ For this purpose, Parliament in the exercise of its legislative mandate plays an active role in the regulation of public inquiry in Kenya through legislating Acts of Parliament relating to the exercise of public inquiry.

The constitution establishes a two-pronged institution comprising of the Senate and National Assembly. Moreover, representation in Parliament reflects wider scope of interest groups in the house.²⁷¹ The National Assembly is mandated to deliberate and resolve matters of concern to the citizenry.²⁷² The Senate, on the other hand, is particularly concerned with deliberating matters touching on the counties and their governments.²⁷³ Both houses in the exercise of their oversight mandate have created a strong committee system that plays a pivotal role in their discharge of this role. Committees are a legislative instrument of oversight through holding the government accountable.²⁷⁴ The Committees are established and regulated by the Parliamentary Standing Orders that govern the conduct of business in both houses. Under the new constitutional dispensation Cabinet Secretaries do not sit in Parliament and as such the primary scrutiny point of the executive is via the parliamentary committees.²⁷⁵ Cabinet Secretaries and other government are expected to appear before committees whenever required.

²⁶⁹ Constitution of Kenya, 2010 Article 94(1)

²⁷⁰ Ibid Article 94(5)

²⁷¹ Ibid Article 93(1)

²⁷² Ibid Article 95(5)(b)

²⁷³ Ibid Article 96(1)(a)

²⁷⁴ Kipkemoi Arap Kirui & Kipchumba Murkomen' The Legislature: Bicameralism under the new Constitution '(2011) Constitution Working Paper Series No. 8 Accessed on April 29 2019

²⁷⁵ African Centre for Open Governance' Public Participation and Parliamentary Oversight Legal Policies and Policy Options' p.2 Available at https://africog.org/wp-content/uploads/2012/10/Final_Policy_Brief1.pdf Accessed on April 7 2019

The Constitution empowers either house of Parliament to institute committees which are regulated by internal procedures established by the respective appointing house.²⁷⁶ The committees are categorized as either standing committees of Parliament established as departmental committees dealing with different areas of operation of Parliament or select committees that are constituted through a resolution of either house when necessary. The select committees are ad-hoc in nature, seeing that they are established on a need basis through resolutions of either house of Parliament to deal with pressing public issues.²⁷⁷ These committees operate under terms of references that are set out by the establishing house.²⁷⁸ Further, the Constitution provides that Parliament may come up with regulations to govern the conduct of its internal structures.²⁷⁹ The underlying principle is that whatever procedure Parliament adopts, it must be constitutional and lawful, which include the application of principles set out under Article 47 to conduct probes and inquiries.²⁸⁰

The Committees have in the past been instrumental in carrying out probes and investigations on various matters that concern the public. A case in point is the senate select committee on the maize crisis in the country that came at a point when Kenya was experiencing maize shortage due to the high cost of production, effects of climate change and poor management of Strategic Grain Reserves.²⁸¹ The select committee was established to investigate and come up with recommendations to enable farmers to resolve challenges relating to the production of maize and management of maize in Kenya. The committee conducted a detailed and in-depth inquiry into the maize crisis by inviting the different stakeholders and persons of interest.

²⁷⁶ Constitution of Kenya 2010, Article 124(1)

²⁷⁷ AfriCoG supra note 12 at p. 3

²⁷⁸ Government Printer, Twelfth Parliament Senate Standing Order No. 191, 2017 and National Assembly Standing Order No. 172(1), 4th Edition 2017

²⁷⁹ Constitution of Kenya 2010, Article 117

²⁸⁰ Republic V Speaker of the National Assembly & 4Others Ex-Parte Edward R.O.Ouko (2017) eKLR

²⁸¹ Senate Debate Twelfth Parliament-Second Session August 8, 2018

The select committee presented its report before the Senate on November 27, 2018, recommending immediate payment of all arrears due to farmers who had supplied maize to the National Cereal and Produce Board (NCPB).²⁸² The committee also noted that the national agency in charge of investigating corruption was investigating irregular payments paid out on a preferential basis to undeserving individuals.²⁸³ The committee observed that endemic corruption, coupled with gross mismanagement in the maize sector shrouded the production and management of maize in the country. The committee emphasized the need to have well-coordinated seamless support by the government in the form of technical and financial support in maize production.

The Solai dam tragedy in 2018 that claimed 47 lives and scores injured and displaced spurred the Senate to take action against those whose negligence led to the tragedy. The Mutula Kilonzo led select committee conducted the probe into the tragedy through questioning various government stakeholders involved in licensing and regulating the operation of the dam as well as the owners of the dam. The report revealed that both the government agencies in charge of water resource management and the management of Patel dam were negligent. The report revealed that there had been complaints dating back to the 1980s when the residents through the then Subukia Member of Parliament Koigi Wamwere raised the issue with the farm regarding the blocking and diversion of rivers and streams.

Under Article 95(5) of the Constitution, the National Assembly exercises oversight over state officers and commences processes of removing them from office. The mandate to review the conduct of all state officers including the President and the Deputy President falls squarely

²⁸² Parliament of Kenya, Report on the inquiry of the maize crisis in Kenya 2018, Senate Available at Accessed on April 29 2019

²⁸³ Ibid p.97

within the role of the National Assembly. The committee set up for such, and other incidental purposes conduct an inquiry to gather evidence, in the exercise of its oversight function and determine whether there are grounds for removal. The 2010 constitution brought a clearer separation of powers departing from the old dispensation where the executive had unfettered powers to manipulate the legislature.²⁸⁴ OkothOgendo and Arthur Schlesinger described this leadership as highly imperial.²⁸⁵ Previously, the Constitution only provided for the passing of a motion to declare lack of confidence in the government.²⁸⁶ This process was characterized by many hurdles and bureaucratic bottlenecks including the issuance of a seven-day notice, resignation of the President within three days of passing the resolution and the subsequent dissolution of Parliament.²⁸⁷ Consequently, this meant that an independent audit of State offices such as the Presidency was consequential with the drastic repercussion of dissolution of Parliament in its entirety.

Parliament also plays a part in the implementation of recommendations and findings of the various public inquiries conducted. In the past, reporting the outcomes of public inquiries has faced interference from the executive arm of government. A case in point is the Parliamentary Select Committee that was set up to probe the murder of J.M. Kariuki, a former MP for Nyandarua North. Eventually the committee prepared its report and mentioned MbiyuKoinange as a person of interest in the murder. However, due to interference by the Presidency, the final

²⁸⁴Emmanuel Kibet & Kimberly Wangeci, 'A perspective on the Doctrine of Separation of Powers based on the response to court orders in Kenya,' (2016) *Strathmore Law Review* 220, 222.

²⁸⁵OkothOgendo & Arthur Schlesinger, *Constitutions Without Constitutionalism: Reflections Of An African Political Paradox*; Issa Shivji (ed)

²⁸⁶Constitution of Kenya, 1969 Section 59(3)

²⁸⁷ *Ibid*

report presented by the Committee was doctored excluding MbiyuKoinange and Arthur Wanyoike who was implicated in the initial report.²⁸⁸

In 2009 the members of Parliament expressed concern over CIs reports that are never made public. The members of Parliament lobbied for the release of the reports of findings of CIs. On July 29 2009,²⁸⁹ it became apparent that the MPs could not compel the President to release the reports of the various CIs.²⁹⁰ On June 8, 2010, Honorable OlagoAluoch moved the Commissions of Inquiry (Amendment) Bill. The Bill sought to compel future CIs to submit reports to the President and National Assembly in their oversight role capacity.²⁹¹ The amendment was passed on August 13, 2010, and came into force on August 30 2010. The TJRC, for instance, was established through and an Act of Parliament following the post-election violence.²⁹² The TJRA, expressly provided that upon the release of the findings, the report would be tabled before Parliament for discussion and implementation. The TJRC report was published in May 2013 and tabled in the National Assembly on July 2013.²⁹³ Conversely, no substantive progress is visible by way of creating implementation mechanisms for the recommendations in the report.

The acrimonious relationship between the two houses of Parliament has also borne a thrust in the quality of public inquiry reports submitted by both houses. The cloud of controversy surrounding the infamous Ruaraka Land Saga epitomizes a divergence in public inquiry between the two houses of Parliament. The report prepared by the Sessional Committee on County Public

²⁸⁸ Africa Centre for Open Governance, 'First Report: A study of commissions of inquiries in Kenya' 2007 Available at https://africog.org/wp-content/uploads/2012/10/Final_Policy_Brief1.pdf Accessed on May 15 2019

²⁸⁹ Parliament of Kenya Debate 29th July 2009, Column 4561

²⁹⁰ Section 7 Commission of Inquiry Act, Chapter 102 Laws of Kenya stipulated that the Commissioner(s) could only submit findings of any inquiry to the President.

²⁹¹ Section 2 of the Commissions of Inquiry (Amendment) Act No. 5 of 2010 amended Section 7 of Cap 102

²⁹² TJRA, No. 6 of 2008

²⁹³ Government of Kenya, Truth, Justice and Reconciliation Commission, 2013 Final Report Volume IV at page 11 <<https://www.jfjustice.net/downloads/1460970274.pdf>> accessed on 2 June 4 2019

Accounts and Investments placed the blame squarely of irregular payments of the land on Cabinet Secretary Fred Matiang'i, Principal Secretary Bellio Kipsang and senior National Land Commission officials.²⁹⁴ Interestingly, the Senate rejected the report prepared by the Committee after forty-eight senators failed to stay away from voting. Additionally, some members who appended their signatures failed to adopt the report by failing to vote.²⁹⁵ The National Assembly Committee on land zeroed in on the former National Lands Commission chairman Muhammad Swazuri over the controversial payment of compensation for the land.²⁹⁶ The committee recommended the investigation and possible prosecution of the NLC chairman seeing that it observed that the NLC was squarely culpable for the illegal payment. The report by the National Assembly Committee conspicuously left out the umbrella Ministry of Education in its report.

3.4.2 The Executive

The constitution under Chapter Nine establishes the executive arm of government.²⁹⁷ The source and extent of executive powers is a subject that evokes divergent views from various scholars. Professor J.B Ojwang conceptualizes the executive as the organ comprising of person or persons entrusted with performing functions of government other than the ones specifically entrusted to the legislative and judicial arm of government.²⁹⁸ He argues that executive powers are extra

²⁹⁴Parliament of Kenya, Report on the inquiry into the possible loss of funds through the acquisition of Land LR. No. 7879/4 (part) by the National Land Commission for use by two public schools (Ruaraka High School and Drive-In Primary School), Nairobi City County, August 2018 Available at www.parliamnet.go.ke/ Accessed on July 9 2019

²⁹⁵ Senate rejects Ruaraka Land Scam Report, <https://www.youtube.com/watch?v=uOqbsq6hnK4> Accessed on July 9 2019

²⁹⁶ James Ombaka 'Land Boss Swazuri 'to be charged' over Ruaraka land scandal' The Star (Nairobi, 6th June 2018) <<https://www.the-star.co.ke/news/2018-06-06-lands-boss-swazuri-to-be-charged-over-rauaraka-land-scandal/>> accessed on 9th July 2019. For a clear depiction of this tussle see, Citizen Tv' News Review| Senate vs National Assembly |Part 2' (2019) <https://www.youtube.com/watch?v=Jb753fenBw> accessed on July 9 2019

²⁹⁷ Constitution of Kenya, 2010 Article 129

²⁹⁸Jackton B. Ojwang, *Constitutional Development in Kenya: Institutional Adaptation and Social Change*(African Centre for Technology Studies, 1990) 75

juridical and mainly based on the charisma of the government of the day.²⁹⁹ In response to this view, Professor Kibwana opposes this, seeing that he views this as the underlying basis of totalitarian governments.³⁰⁰ Some scholars argue that functions the executive are those performed by the government after the legislature and judiciary carry out their functions.³⁰¹ This view suggests that the executive can undertake any function that is not covered by the legislature or judiciary unless expressly excluded by the law.

Theodore Roosevelt aptly captured this when he said: *“the President, as a Steward of the people is under duty to do anything that the needs of the nation demand unless such action is forbidden by the Constitution.”*³⁰²

The Constitution establishes the national executive made up of the President,³⁰³ Deputy President, Attorney General, and Cabinet Secretaries.³⁰⁴ The executive arm in performing its functions has participated in a public inquiry in several instances, as discussed below.

3.4.2.1 President

The President is the head of both state and government.³⁰⁵ S/he in exercising executive functions derives authority from the people of Kenya. The exercise of this executive power must be to the service and benefit of the citizenry.³⁰⁶

²⁹⁹ Ibid p.5

³⁰⁰ Kivutha Kibwana, *The Legal Limits Of Executive Power In The African One Party State: An Examination Of Ojwang's Idea Of Extra Juridical Executive Power* in Kivutha Kibwana (eds), *Readings In Constitutional Law And Politics In Africa, A Case Study of Kenya* (Claripress Ltd, 1998) p. 249

³⁰¹ Emmanuel & Kimberly Supra n. 22 p. 222

³⁰² Alpheus T. Mason and William M. Beaney *American Constitutional Law*, (Prentice-Hall, Inc Englewoods Cliffs, 1968) p.61

³⁰³ Constitution of Kenya, 2010 Article 130

³⁰⁴ Ibid Art. 152

³⁰⁵ Constitution of Kenya, 2010 Article 131(1)

³⁰⁶ Ibid Art. 129(2)

The Commissions of Inquiry Act,³⁰⁷ reserves the power to issue a CI to the President exclusively on any matter that touches on public interest as previously discussed.³⁰⁸ The first three post-independence presidents prevalently favored the use of CIs as the preferred public inquiry mechanism. However, since the accession of President Uhuru Kenyatta to the rim of power in 2013, no CIs have been established. Instead, President Kenyatta has instead used resulted in using presidential commissions task forces and committees.

Arguably, some perceive the Presidency as a focal point of reform under the Constitution, 2010.³⁰⁹ The new constitutional dispensation reinforced checks and balances on the Presidency which curtailed the imperial powers and functions of the President. The constitution, for instance introduced in certain circumstances consultative processes with other organs and government agencies. For this purpose, the decision-making process in some circumstances involves external consultations and approvals hence curtailing the ambivalent and imperialistic Presidency. The classic example is the process of removal of a superior court judge. In such an instance the Judicial Service Commission upon consideration of a petition may recommend to the President to establish a tribunal to probe allegations.³¹⁰ The President, upon such a recommendation by the JSC then sets up a seven-member tribunal to probe into the matter. Thereafter the tribunal submits a report and makes binding recommendations.³¹¹

The Presidential Task Force on Parastatal Reforms, 2013 is an example of a President's appointed task force. The task force was mandated with the responsibility of looking into the

³⁰⁷ Chapter 102 Laws of Kenya

³⁰⁸ Ibid s.3

³⁰⁹ Ben Sihanya 'The Presidency and Public Authority in Kenya's new Constitutional order' (2011) Society for International Development (SID) Constitution Working Paper No. 2,20 <sidint.net/docs/WP2.pdf> accessed on May 20th 2019

³¹⁰ COK, 2010 Article 168(5)

³¹¹ Ibid Art. 167(2)

institutional arrangement in line with the new constitution and restructuring of State-Owned Entities (SOE) as well as parastatals. In June 2016, with the ban on *miraa* exports in European countries, the President established a committee on the development of *miraa* industry.³¹² The committee was required to recommend strategies and interventions in the *miraa* industry.

3.4.2.2 Deputy President

Article 147 provides for the functions of the Office of the Deputy President. These functions include being the president's principal assistant and deputizing him in the execution of his functions. In recent years, the forest cover in the country has been depleted ineptly. Kenya has come face to face with the effects of climate change with prolonged dry seasons and acute water shortage. This depletion could potentially rollback the realization of the Government's plan in the Big Four Agenda and Vision 2030 plan.³¹³ The Deputy President ordered a ban on logging on all public forests to save the water catchment areas. He further ordered the concerned government agencies to reassess and rationalization of the entire forest sector.³¹⁴

The Environment and Forestry CS formed a task force to examine the management of forest resources illegal forest activities.³¹⁵ The task force conducted the probe by way of information gathering involving key stakeholders. The task force presented its findings to the Cabinet Secretary in April 2018.

³¹² Gazette Notice No. 5736 of 2017 Vol. CXIX-No. 77

³¹³ Government Printers, Report on the Forest Resource Management and Logging Activities in Kenya, April 2018, p. 6

³¹⁴ K24 Television, 'DP Ruto orders a 90 day ban on logging in all forests' (24th February 2018) Available at <https://www.youtube.com/watch?v=Xmt-DPocfDw> Accessed on 26th September 2019

³¹⁵ Gazette Notice No. 1938 of 2018 Vol. CXX-No.28

3.4.2.3 Cabinet Secretaries

Cabinet Secretaries head specific portfolios and implement policies therein. Under the 2010 Constitutional dispensation, they carry out a wide range of highly discretionally policy-making tasks in the domestic arena.

Cabinet Secretaries constitute task force to help in policy-making within the various sectors. The Ministry heads have in the past established several task forces to review and oversee the implementation of directives or policies. In the wake of the roll out of a new education curriculum (Competence Bases Curriculum), the CS in charge of education Professor George Magoha appointed a task force. The task force was mandated to iron out sticky areas in the implementation of the CBC by liaising with key stakeholders in the education sector.

3.4.2.4 Attorney General

Article 156 of the Constitution establishes the Office Attorney General as the chief legal adviser of the Government. The COK further gives the AG the mandate to advance the rule of law and safeguard the interest of the public. The COK and Office of the Attorney General Act explicate the functions of this office. The Act allows the AG to delegate performance of duties bestowed on the office to other subordinate officers under specific or general directions.³¹⁶

The AG has in the past appointed task forces to look into matters that touch on public interest. One such example is the task force set to review of the framework for combating corruption.³¹⁷ This move was as a result of an executive order given by the President when addressing Parliament on March 26, 2015. The task force was mandated to examine the legal, policy, and

³¹⁶ Office of the Attorney General Act, No. 49 of 2012

³¹⁷ Gazette Notice No. 2118 of March 30 2015 (published in The Kenya Gazette (Special Issue) of March 31, 2015

institutional framework for fighting corruption with a view of recommending interventions to enhance the fight against corruption.

In 2017 Kenya embarked on a journey of to carry out reforms that would cater for the plight of intersex persons in Kenya. The AG established a task force on May 26, 2017, to formulate comprehensive reform recommendations to protect intersex persons. The court while delivering its judgment in the case of Baby' A' versus the AG and another Justice Lenaola brought out the need to have a consolidated list of policy and legal framework to regulate affairs of intersex persons in Kenya.

The courts in adjudicating matters brought before them are guided by the comprehensive Bill of rights under the constitution. In lieu of this consideration, the courts have sparked debate on the certain provision of law deemed unconstitutional. One such instance is the case of Francis KariokoMuruatetu and another versus the Republic & 6Others³¹⁸ that had the effect of outlawing the compulsory nature of the death sentence. To this end, the AG constituted a task force mandated to give a detailed professional evaluation of the death penalty in the context of the judgment and order made by the Supreme Court.

3.4.3 Courts

Chapter 10 of the COK vests judicial authority on the judicial arm of government. The judiciary consists of courts and tribunals which have powers to conclusively and authoritatively decide disputes. First, Courts can invoke the power of judicial review to make orders that restrain the conduct of a public inquiry or matters incidental to the inquiry. Further judicial authority may be

³¹⁸ Petition No. 5 of 2015

invoked at the point of inception of a public inquiry, proceedings of the inquiry and implementation of the findings of such inquiries.

3.4.3.1 Recommendation for the formation of task forces/ inquiry process

Courts have risen above their definitive mandate of interpreting laws to play practical and realistic roles by giving solutions to real societal problems. The courts have brought out the plight of certain classes of person and the need to review policies to cater to the needs of such groups. Such was the case in the Baby 'A' (suing through the Mother E A) and Another versus the AG and 6 others,³¹⁹ where Justice Lenaola ordered the AG to name task force that would develop policies to cater for intersex persons as marginalized persons. In May 2017 vide gazette notice No. 4904 of 2017, the AG named a ten-member to look into the plight of this group and propose reforms.³²⁰ The task force was assigned the responsibility of compiling comprehensive data on intersex persons, developing a prioritized implementation matrix stating reforms *inter alia*.

The task force investigating the process of renewing and extending leases was also a brainchild of courts through judicial interpretation. Previously, different legal regimes governed the procedure for extension and renewal of leases. With the COK 2010 and subsequent enactment of Land Laws in 2012, there was the introduction of the National Land Commission. The constitutional commission introduced new dynamics in the procedure of renewal and extension of leases. The National Land Commission has the responsibility of effecting these changes had not been doing so. This change posed as a conundrum with increases public concern on the irregular allocation of leases that saw the cabinet issue a moratorium freezing the process of

³¹⁹ 2014 eKLR

³²⁰ Government Printers, Gazette Notice No. 4904 of 2017, Kenya Law.

extension and renewal of leases. Justice Onguto when presiding over the landmark case of Anthony Otiende Otiende versus Public Service Commission and 20 Others³²¹ brought to light a glaring anomaly in the process of renewal and extension of leases. The court, in this case, directed the Ministry of Lands to initiate meaningful engagement through concerted efforts with relevant stakeholders to streamline the process of renewal and extension of leases. The Cabinet Secretary in charge of lands formed a task force to investigate and advise on the status of leases in Kenya since 2010.³²² The Gazette Notice mandated the task force to among other things, analyze and review the existing framework on the processing of leases, establish the status of leases held by investors and review leases that had been renewed and extended since 2010.³²³

3.4.3.2 Judicial Intervention during the Continuance of Inquiry Process

Public inquiries have been subjected to legal actions during the continuance of inquiry processes. After the establishment of the TJRC two legal actions were instituted challenging the composition of the commission as constituted.³²⁴ In the Augustine Njeru Kathangu & 9 Others versus TJRC and Bethuel Kiplagat³²⁵ the applicant challenged the constitutionality of the composition of the commission. The court intervened allowing the commission to operate as had been constituted.

3.4.3.3 Judicial Intervention At The Point of Implementation

Judicial intervention has been sought at the point of implementation of findings of the various inquiries set up. Disgruntled persons of interests have sought judicial intervention through judicial review at the point of implementation of the findings of these public inquiries. A case in

³²¹ (2016) eKLR

³²² Kenya Law, Gazette Notice No. 1812 Vol. CXIX-No. 26

³²³ Government of Kenya, Report of the Task Force investigating the processing of extension and renewal of leases, Government Printers, 2017

³²⁴ Government Printers, Summary of the Truth Justice and Reconciliation Commission, Government Printers, 2013

³²⁵ High Court Miscellaneous Application No. 470 of 2009

point is the Goldernberg Commission that had been appointed by President MwaiKibaki to look into allegations corruption and loss of public funds in the National Treasury occasioned through alleged fraudulent and illegal trade of fake and non-existent gold.³²⁶ The Commission recommended criminal prosecution and civil action for individuals incriminated in its report after probe. George Saitoti, the then Vice President and Minister of Finance, was among the fourteen persons listed for criminal and civil action. He sought to bar the Attorney General from prosecuting him in respect to the Goldernberg affair vide judicial review proceedings *Republic versus Judicial Commission of inquiry into the Goldernberg affair & 2 Others Ex parte George Saitoti* instituted in the high court.³²⁷

The President appointed a National task Force on Coffee sub-sector Reform to look into the problems bedeviling the coffee sector.³²⁸ The implementation of the recommendations given by the task force was contested in court.³²⁹ A section of aggrieved farmers approached the court contesting implementation of the recommendations of the task force.³³⁰ The farmers cited reasons that the task force's report favored big players in the coffee industry at the expense of small scale farmers. Justice G.V Odunga declared the new coffee regulations unlawful and barred the Cabinet Secretary from implementing the same. Additionally, the court quashed the report presented by the national task force on coffee sub-sector citing that the task force neither conducted meaningful participation nor took the report to Parliament for approval.

³²⁶Government of Kenya, Report of the task force on the establishment of a truth, justice and reconciliation commission, Government Printers, 2003

³²⁷ (2006) eKLR

³²⁸ Gazette Notice No. 1332 of 2016 Vol.CXVIII-No. 21

³²⁹ Maureen Kakah, 'New Coffee rules unlawful, court rules' Daily Nation (Nairobi, August 2 2017)

<https://www.nation.co.ke/news/New-coffee-rules-unlawful-court-Odunga/1056-4042218-vp326kz/index.html>

Accessed on May 10, 2019

³³⁰ Republic versus Cabinet Secretary, Ministry of Agriculture, Livestock & Fisheries & 4 Others Ex Parte Council of Governors & Another (2017) eKLR

3.4.4 Auditor General

The constitution of Kenya establishes the office of the auditor general under Article 242(2) as an independent office. The state agency is charged with the oversight role in order to ensure accountability within the three-arm of government.³³¹ The Constitution further tasks the auditor general to ensure public resources effective and lawful utilization. The auditor general's office ensures accountability by providing audited reports. The constitution of Kenya introduced accountability as one of the cardinal national values principles of governance. The impetus behind this was to ensure the responsible and prudent use of state resources and curb misuse of state power.

The Auditor-General provides Parliament with accurate and independently derived audit information on state organs and public bodies' expenditure thus ensures there is public sector accountability. The Public Audit Act³³² allows the auditor general to on his own motion or based on a complaint by a third party conduct investigations of any state organ or public entity relating to utilization of public funds.³³³

3.4.5 Directorate of Criminal Investigations (DCI)

Part V of the National Police Service Act establishes the DCI as a state agency under the police service that undertakes investigations of serious crimes.³³⁴ The DCI is organized in departments that undertake investigations into serious crimes in particular economic crimes, money

³³¹ Constitution of Kenya 2010, Article 229

³³² Act No. 34 of 2015

³³³ Ibid s. 9(1)

³³⁴ Section 28, National Police Service Act, Act No. 11A of 2011

laundering, homicide, organized crime among others.³³⁵ The DCI is also charged with the responsibility of probing any matter referred to it by the IPOA.³³⁶

3.4.6 Ethics and Anti-Corruption Commission (EACC)

The EACC is the state anti-corruption agency mandated to fight corruption through a three-dimensional approach to combating corruption, public awareness, deterrence and investigation. The EACC is the only constitutional commission not explicitly listed under Article 248 of the Constitution. Subject to provisions of Article 79 Parliament is mandated to establish an independent anti-corruption agency. Parliament enacted the EACC Act 2011 for this purpose. As an independent commission, the EACC is expected to perform functions as enshrined under its establishing Statute.³³⁷ The Commission under Section 13 has the authority to conduct investigations initiated on its own motion or through complaint made by any person.

According to the African Capacity Building Foundation, the establishment of independent anti-corruption agencies is necessitated by the systemic character of corruption that persists in many government institutions.³³⁸ Thus these anti-corruption agencies are established as response mechanisms to ensure efficiency and accountability in state institutions. The independent nature of these commissions ensures that in the performance of their function, they are entirely autonomous from the government.

³³⁵ Ibid s.35

³³⁶ Ibid Section 35(j)

³³⁷ Ben Sihanya (2013) "Constitutional Commission in Kenya Experiences, Challenges and Lessons" Presented at Conference on State Implementation of the Constitution since 2010 Laico Regency, November, 20, 2013.

³³⁸ African Capacity Building Foundation (ACBF), *Institutional Frameworks for Addressing Public Sector Corruption in Africa*. Lynne Rienner Publishers 2007) 6

According to the EACC Act, the agency has investigatory powers after which the anti-corruption agency prepares a report and recommends for prosecution to the Director of Public Prosecution, for any violations of the codes of ethics or other matters prescribed in the Act.³³⁹

3.5 International Level

The 2010 Constitution opened up in Kenya's legal sphere with regards to the status of international law. Article 2(5) recognizes that general principles accepted by the international community form part of the law of Kenya. It further qualifies that treaties ratified by Kenya forms part of the laws applicable. Kenya has ratified several treaties that recognize the place of public inquiry and authorize the conduct of public inquiry in several spheres.

3.5.1 Charter of the United Nations and the Statute of the International Court of Justice

Chapter VI of the Charter establishing the UN enshrines the need and means of settling disputes. The Charter allows enquiry through ad hoc bodies to look into any matter that threatens the peace and security.³⁴⁰

Additionally, the Charter of the UN establishes the International Court of Justice under the Statute of the ICJ as a principal organ of the UN. Article 50 of the Statute provides that the Court may constitute a commission of enquiry or refer a matter to any individual, body or bureau for the purpose of carrying out enquiry or giving expert point of view.

3.5.2 Rome Statute of the International Criminal Court

The Statute establishes the International Criminal Court. Kenya became a signatory on 11th August 1998 and ratified the Rome Statute on 15th March 2003.³⁴¹ The treaty outlines three ways

³³⁹ Supra n. 59 s. 11(d)

³⁴⁰ Article 33(1), Charter of the UN, 1945

through which the Court may initiate action in a member state. Article 15 highlights that a prosecutor may on his motion (*proprio motu*) launch investigations based on the information available to the court regarding the crime. The prosecutor may pursue more information from the State organs of the United Nations, non-governmental agencies and any other reliable sources. If the Prosecutor concludes that there are justifiable reasons for investigation, they then apply to the Pre-Trial Chamber requesting for approval to investigate.³⁴² The Prosecutor then probes into the crime to gather sufficient evidence for support the prosecution of the case.

3.5.3 United Nations Human Rights Council

The UN Human Rights Council is an important institution within the UN with growing influence in advancing preservation of human rights in the world.³⁴³ The Council³⁴⁴ was established in 2006 vide General Assembly Resolution 60/251 as a subsidiary body of the General Assembly.³⁴⁵ Since its establishment in 2006, the council has constituted a number of CIs to examine circumstances within the human rights system.³⁴⁶ These CIs are established as independent fact finding mission to ensure accountability. However, the establishment of the commission of inquiry can present a parallel to the functions and relationship with established international criminal law mechanisms.

³⁴¹ Ministry of Foreign Affairs Kenya Website, Available at <<http://treaties.mfa.go.ke/treaties>> accessed on 13th September 2019

³⁴² Article 15(3), Rome Statute Establishing the ICC

³⁴³ Handbook for Parliamentarians, United Nations Office of the High Commissioner (2016) Inter-Parliamentary Union Available at <<https://www.ohchr.org/Documents/Publications/HandbookParliamentarians.pdf>> Accessed on 13th September 2019

³⁴⁴ Article 7, Charter of the United Nations, 1945

³⁴⁵ United Nations General Assembly, Sixtieth Session A/RES/60/251(72nd Plenary Meeting, 15th March 2006) Available at <https://www2.ohchr.org/english/bodies/hrcouncil/docs/A.RES.60.251_En.pdf> accessed on 13th September 2019

³⁴⁶ Tedd Piccone 'U.N Human Rights Commission of Inquiry' (2015) Foreign Policy at Brookings Available at <https://www.brookings.edu/wpcontent/uploads/2017/12/fp_20171208_un_human_rights_commissions_inquiry.pdf> accessed on 13th September 2019

3.6 Conclusion

The focus of this Chapter has been analyzing the legal and institutional framework governing the various spheres of public inquiry in Kenya. The findings in this chapter have revealed that the practice of public inquiry is governed by vast legal frameworks and exercised by many institutions. The 2010 Constitution is heralded as being progressive seeing that in the public inquiry sphere it has created a number of institutions that conduct inquiries of public nature for purposes of informing the government. This restructuring has further diversified and strengthened the practice of public inquiry. The institutions created under the Constitution have specialized jurisdiction to probe certain matters of public interest that fall squarely under their mandate.

Institutions/offices that are empowered to appoint bodies to conduct probes in Kenya have more prevalently favored the use of task forces in the post-2010 era. The President has for instances appointed a number of task forces to inquire into legal reform and crisis in various sectors that depict public interest. The issuance of task forces to examine matters that touch on legal reform is a practice that is akin to the colonial and early post-independence regimes in Kenya. During the latter, CIs were formed to look into legal reform questions and make recommendations for reform.

The various mechanisms of public inquiries are anchored in the law. Notably, there exists no regulatory framework that underpins the use of task forces in Kenya. Task forces are a tool that has been pivotal in public inquiry and ultimately administratively ensuring implementation of constitutional provisions.

CHAPTER FOUR: NATURE AND TYPOLOGY OF TASK FORCES IN KENYA

4.0 Introduction

The preceding Chapter has analyzed the legislative and institutional framework that underpins the practice of public inquiry in Kenya. The Chapter revealed that the 2010 constitution has significantly restructured the conduct of public inquiry. The constitution created various institutions mandated with responsibilities that are inquiries in nature or that are incidental to the practice of public inquiry.

This Chapter will examine the use of task forces and explain their nature and typology in the practice of public inquiry in Kenya. It responds to the fourth question on what is the nature and typology of task forces. It also demonstrates that task forces as currently formed mirror some CIs formed in the past in that they look into legislative and policy issues. The researcher argues that the formation of task forces for public inquiry depicts specific distinct trends that are akin to commissions of inquiry as seen throughout Kenya's history. In addition, it illustrates that unlike the traditional use of task forces for policy reform, they now have an expanded mandated that is investigative in nature.

4.1 NATURE OF TASK FORCES

Task forces are unique bodies established from time to time mandated with a specific duty within a specified period. Peter Aucoin views public inquiry as an essential instrument in governance through which decision-makers analyze significant matters of public interest for purposes of policy analysis and good administration.³⁴⁷ Notably, after attainment of independence in Kenya, during Jomo Kenyatta's presidency the CIs established were necessitated by several legal and

³⁴⁷Peter Aucoin, 'Contributions of commission of inquiry to policy analysis: An evaluation' in G. Bruce Doem and Peter Aucoin (eds) (Macmillan, 1989)

policy reform issues. Additionally, in the 1990s the Attorney General set up some task forces mandated to analyze legal issues and make recommendations for reforms. In the pre-2010 era, CIs were predominantly invoked by the previous governments to probe matters of public interest. Ben Sihanya views task forces as policy review mechanisms which the government uses to implement constitutional provisions and requirements administratively.³⁴⁸ AfriCOG shares the same view, describing task forces as legislative instruments that are functionally disparate from CIs.³⁴⁹ This study must examine the nature of task forces as currently constituted while mapping out the points of convergence and divergence from CIs.

4.1.1 Constituting of task forces

Task forces are appointed or established by a vast of government agencies authorized within their respective mandates to conduct duties that are incidental to the public interest. The constitution of task forces in form differs from that of CIs whose composition is purely a prerogative of the President.³⁵⁰ The President issues CIs vide gazette notices in the Kenya Gazette.³⁵¹ The law governing the issuance of CIs contemplates three instances when the President may issue a CI namely: to look into the conduct of any public body, public officer or any other matter which he/she may deem to be of general interest.³⁵² The President in issuing such a commission reserves the right to determine what the President may deem as public interest and the terms of the commission.

³⁴⁸ Ben Sihanya 'The Presidency and Public Authority in Kenya's new Constitutional order' (2011) Society for International Development (SID) Constitution Working Paper No. 2,20 <sidint.net/docs/WP2.pdf> accessed on 15th May 2019

³⁴⁹ Africa Centre for Open Governance, 'First Report: A study of commissions of inquiries in Kenya' 2007 Available at https://africog.org/wp-content/uploads/2012/10/Final_Policy_Brief1.pdf Accessed on 15th May 2019

³⁵⁰ Commissions of Inquiry Act, s. 3(1)

³⁵¹ Ibid s. 18

³⁵² Ibid s. 3(1)

Notwithstanding the foregoing, task forces are formed with the mandate of performing functions that entail inquiry into matters of national and public concern. Additionally, a careful examination of the history of public inquiry in Kenya reveals that the task forces are formed to undertake functions of law reform and policy review that are akin to those of CIs formed during the colonial and the first post-independence regimes. Task forces are used as tools to study various legal problems and give recommendation for reform.

In the past, the Presidency in the exercise of its discretionary powers to determine matters of public interest has issued commissions for policy and legal reform agenda. An illustrative example would be when President Jomo Kenyatta formed the Commission of inquiry to look into marriage and divorce laws.³⁵³ As discussed in Chapter two, the colonial rule in Kenya had entrenched English laws practiced in various spheres of social life to an already existing and organized African system.³⁵⁴ The vast number of communities and diversity in cultures presented the conflict in the administration and practice of inheritance matters. Over and above that, there was a multiplicity of laws governing inheritance whose existence created many problems and disputes. The differences in customs of the various tribes accounted for this disparity. The plight of women in the marriage and succession laws under customary laws was also second-rated.³⁵⁵

To this end, the government made attempts to promulgate the law on inheritance and marriage in Kenya. The commission was given the responsibility to consider the existing legislative framework on marriage, divorce, and other related matters. The commission completed its work

³⁵³Government of Kenya, 'Report of the Commission of the Law Marriage and Divorce' August 1968, Available at kenyalaw.org?kl/fileadmin/CommissionReports/Report-of-the-Commission-on-the-Law-of-Marriage-and-Dovorce-1968.pdf Accessed on 15th May 2019.

³⁵⁴ Joseph Kaburu *supra* n. p.37

³⁵⁵ Eugene Cotran 'Marriage, Divorce and Succession Laws in Kenya: Is integration or unification possible?' Vol. 40(2) (1996) Cambridge University Press 194, 198

and prepared its findings even come up with the Marriage Bill, 1967. The question on the plight of women would later re-emerge in 1999 when the conversation on the impact of Kenya becoming a signatory of CEDAW. Around this time, the AG constituted a task force to review all laws relating to women.

One of the legacies of colonization was the alteration of the public service structure. The exit of the British left gaps in the public service workforce. The Government needed to reorganize the civil service structure seeing that the new government had taken up the task of provision of essential services to its citizenry.³⁵⁶ To help resolve this conundrum, the President appointed the Public Service and Remuneration Commission in 1970.³⁵⁷ The commission was mandated to investigate into matters affecting the structure and salary scheme for all public service and government employees including daily workers, teachers, local government staff, Judiciary and other statutory bodies.³⁵⁸ The commission's findings revealed a public service structure that was manifested with British Colonial features and recommended a reorganization of the public service. These recommendations informed the radical changes in the civil service, including changes in the job group remuneration structure.

During the run-up to the 1997 general election, the debate on education in Kenya had taken centre stage among the political and academic circles.³⁵⁹ The citizenry was opposed to the 8-4-4 system. KANU, the ruling party had made promises to review the education system as a campaign strategy. This proposal was, however met with much resistance from various quarters.

President Moi appointed the Davy Koech led commission to inquire into the appropriateness of

³⁵⁶ Republic of Kenya, 'Office of the President: Public Service Reform and Development Secretariat' (April 2005) Available at web.worldbank.org/archive/website01259/WEB/IMAGES/PSRD-SEC.PDF Accessed on 15th May 2019

³⁵⁷ Ibid p. 5

³⁵⁸ Government of Kenya Report of the Commission of Inquiry (Public Service Structure and Remuneration Commission) 1970 p. iv

³⁵⁹ AfriCOG supra n. 3, p. 3

the 8-4-4 education system.³⁶⁰ The commission in presenting its recommendations advised that the 8-4-4 system be scrapped and replaced with the 7-4-2-3 system. The move to reform the 8-4-4 system to competence based curriculum has seen many stakeholders and education experts design the new curriculum initiated by the Kenya Institute for Curriculum Development. In the recent past the CS in charge of education constituted a task force to examine the national roll out of the Competence Based Curriculum and advice on implementation issues.³⁶¹ Notably, the discussion on the change of curriculum gained traction after the release of the report by the taskforce that considered the re-alignment of the education sector to the Constitution 2010 and the Vision 2030.³⁶²

Notwithstanding, the administrative element of task forces that, they have played a role akin to that of CIs formed previously. With the promulgation the 2010 constitution, the government had a newly added responsibility to ensure implementation of the constitution. The taskforces constituted manifest a common theme of either harmonization of the constitution and all existing legislative frameworks or to put forward suggestions to implement specific provisions of the constitution.³⁶³ The quintessential example is the task force on devolved government that was set up to chart the direction on implementation of devolution. Devolution is one of the most transformational developments to Kenya's system of governance as a constitutional architecture.

The then Deputy Prime Minister and Minister in charge of Local Government,

³⁶⁰ Owate N. Wambayi, 'Ministry of Education and Science and Technology National Council for Science and Technology: Unit Cost of Basic Education-Kenya' May 2004 Available at https://oris.nacosti.go.ke/modules?library?publications?research_reports/NACOSTI-DL-RR-1051.pdf Accessed on 15th May 2019.

³⁶¹ Kenya Gazette, Volume CXXI-No.79 Gazette Notice No. 5328 of 2019, Taskforce on enhancing access, relevance, transition, equity and quality for effective curriculum reforms implementation (2019) Government Press Printers

³⁶² Ministry of Education Kenya, Report of task force on the re-alignment of the education sector to the constitution of Kenya 2010' Government Printers, (February 2012) Available at <http://vision2030.go.ke/inc/uploads/2018/05/Re-Alignment-Education-Sector..pdf> accessed on 17th September 2019

³⁶³ Ben Sihanya "Constitutional Implementation in Kenya, 2010-2015: Challenges and Prospects", Occasional Paper No. 5 (2012) Friedrich Ebert Stiftung pp 16.

MusaliaMudavadi, vide Gazette Notice 12876 of 2010 constituted the task force chaired by MutakhaKangu.

President Kenyatta rose to the helm of power at a time when the country was in the very process of implementing then newly promulgated constitution. Subsequently, it was almost inevitable that the government needed a mechanism to align the existing laws with provisions of the Constitution. To this end, task forces have been used as the most preferred tool for this purpose.

Public pressure in prevailing circumstances has also provoked the formation of task forces. An exemplar of the impact of public pressure as the impetus of forming task forces would be the task force formed to review the framework for combating corruption. Corruption remains arguably the most significant challenge to Kenya's economic development. During the president's address to the parliament on 26th March 2015 he reiterated on his commitment to fighting corruption.³⁶⁴ The President gave directives towards geared towards toughening the fight against corruption. At around this time, grand corruption scandals involving huge sums of money in government institutions were constraining the effective service delivery. The AG constituted a task force to review corruption laws and institutions engaged in the fight against corruption. The AG formed the task force but was under the patronage of the President. The task force reviewed the framework dealing with the fight against corruption. The ad hoc body presented a detailed report to the President on October 2015, six months after its inauguration. Notably, despite this inquiry and presentation of findings, corruption is still a never-ending social evil that persists through the system. The report presented a detailed report aimed towards revamping and

³⁶⁴The Presidency Website available at <http://www.president.go.ke/former-presidents/> Accessed on 14th June March 2019

strengthening the framework for combating corruption. .³⁶⁵ The report and recommendations by the task force are not binding. This means positive action must be taken by agencies such as amending the law is imperative towards realizing the maximum benefit from these inquiries.

Conspicuously, this was not the first inquiry that the government had conducted to investigate into corruption allegations. The Bosire commission, Ndegwa Commission and Ndung' u Commission had extensively addressed the question of corruption which appears futile. According to Peter Aucoin, the establishments of inquiries allow decision-makers to delay or postpone decisions without being criticized.³⁶⁶ The same problem has manifested in probing what ails the land question, state corporations, and sugar sector.

4.1.1.1 Conceptualizing public interest

Ad hoc inquiries are aimed at addressing issues that fall within public domain. CIs, task forces and other specialized agencies set up to look into issues of public or national interest. The formation of these inquiries falls is informed by broad array of issues affecting the public. The government agencies and state departments constitute task forces to look into matters falling within the public sphere. It is therefore important to consider what other scholars conceptualize the term “public”.

JurgenHabermas deconstructs the concept of the public domain as "the sphere of private property coming together as a public." Task forces, as discussed earlier, are constituted to inquire and tackle matters that are in the public sphere or for the good of the public. The concept

³⁶⁵State Law Office, Report of Task Force on the Review of Legal, Policy and Institutional Framework for Fighting Corruption in Kenya (2015 Government Printer) Available at <https://www.statelaw.go.ke/> Accessed on 14th June 2019

³⁶⁶Aucoin Peter' Contributions of Commission of Inquiry to policy analysis: An evaluation,' 1990 HO 43(1) p.12 <<https://heinonline.org/HOL/LandingPage?handle=hein.journals/dalholwj12&div=45&id=&page>>accessed on 22nd June 2019

publicsphere is one of the most popular and most deliberated ideas in the social and political sciences.³⁶⁷ The term public sphere attracts attention from a multiplicity of disciplines ranging from social sciences, political science and philosophy *inter alia*. The terms public and public interest render itself to multitudinous interpretations.

W.B. Gallie conceives concepts that lack consensus about the proper definition, explanation, and application as essentially contested concepts in its internal character.³⁶⁸ These are concepts that fundamentally lineally and continually invoke conflict of interests, tastes, or divergent attitudes in conceiving, evidence, arguments and other justification.³⁶⁹ In Gallie's view, essentially contested concepts have attained a particularly complex character which is admissible to substantial alteration in the light of changing circumstances.³⁷⁰ According to Gallie, such concepts continually introduce expanded and expounded meanings and connotations. This perhaps explains the broadened application of public inquiry. Additionally, the use of task forces as a medium for public inquiry has broadened application in reviewing legislative, policy and structural framework. Emanating from Gallie's article, it is clear that scholars have further expounded and deliberated on some of the concepts that manifest the character of essentially contested concepts.

Another author, Adrain Rauchfleisch, in his article also deciphers the aspect of the public sphere as an essentially contested concept. According to Adrian the public spectrum tends to be an essentially contested concept because of different conceptions in structures in a society, the traditional view of the public sphere and differentiation of needs in communities. He explains

³⁶⁷ Adrian Rauchfleisch, 'The public sphere as an essentially contested concept: A co-citation analysis of the last 20 years of public sphere research' (2017) 2(1) Sage Publications Journal 3.

³⁶⁸ W.B. Gallie, 'Essentially Contested Concepts: Proceedings of the Aristotelian Society' (1956) 56 The Aristotlean Society 167, 168

³⁶⁹ Ibid p. 168

³⁷⁰ Ibid p.172

that the different characterizations in social change the elements that determine the epicenter of debates surrounding what comprises of the public sphere.³⁷¹ The malleability, in turn, renders the term public sphere diverse describability and openness.³⁷² Adrian attributes the contestable concepts to the changing dynamics in a society that force the society to adapt to different meanings such concepts. This elastic element of what comprises of the public sphere principally influences the interpretation and application of the term public interest. The use of task forces as discussed above largely mirrors application of CIs during previous legal and presidential regimes. The changes in the legal order have highly influenced the shift to using task forces as not only policy reform vehicles but also investigative tools. The post 2010 period has accommodated a broader conception of public interest in public inquiry to allow its use in the legal and policy review sphere in matters of general national concern.

An excellent place to start when examining the public sphere concept would be the rich intellectual history of the idea. The Romans defined the term *respublica* using the terminology meaning public thing, for the common good or the public interest.³⁷³ In polity, *res publica* means belonging to everyone in general and no one in particular.³⁷⁴ Marcus Cicero, one of the prominent Roman scholars, defined it as a thing common to all. Cicero through his writings best captures public good as: "The public thing is the thing of the people and by the people. I mean not just any gathering of people, but a large group of people forming society and united by their

³⁷¹ Adrian supra note. 16 p. 14

³⁷² Ibid

³⁷³ Elisabeth Zoller, 'Public Law as the law of the Res Publica' (2008) 32(1) Maurer School of Law 93

³⁷⁴ Ibid p.95

adherence to a pact of justice and sharing common interests." ³⁷⁵ Throughout history, the term public and society is conceived as the obverse of private rights or individualism. ³⁷⁶

Within the Kenyan context, a good place to start in analyzing the malleable nature of public interest would be a judicial interpretation of the term under the old constitutional dispensation and in the post-2010 constitutional dispensation.

Justice G.V Odunga approaches public interest from a justice point of view. He views that public interest is a two-pronged principle that ought to be balanced to meet the ends of justice.

“...I am therefore of the firm view that in appropriate circumstances, Courts of law and Independent Tribunals are properly entitled pursuant to Article 1 of the Constitution to take into account public or national interest in determining disputes before them where there is a conflict between public interest and private interest by balancing the two and deciding where the scales of justice tilt. Therefore, the Court or Tribunals ought to appreciate that in our jurisdiction, the principle of proportionality is now part of our jurisprudence and it is not unreasonable or irrational to take the said principle into account in arriving at a judicial determination and fashioning appropriate relief. What the Court ought to do when confronted with such circumstances is to consider the twin overriding principles of proportionality and equality of arms. These twin principles are aimed at placing the parties before the Court on equal footing so that the Court can see where the scales of justice lie considering the fact that it is the business of the court, so far as possible, to secure that any motions before the Court do not render nugatory the ultimate end of justice.”

³⁷⁵Walter Nogorski, *Cicero and the Natural* (The Witherspoon Institute, 2011)2

³⁷⁶C.W.Cassinelli, 'Some reflections on the concept of public interest' (1958) 69(1) *The University of Chicago Press Journals* 48, 49

What emerges then is that the term public interest is applied in diverse usages and utilization. Its malleable nature in the application has, in some instances rendered its application misuse. The formation of public inquiries is highly pegged on public interest. It extends to the use of task forces in dealing with matters of public importance. The lack of objectivity in deciding what amounts to public interest or not may affect the formation of task forces.

4.1.2 Terms of References (TORs)

One of the most crucial moments in the life of public inquiries and task forces in particular lies at the centre of drafting the terms of reference.³⁷⁷ Task forces are appointed and named vide a publication in the Kenya Gazette. The gazette notice specifies the appointing authority, mandate of the ad hoc body, and duration of the body. The use of task forces has seen the appointing body determine the TORs which define the task force's scope. The terms of reference *ab initio* design the task force by providing instructions to the task force on their mandate, limitation of activities and structure of the task force as constituted³⁷⁸

As mentioned in Chapter two and three, the constitution of task forces is as wide as the various exigencies of matters of public concern. The scope of the task forces' mandate is, therefore dependent on the nature of the task force and the specifications by the appointing authority. The appointing authority has unfettered power to determine the scope of the task force as constituted depending on the issue under probe.

³⁷⁷ Nicholas d'Ombrain, 'Public Inquiries in Canada' (1997) 40(1) Canadian Public Administration 86, 92 Available at <https://onlinelibrary.wiley.com/doi/epdf/10.1111/j.1754-7121.1997.tb01498.x> Accessed on 13th June 2019

³⁷⁸ Gerard J. Kennedy, 'Public Inquiries' Terms of Reference: Lessons from the Past-And for the future' 41(1) Manitoba Law Journal 318, 321

The TORs are principally the oxygen of the ad hoc body.³⁷⁹ The TORs, therefore, define the task force and give life to the working of the task force as constituted. Arguably, the designing of the task force through TORs can be couched to favor a particular outcome. Ostensibly, this then presents a tension between the need to provide clear guidelines for the task forces by stipulating the TORs without restricting the panelists. The TORs as stipulated may impede the delivery of outcomes by the task force.³⁸⁰ Where the appointing authority couches the TORs to strictly restrict the mandate of an ad hoc body, the delivery of objective outcomes may be comprised. This may hamper the object of introducing an independent body to help resolve a conundrum. However, on the other hand, having unlimited TORs within such a framework may render the objectives of the body ambiguous and uncertain.

To this end, task forces can be termed as semi-independent from the appointing authority that establishes them seeing that the appointing power dictates the mandate, purpose, and possibly the outcome of the task force.

The very conception of task forces as a public inquiry mechanism is to provide solutions to matters of national importance and the public good. It is therefore paramount that the task forces yield findings that are objective and mutually exclusive to the appointing authority. How the TORs are framed, speaks to the heart of the operation and outcome of the inquiry. Furthermore, in as much as the terms of reference may in some instances, anticipate or forecast an outcome, the task forces are capable of nurturing their independence.

It is not lost that in some cases, regular reporting to the relevant appointing authority or reporting channel has been incorporated in terms of reference as a mandatory requirement. The appointing

³⁷⁹ Macharia J. Kaburu, 'Towards effective Commissions Of Inquiry in Kenya: A review of the Commission of Inquiry Act in view of the Constitution of Kenya, 2010' (Masters Research Project, University of Nairobi 2018) 71

³⁸⁰ Gerard Supra n. 16, p.18

body has, in some instances, required the task force to avail to the appointing authority regular progress reports. The progress reports are a monitoring and evaluation mechanism to gauge the performance and progress of the task force. The consistent reporting may be seen as a mechanism to ensure the efficacy of the ad hoc body or keeping it on its toes to ensure that the task force works round the clock to deliver results.

The appointment of task forces with duplicate terms of reference by two government agencies questions the objective of the ad hoc bodies. As discussed in Chapter two, the Public Service sector has on numerous occasions been subject to public inquiry. In 2013 the President appointed a ten-member task force comprised of representatives from government and the private sector. The task force secretariat consisted of State Corporations Advisory Committee(SCSC) and Economic and Political Advisors. The task force was mandated with the responsibility to look into an institutional arrangement in line with the new constitution, develop a criterion for separating the parastatals and a review of the human capital. This was aimed at getting competent people in the boards as a reflection of the constitutional requirements. The task force presented its findings to the President proposing the restructuring of State Corporations and Government Owned Entities.

In 2019, the Public Service Commission formed another task force charged with reviewing the categorization of State Corporations. The proposals put forward by the 2013 Presidential task force already covered a significant portion of what the latter task force was charged with delivering. The latter task force was merely engaging on a repeat exercise. This raises the question whether the terms of references streamline the conduct of inquiry using task forces.

4.1.2 Selection of task force members

One of the most critical moments in the life of task forces and a public inquiry is the selection of panelists. These formative decisions are crucial in determining the success of the task force as established. Task forces as constituted are temporary forums attracting representation from institutions drawn from various sectors and advocacy groups that have responsibilities and loyalties elsewhere.³⁸¹ Task forces stimulate research involving a vast participation in the policymaking process.

The selection of members of task forces in Kenya reflects the incorporation of sector-specific membership and relevant stakeholders in some inquiries. The task force on the review of the mandatory death sentence saw representation from the AG's office, the office of the Director of Public Prosecution, the Judiciary, Parliament, Kenya Law Reform Commission, the Power of Mercy Advisory Committee, Kenya Prisons Service, Probation and Aftercare Services, the National Crime Research Centre and the KNHRC.

4.1.3 Duration of task forces

The TORs specify lifespan of the ad hoc body as constituted. It may specify a time limit for the report by the task force. The limitation as to time may be a source of difficulty during the operation of the task force seeing that it frequently happens that circumstances make it impossible for the task force to conclude the inquiry in time. The appointing authority may, in some cases extend the duration of the task force.

The deadlines set for the ad hoc institutions created to address crisis in various sectors are often extended to prolonged periods. Ironically, the ad hoc bodies are constituted as attempts to

³⁸¹Liora Salter & Debra Slaco, *Public Inquiries in Canada* (Canadian Government Publishing Centre, 1981) 15

provide urgent diagnosis to urgent problems have their timelines extended. This in turn translates to prolonged challenges in the sector under re-construction. A case in point is the sugar sector which has grappled with reeling problems that have seen the collapse of the vibrant sugar industry. The task force constituted to address problems in the sugar industry and attempt to revamp the sector was constituted in November 2018.³⁸² The task force was prescribed a period of thirty days to carry out the probe and present detailed findings to the CS in charge of Agriculture. The sixteen member task force only submitted its report nine months on 4th September 2019. The peasant farmers at the bottom of the food chain bare the greatest brunt in delayed payments and a collapsed sugar industry.

4.1.4 Implementation of findings

Task forces in practice report and are answerable to the appointing authority. The terms of reference that stipulate the operation any given task force specify the reporting channels for purposes of recommendations for purposes of consideration and reporting. Task forces play an advisory role by making recommendations that the government may or may not accept. Task forces do not have the legal power to compel the government to implement its recommendations.

Generally, political will is a great determinant in the implementation process. It is critical to sustaining the national dialogue on the matter under probe as well implementation of findings presented by any public inquiry body. Political patronage largely determines the formation of the ad hoc body and the implementation of its results. Task forces are now emerging as the instrument of choice when the government decides to rethink its approach to broad issues of public importance.

³⁸² The Kenya Gazette, Gazette Notice No. 11711 of 2018, Government Press Printers (2018)

Jeffrey R. Stutz,³⁸³ conceptualizes implementation within diverse contexts from declaration that the government welcomes the recommendation, declaring change in policy, legislative enactments, allocation of funds, coming up with new programs or institutions to the verification that change has been made. He also emphasizes on the need to draw a connection between the implementation in any form and the actual action that follow.³⁸⁴ He points out that autonomy from the governments that establish the body as well as the implementing agencies is critical towards the realization of the outcomes of the inquiry. Likewise, the implementation of the findings of task forces within the Kenyan context is mainly dependent on political will. Examining the implementation of the Presidential Task Force on Parastatal Reforms, 2015 reveals a reluctance to implement findings of an inquiry from the political class.

Following the adoption of the COK in 2010 some significant changes were put in place. Appointment to government parastatals and government-owned entities was mostly a reward mechanism for political loyalty. It led to the proliferation of these entities with duplication of roles and creation of corruption avenues through wastage of public funds. To this end, when the Jubilee government ascended to the helm of leadership, the President formed the task force to look into this teething issue. This ad hoc body proposed among other things, the consolidation, reclassification, transfer of roles and the rationalization of Government Owned Entities (GOE). The rationale behind this was to avoid the overlap of mandates and enhance the ability of public agencies to perform their core regulatory and developmental mandates.

³⁸³ Jeffrey R. Stutz, "What gets done and why: Implementing the recommendations of public inquiries" 2008 51(3) WO <<http://citeseerx.ist.psu.edu/viewdoc/download?doi=10.1.1.537.9130&rep=rep1&type=pdf>> accessed on 25th January 2019

³⁸⁴ Ibid 512

Furthermore, the task force recommended the reduction of some board members to these entities.³⁸⁵ Implementation of these policy reforms is yet to be realized. Interestingly, in 2019 the public service commission formed another task force to review the categorization of state corporations which is a duplication of the 2013 Presidential task force.³⁸⁶ Interestingly, the same Jubilee government that commissioned the 2013 task force whose recommendations remain unimplemented is the same government that appointed the 2019 task force. Duplication of this nature is not necessary and prudent seeing that a repeat exercise of this nature seeks to achieve the very same ends as the 2013 Presidential task force.

In the Agriculture sector, the coffee task force appointed by the President on 3rd March 2018 was seen as the light to a dimming industry.³⁸⁷ The nineteen member team was appointed to probe into the coffee industry in Kenya and come up with solutions to revamp the bedeviled sector.³⁸⁸ The task force presented its report to the President for his consideration.

Upon submission of the findings, the CS in charge of Agriculture issued *The Coffee (General) Regulations*.³⁸⁹ A section of farmers drawn from coffee growing areas contested the implementation of the said recommendations through judicial review proceedings citing lack of proper public participation.³⁹⁰ Agriculture is a fully devolved function under Article 186 of the

³⁸⁵ Republic of Kenya, Report on the Presidential Task Force on Parastatal Reform, (Government Printers) 2013, p. 18 Available at <https://www.cofek.co.ke/Report%20of%20The%20Presidential%20Task%20force%20on%20Parastatal%20Reforms.pdf> Accessed on 22nd June 2019

³⁸⁶ For a detailed report on the new task force formed by the Public Service Commission see NTV Kenya 'Another task force set up to review categories of state corporations' (9th May 2019) <https://www.youtube.com/watch?v=fioeQ2sn0tM> Accessed on 24th June 2019

³⁸⁷ Government Printers, Kenya Gazette Vol, CXVIII-No.1332 of 2018, 2016

³⁸⁸ Otiato Guguyu, 'Uhuru forms team to fix coffee sector troubles' Business Daily (Nairobi, March 4, 2016) <<https://www.businessdailyafrica.com/economy/Uhuru-forms-team-to-fix-coffee-sector-troubles/3946234-3103178-f8s2x1/index.html>> accessed on 11th June 2019

³⁸⁹ Kenya Gazette, Legal Notice No. 120 in Kenya Gazette Supplement No. 105 dated 27th June, 2016, Government Press Printers

³⁹⁰ Republic v Cabinet Secretary, Ministry of Agriculture, Livestock & Fisheries & 4 others Ex Parte Council of County Governors & another [2017] eKLR

COK and the Fourth Schedule. Agriculture being a shared function means that the National Government's role in agriculture is strictly limited to agricultural policy while implementation of the agricultural policies and other agricultural purposes are a preserve of the County Governments. In determining the issues in question, Justice George Odunga noted that the recommendations as presented in the report were unlawful because the task force failed to conduct public participation and involve the County Governments which are critical stakeholders in the coffee sector.

Numerous sectors continue to grapple with recurrent problems despite referral to different ad hoc inquiries. The question on what ails the sugar sector for instance has been a malady presented to numerous task forces and inquiries for diagnosis. Despite the presentation of the numerous findings the sector continues ailing. The concerned state agencies fail to take decisive action but instead appoint more inquiries to diagnosis the same monotonous issue.

Kenya has a history of commissioning inquiries, collecting task force reports that remain unimplemented. Decisive action is overdue to take action on problems that ail the various sectors purposively.

4.2 TYPOLOGY OF TASK FORCES

Within the Kenyan context, task forces are a common feature in governance. Task forces have been set up to look into public interest matters that are as wide and varied as the exigencies of the situations at hand. The primary function of task forces is to inform the government on issues that broach on the subject of public interest. Task forces can be classified into two main groups namely: policy formulation task forces and investigative task forces. This classification is based on the purpose for which a task force is set up as well as mandate of the task force.

The table below illustrates this typology:

Table 1.1 Typology of task forces

CRITERIA	POLICY REVIEW TASK FORCES	INVESTIGATIVE TASK FORCES
MANDATE OF THE TASK FORCE	<p>Review existing laws and policies in a particular sector. Review the legal and institutional framework. Review recommendations from court decisions.</p>	<p>Probe into an occurrence or disaster. Disaster management strategies.</p>
	<p>Examples: Task Force on the Review of the Legal, Policy and Institutional Framework for Fighting Corruption in Kenya, Task force on the implementation of the decision of the African court on Human and Peoples’ Rights issued against the government of Kenya in respect of the rights of the Ogiek community of Mau and enhancing the participation of indigenous communities in the sustainable management of forests, Task force to operationalise the Land Act and Community Land Act 2016.</p>	<p>Examples: Task force on forests resources management and logging activities in Kenya, Task force probing into the lack of water in Ndakaini dam, Task force on Sugar Industry.</p>
MEMBERS OF THE TASK FORCE	<p>Membership drawn from sector specific experts. Technical committees. Key stakeholders. Representation from concerned institutions and organizations.</p>	<p>Experts from sector specific fields. Local leadership representatives and key stakeholders. Representation from concerned institutions and organizations.</p>
	<p>Examples: Presidential Task force on Parastatal reforms, Task force on Building Bridges Initiative and Proposed Changes to the Constitution, Task force on</p>	<p>Task force on Sugar Industry, Task force of Coffee Industry, Presidential Task force on Miraa Industry,</p>

	police reforms, Taskforce on the review of the mandatory death penalty	Taskforce on Maize Industry.
METHODOLOGY	Review of existing laws and policy issues to establish gaps. Working groups Consideration of memorandums from members of the public and various stakeholders. Oral hearings from members of concerned institutions. Data analysis from memoranda's received and other materials. Preparation of draft policies. Reviewing good practices from other countries	Literature review. Summoning affected parties. Receiving representations in form of memoranda and petitions. Public hearings. Cite visits.
	Task force on Building Bridges Initiative and Proposed Changes to the Constitution, Taskforce on policy, legal, institutional and administrative reforms regarding the intersex persons in Kenya, Task force investigating the process of renewal and extensions of leases.	Task force on forests resources management and logging activities in Kenya, Task force on Sugar Industry, Task force of Coffee Industry, Presidential Task force on Miraa Industry
OUTCOME OF THE TASK FORCE	Make recommendations for policy review. Identify innovative models of improving practices, policies and administrative reforms. Make proposals for establishment of new organs to implement policies.	Investigate the causes of an occurrence or disaster. Identify aggrieved parties. Propose administrative reforms. Make recommendations for prosecution.
	Presidential Task force on Parastatal reforms, Taskforce on policy, legal, institutional and administrative reforms regarding the intersex persons in Kenya	Examples: Task force on forests resources management and logging activities in Kenya, Task force of Coffee industry

Source: Author

4.2.1 POLICY FORMULATION TASK FORCES

Policy formulation entails a myriad of strides from formation, implementation, and evaluation of performance in a bid to resolve social issues.³⁹¹ It involves a careful study and investigation of the history to establish the impetus of a policy. It often calls for expert reviews in sector-specific areas as well as stakeholder involvement who examine the present circumstances *vis-à-vis* the circumstances at present to inform recommendation for a particular policy. Task forces of this nature are formed to find out what the government has done, why they do it, and the consequences such actions have on society. Formation of a task force of this nature makes a heavy presumption that the matter under investigation ceases to be purely individual and ushers a public domain angle to the issue. An inquiry of this nature involves the development of relevant and acceptable proposed courses of action for dealing with matters of public concerns.³⁹²

AfriCOG refers to task forces as entities that are similar to CIs but that study various legal problems.³⁹³ They are bodies dealing with issues relating to policy and legal reform on matters of public concern.

Policy inquiries are set up as a result of a confluence of circumstances that makes it desirable for the government to act in the public interest by going beyond the standard policy-making processes.³⁹⁴ Policy inquiries are more often than not established to prepare fundamental changes in law certain practices and to introduce new ways to run specific sectors.³⁹⁵ An example of such a task force set up in lieu of such circumstances would be the taskforce on the review of the

³⁹¹Thomas OtienoJuma and Ken Onkware "The Challenge of Public Policy Formulation and Evaluation through the Questions "What, Who, How and When?" 2015 International Journal of Economics, Commerce and Management III(11) 830, 831

³⁹²Ibid p.834

³⁹³African Centre for Open Governance' Public Participation and Parliamentary Oversight Legal Policies and Policy Options' p.3 Available at https://africog.org/wp-content/uploads/2012/10/Final_Policy_Brief1.pdf Accessed on 7th April 2019

³⁹⁴Nicholas supra n. 26 p. 93

³⁹⁵ Ibid

compulsory death penalty. In December 2017, the Supreme Court when determining the case of Francis Muruatetu and others versus Republic³⁹⁶ it was noted that the death penalty violated constitutional provisions enshrined under the Constitution. The court observed that the death penalty was in violation of the right to fair trial secured under the non-derogable rights in the constitution.³⁹⁷ It was not lost on the court's opinion that a judge can still impose a death sentence in the circumstances where the case at hand is serious enough. It was also noted that offenders sentenced to death penalty had the right to a new hearing to determine whether they should still be subjected to the death penalty.

Additionally, the court noted that the referral to life imprisonment did not necessarily mean that the offender stays in prison entirely until death. To this end, the court recommended the AG and Parliament to develop a law that comprehensively covers the subject life imprisonment. The court had brought to light tensions between the laws as presently drafted vis-à-vis internationally accepted and practiced standards on the preservation of human dignity that exists in the criminal justice system. In response to this landmark judgment, the AG set up an ad-hoc body to develop suggestions on how to implement the directives given by the apex court.

Conversely, some policy inquiries are criticized as being delay tactics for implementing specific controversial policies.³⁹⁸ In some instances, governments have established inquiry mechanisms to allow decision-makers to delay or postpone decisions without being criticized. A look into the task force that was set up by the government to implement 2010 Endorois Ruling reveals what maybe be termed as 'a case too little too late.' In 2003, the Minority Group Rights International

³⁹⁶ Petition No. 15 of 2015 eKLR

³⁹⁷ Article 25 Constitution of Kenya, 2010

³⁹⁸ Aucoin Peter' Contributions of Commission of Inquiry to policy analysis: An evaluation,' 1990 HO 43(1) <<https://heinonline.org/HOL/LandingPage?handle=hein.journals/dalholwj12&div=45&id=&page>>accessed on 25th January 2019 p.12

and other partner organizations acting on behalf of the Endorois instituted proceedings before the African Commission on Human and People's Rights to demand that the Kenyan government recognize the right of the Endorois to Lake Bogoria. The Government had earlier on in 1973 gazetted the area around Lake Bogoria area and Koibataek District as game reserves. The Endorois community was subsequently forcibly removed from the ancestral area they occupied as a result of the gazettelement. The ruling was in favour of the Endorois community calling for compensation and restitution of the land in 2010.³⁹⁹

Interestingly, it was not until September 2014 when President Kenyatta formed a task force to make recommendations into interim measures of compensation, return of the land to the Endorois and benefit-sharing of a percentage from the bio-enzymes and rubies found on the land.⁴⁰⁰ Strikingly, the report by the task force has neither been made public nor full compensation of the Endorois community is yet to be realized.

Policy reform task forces have in some instances fast tracked changes in some sectors. The police sector is one that has ripped heavily from the formation of an ad hoc body to look into the challenges facing the sector. The Commission of Inquiry into Post-Election Violence (CIPEV) in its report noted that the Police force contributed to the perpetration of the post-election violence in 2007. The report concluded that the Police force was responsible for cases of deaths through gunshots. The commission proposed the establishment of a specialized police reform body.

³⁹⁹ Communication No. 276/2003 Centre for Minority Rights Development on behalf of Endorois Welfare Council vs. Republic Of Kenya)

⁴⁰⁰ Jared Nyataya, 'Endorois ruling task force formed' (Daily Nation, Nairobi Friday September 26 2014) Available at <<http://www.nation.co.ke/news/Endorois-Task-Force-President-Uhuru-Kenyatta/1056-2466646-10p99nmz/index.html>> Accessed on 13th June 2019

For this purpose, President Mwai Kibaki formed the National Task Force on Police Reform that was led by Retired Honorable Judge Phillip Ransely.⁴⁰¹ The task force was mandated to examine the existing framework and put forward suggestions for service delivery by the police force. The Phillip Ransely task force recommended robust reforms including the rearrangement of the service, community policing mechanisms and improving conditions of service. A Police Reform Implementation Committee (PRIC) was thereafter established to fast track the recommendations of the Ransley task force.

4.2.3 INVESTIGATIVE TASK FORCES

Task forces are information gathering and investigative tools. They have been constituted in instances when crisis arises in various sectors. Investigative inquiries are set up under press of difficult situations in response to political pressure or crisis.⁴⁰² These inquiries are often very sensational and attract a good deal of public attention. The formation of task forces for investigative purposes has been viewed as the retort when the public demands for answers and action.

Many government entities have invoked the use of these ad-hoc multidisciplinary committees in finding solutions in times of crisis. In some instances, the task forces are formed under the direction of different authorities for duplicated mandates. These are knee jerk reactions to satisfy the public need for immediate action. In such cases, task forces are mandated to probe into the occurrence of the issue and present findings and recommendations. One such incident is in the sugarcane farming and sugar industry in Kenya. Besides agriculture being a major economic

⁴⁰¹ Government of Kenya, Report of the National Taskforce on Police Reforms, 2009, Government Printers and Press, Nairobi

⁴⁰² Nicholas supra n.26

pillar in Kenya, it continues to face persistent challenges.⁴⁰³ The major cash crops in the country have faced serious challenges the worst hit being sugarcane and coffee.

Sugarcane farmers have grappled with challenges characterized by delayed payments to farmers and high cost of production. These persistent problems led to the sanctioning of a probe by the government when the sugar task force was formed by the then Acting CS for Agriculture Honourable Mwangi Kiunjuri.⁴⁰⁴ The task force was representative of leaders from sugarcane producing area, agricultural experts, and stakeholders in the sugarcane industry.⁴⁰⁵ The sugarcane industry is not new to controversy and investigation. In 2003 Ministry of Agriculture set up an ad-hoc body to look into the Sugar Industry Crisis. The task force identified major weaknesses in the institutional structure and management of the sugar industry. The task force proposed a change in the institutional and management structure of the sugar sector. In spite of the efforts to invoke independent investigation and opinion the sugar industry continues to grapple in perennial challenges.

The agriculture sector has seen the formation of scores of task forces to investigate and make recommendations for crops seen as ailing. A case in point is the local cotton industry, which is a pale of shadow of what existed in the 1980s. In July 2017, amid calls to revive the cotton industry in Kenya the task force to oversee the commercialization of genetically modified cotton in Kenya. It was formed chart a road map for the commercialization of Bt-cotton technology for

⁴⁰³ Gerald Andae, 'Concern as problems facing farmers mount' (Daily Nation, Nairobi Sunday November 25, 2018) Available at <https://www.nation.co.ke/business/Concern-as-problems-facing-farmers-mount/996-4867828-m82am5/index.html> Accessed on 16th May 2019

⁴⁰⁴ Gazette Notice No. 11711 of 2018 Vol. CXX-No. 138

⁴⁰⁵ Nancy Agutu, 'Kiunjuri unveils sugar reforms task force, names Oparanya co-chair' (The Star, Nairobi 7th November 2018) Available at <https://www.the-star.co.ke/news/2018-11-07-kiunjuri-unveils-sugar-reforms-task-force-names-oparanya-as-co-chair/> Accessed on 17th May 2019.

profitable cotton production in Kenya. Conspicuously another task force on the very same cotton was created in October 2017.

In 2015, the CS in charge of natural resources and environment formed the national task force to address the climate change policy.⁴⁰⁶ The task force was responsible for spearheading the development of a national climate change action plan. In 2018 the task force probing into the forests and water catchment areas was constituted by the same Ministry of Environment and Forestry as directed by the deputy president. This task force was bred out of the illegal logging and encroaching of forests and water catchment areas that had borne a thrust on climate change characterized by delayed rainfall. The Ministry of Tourism and Wildlife would soon after constitute a task force to look into the modalities of wildlife utilization in Kenya.⁴⁰⁷

The grappling water supply problem in Nairobi and its environs despite heavy rains would later form the impetus behind yet another task force. The Ndakaini dam, which is the largest reservoir and source of water for Nairobi registered low water levels despite persistent heavy rains. There were public outcries and worries that the levels of water in the dam remained drastically low, leading to acute water rationing and shortage. The government, through the Principal Secretary for Water Joseph Irungu in its usual fashion, formed an ad hoc body to probe the issues surrounding the management of the third Nairobi Water Supply Project.⁴⁰⁸ This task force added to a list of growing love affair with task forces set up to investigate matters of public nature.

⁴⁰⁶ Ministry of Environment and Policy Website, www.environment.go.ke?p=216 accessed on 10th July 2019.

⁴⁰⁷ Republic of Kenya, Gazette Notice No. 3128 Vol.CXX-No.41, 'Task force on Wildlife Utilization' (Kenya Gazette, Nairobi 29th March 2018)

⁴⁰⁸ Joseph Muraya' Task Force formed to unravel Ndakaini Dam low levels mystery' Capital News (Nairobi, 9th May 2018) available at <https://www.capitalfm.co.ke/news/2018/05/task-force-formed-unravel-ndakaini-dam-low-levels-mystery/> accessed on 10th July 2019

4.3 Conclusion

Task forces have become an emerging tool in public inquiry in the post-2010 era. The examination of task forces reveals that task forces are formed to undertake functions of law reform and policy review that are akin to those of CIs formed in the colonial era and the early post-independence regimes. The task forces formed in the post-2010 era mirror commission of inquiry constituted during the colonial, Jomo Kenyatta and Moi's era in power. This similarity is drawn from the fact that the task forces focus on policy engagement and reform. Task forces are tools used to study various legal problems and give recommendation for reform.

Formation of task forces in Kenya is motivated by diverse reasons ranging from policy reform to investigatory task forces. Establishment of task forces to provide solutions to problems in Kenya can be described as a "growing love affair" with the increasing trend to form task forces. The executive, government ministries, and state agencies regularly constitute task forces to deal with emerging problems within the many different sectors.

Notably, there has been the formation of more than one task force to look into the same issue in particular sectors. In constituting the task forces the appointing agencies have in some instances appointed more than two task forces with similar terms of reference to perform duplicate roles. This has been witnessed in sectors that experience perennial and recurring issues such as the public service, agricultural sector and combating corruption.

Moreover, the culture of secrecy has grappled the practice of public inquiry in Kenya. Despite forming these bodies to probe matters of public concern, publishing of the reports is rarely done. For these reasons, task forces as institutions of inquiry can be viewed as institutions created to

satisfy the public need for immediate action while forgetting that there has been an opportunity to plan ahead and action taken.

Conspicuously, unlike CIs whose appointment, operations and relationship with other state agencies, there exists no framework that regulates the establishment and operation of task forces. This perhaps reflects in the duplication of these ad hoc institutions, constant extension of timelines for the task forces and the failure to make public the findings of these bodies could perhaps be attributed to this gap in law. Ultimately, the very issues that the task forces are set up to tackle recur and continue to persist in the public and national domain.

CHAPTER FIVE: CONCLUSION AND RECOMMENDATIONS

6.1 Introduction and Research Findings

The previous chapter analyzed the nature of task forces. It also typologized task forces in two main groups; policy reform/implementation and investigative task forces. In this chapter, the author summarizes the findings of the study and puts forward suggestions to improve public inquiry.

This study set out to examine the move by the government to employ other mechanisms to probe into matters of national importance in the post-2010 regime. The study hypothesized that although historically Kenyan governments have often resulted to the use of commission of inquiry for purposes of public inquiry, nevertheless in the post-2010 period the government has resorted to the use of task forces and other mechanisms because of structural changes introduced by the Constitution. This change saw the Constitution create new institutions and redesign or reinforce some institutions that already existed to undertake functions that are incidental to public inquiry.

The study utilized the historical research method to examine the genesis of the practice of public inquiry throughout Kenya's history. This method aided the study in locating the role of public inquiry has played in the governance and political landscape of Kenya. Additionally, it interrogated the force the past history in the public inquiry sphere has had in shaping the current trends. On the other hand, doctrinal research method, guided in analyzing the various legal and institutional frameworks that govern the practice of public inquiry in Kenya.

This study was organized and compartmentalized into five research questions which were examined and answered in five distinct chapters. Chapter two of the study located the history of the public inquiry in Kenya. The author in this chapter argued that public inquiry mechanisms formed have always reflected the political regime and governance structures in place throughout the different regimes. The composition of public inquiry bodies in during the earlier regimes of power was governed largely by the constitution and Commission of Inquiry Act. This meant that the formation of CIs was at the prerogative of the presidency. The unfettered powers of the executive, paved way for interference with other state departments and agencies that carried out public inquiry. The 2010 constitution expounded, expanded and re-distributed the mandate of public inquiry. This chapter traces the historical timeline of public inquiry in Kenya, demonstrating the patterns of the practice of public inquiry through the different legal and presidential regimes.

The study divided this into five parts, namely: the pre-colonial era, colonial era, Jomo Kenyatta, Daniel Arap Moi, MwaiKibaki, and Uhuru Kenyatta's presidential regimes. This chapter looked into establishment, operation, and implementation of the findings of public inquiry reports. The chapter revealed that the British imperialists used public inquiry as a mechanism to entrench colonial policies on the colony of Kenya. The examination into the practice of public inquiry

during President Jomo Kenyatta's regime reveals that probes were majorly inclined towards the legal reform agenda. The post-independence government came face to face with the post-colonial challenges of running a government that had been preceded by colonial rule. To this end, the government needed to adjust certain policies to reappraise the same with the realities of a young post-independence nation. During President Moi's era, public inquiry majorly manifested through the use commission of inquiry. The public inquiry then was mainly a tool for centralizing power.

Additionally, during President Moi's regime saw many economic difficulties manifest, including fluctuating prices of the country's major exports. The government resulted in the implementation of the structural adjustment programs initiated at the behest and implemented by International Organizations. As part of the conditions of implementing SAPs, these organizations demanded accountability by the government. This new development required positive response towards fulfilling the set down conditions. The government formed various CIs and inquiries as compliance to the accountability and transparency condition.

President Mwai Kibaki's was preceded by a twenty-four-year-old government that had sidestepped the rule of law in a bid to consolidate power. Kibaki's regime, therefore, used commissions of inquiry to cure ills committed by previous governments. Further, Kibaki's reign in power saw the post-election violence of 2007 that were of great magnitude. This occurrence necessitated the formation of the last commission of inquiry to be formed in the country. President Uhuru Kenyatta's government has not appointed any commission of inquiry but has instead resulted in employing task forces, parliamentary committees, and other agencies. The use of task forces mainly has primarily been to probe some chronic issues such as corruption, sectoral problems inter alia. Uhuru Kenyatta's regime came to the helm of power when the

implementation of the Constitution had taken center-stage. As such, task forces have been a preferred tool to help implement the Constitution administratively. Notably, during the regime of the first President Jomo Kenyatta CIs were established necessitated by some law reform issues. The use of task forces during President Uhuru's regime is not any far disparate from Kenyatta's regime.

Chapter three examined the legislative and institutional framework governing the public inquiry in Kenya. This chapter considered the national legal framework and national institutional framework on public inquiry. The 2010 Constitution is heralded as being progressive, having introduced changes in systems of governance. It redesigned existing institutions and created many institutions that conduct inquiries of public nature for purposes of informing the government. The reconfiguration of these institutions has further diversified and strengthened the practice of public inquiry. The institutions created under the Constitution have specialized jurisdiction to probe certain matters of public interest that fall squarely under their mandate. Statutes such as the EACC Act establish the Ethics and Anti-Corruption Commission with powers to conduct investigations on matters touching on integrity and corruption.

The fourth chapter analyzed the nature and typology of task forces in Kenya. This chapter responded to the fourth question on what is the typology and nature of task forces as a mechanism of public inquiry in Kenya. This chapter unearthed that task forces are appointed or established by a vast of government agencies authorized within their respective mandates to conduct duties that are incidental to public interest. The question of public interest or public concern is malleable and renders itself to vast interpretations for purposes of constituting task forces. Task forces have been constituted to look into a myriad of events and reasons. Within a more confined classification, task forces are categorized into policy reform task forces and

investigatory task forces. The term public interest and public good are very fluid. Formation of task forces for the public good has therefore seen the commissioning of these inquiry bodies for purposes that squarely fall under the mandate of a state agency. Additionally, investigatory task forces are more often knee jerk reactions to situations. To this end, in some instances, there has been an overlap of task forces formed to serve the same purposes by different authorities.

6.2 RECOMMENDATIONS

Based on the previous findings, this study provides some recommendations. The recommendations are based on the emerging gaps that the study has pointed out in the practice of public inquiry in Kenya. These recommendations are categorized into immediate recommendations by the various actors, medium-term recommendations and long term prescriptions to improve public inquiry in Kenya.

6.2.1 Immediate Recommendations

i) Referral to established state agencies and institutions

While public inquiry enhances transparency and accountability of government, there exist state agencies and institutions established to serve this purpose. Formation of external entities to carry out public inquiry is a more natural approach to resolving these problems. The creation of other entities such as task forces serves as a duplication of roles where there are State departments established and mandated to carry out functions that are referred to the task force established. The staffing of these State departments is comprised mostly of technocrats drawn from different disciplines; thus, these institutions can carry out inquiries.

The task forces are formed to try and fix dilemmas that are in some cases disasters in waiting. State agencies are established and funded to provide solutions to common problems which if

neglected channel into crisis. The agencies afford the government an opportunity to have action done as opposed to creating external institutions to satisfy the need for immediate action. Task forces should only be created where the institution charged with the responsibility fails to perform its function.

6.2.2 Mid-term Recommendations

i) Scrutiny process before the establishment of a task force

There should be thorough scrutiny before the formation of a task force to probe into an issue. It ensures that issues are not referred to ad hoc bodies hence creating duplication of roles. The cabinet should develop a policy framework that regulates the establishment of task forces. The policy framework should rationalize the instances when if need be a task force may be constituted. The policy should also provide for scrutiny and approval procedures that ensure that there exists no duplicity of roles between the task forces and institutions established to carry out similar functions.

i) Formulate a regulatory framework for task forces

Task forces have gained prominence in driving the policy reform agenda and investigation. The government continues to rely on the task forces to assess gaps in various sectors as well as investigate occurrences. Numerous reports and piles of recommendations have been produced from the task force assignments. Most of the issues under investigation and scrutiny persist as perennial problems. In some instances multiple task forces and working groups have been established to look into the recurrent problems. There is a huge gap between problem identification and the process of developing a way out for the problems. There are no firm and binding frameworks for considering and implementing solutions.

To this end, this research proposes a regulatory framework in form of a legal instrument. The reason for proposing a legal instrument is because the legal instrument will have binding force. Additionally, a legal framework will establish a relationship between the task force, appointing authority and other agencies involved. This will ensure that the task force in conducting its assigned mandate does not operate amorously. The framework will also ensure speedy consideration and implementation of suitable proposals that are presented by the task force.

As discussed earlier, task forces have been appointed to undertake duplicate roles. Some task forces are created as knee jerk reactions to perennial problems. The framework should stipulate a detailed criterion that ensures a myriad of duplicate task forces are not formed to carry out similar assignments. The framework should establish an intergraded repository where all state corporations and agencies not only gazette the appointment of a task force but also manage and preserve reports from the task forces. This will ensure that the different state agencies restrain from constituting similar task forces.

ii) Audit the value of ad hoc task forces and commission of inquiry

To comprehensively address the efficacy of task forces and commission of inquiry, the government should carry out objective audits on the efficacy of these ad hoc bodies. The audit should be aimed at addressing the public interest arguments in establishing these bodies. The audit should be aimed at determining how effective commissions of inquiries have been in answering the issues before them and making implementable recommendations. The audit should examine the value of the findings that the probes reasonably yield.

6.2.3 Long term recommendations

i) Develop African epistemologies for public inquiry

The use of commission of inquiry and task forces was an inherited colonial legacy. It is essential to audit and examine their efficacy in yielding real and meaningful results that steer change. To this end, it is vital to develop institutions of accountability, transparency, and policy change that speak to the African realities. Alternatively, the government should configure the institutions with the African reality as causative agents of inquiry and policy change.

Ultimately, in the end, it is crucial to rethink the use of the ad hoc inquiry and policy research bodies. With an extensive and robust constitution that establishes independent commission and bodies, the value/structure of the ad hoc inquiry bodies ought to be revisited. This will revitalize and fortify public inquiry and the value of public inquiry yield in governance. This analysis would go a long way in strengthening public inquiry bolstering the value of probes carried out for public interest matters.

6.3 Conclusion and further areas of research

This study examined why the government has shifted to employing the use of task forces, boards, and other institutions to carry out public inquiry. The study revealed that the Constitution 2010 restructured and redesigned institutions to carry out public inquiry. Chapter four revealed that task forces are employed to investigate areas for policy reform. The task forces have been constituted by several quarters in pushing the agenda for policy reform. The various sector-specific departments establish the task force in examining the need for policy reforms. Further research would be needed to critically analyze the place of state departments and agencies in carrying out inquiries. It is critical to examine the efficacy of the constitutional bodies and structures that carry out public inquiry. Studies focusing on public inquiry beyond the ad hoc institutions would go a long way in ensuring that ad hoc public inquiries yield meaningful

results for change. Research in this would go a long way in strengthening public inquiry bolstering the value of probes carried out for public interest matters.

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