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Historical legacies and the truth process in Kenya

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HISTORICAL LEGACIES
AND THE TRUTH PROCESS IN KENYA

BY
MICHAEL OMONDI OWISO

DISSERTATION SUBMITTED 2017

TRANSITIONAL JUSTICE AND THE INSTITUTIONALISATION OF DEMOCRACY: HISTORICAL LEGACIES AND THE TRUTH PROCESS IN KENYA

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CV

Michael Omondi Owiso has extensive professional experience in conflict, peace, security and development issues with a special interest in conflict management and post-conflict state building; and an excellent understanding of African peace, security and development issues. Previously he worked with civil society within the Eastern and the Horn of Africa region for over 20 years.

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ENGLISH SUMMARY

Attempts at institutionalising participatory democracy in Africa have been achieved through various mechanisms such as institutional and economic reforms but have remained problematic. The occurrence of countries coming from ´dark pasts´ and employing transitional justice mechanisms to deal with those past injustices to institutionalise democracy is also growing. While this is the case, there exists a dearth of knowledge on whether the outcomes of a truth mechanism do facilitate the prevalence of justice and reconciliation and subsequently impact institutionalisation of participatory democracy. This study examined the extent to which transitional justice mechanisms mediate the institutionalisation of participatory democracy. In particular, the Truth, Justice and Reconciliation Commission of Kenya (TJRC) process was on focus. Two important questions were: (i) Whether the TJRC process facilitated the prevalence of justice and reconciliation? (ii) If it did, how has the TJRC process impacted the transition to a more institutionalised and participatory democracy? The circumstances under which and, around which Kenya embarked on the truth, justice and reconciliation process were unique in history, politics and structure and thus provided possibilities for new learning. The assumption is that such processes lead to the promotion of a human rights culture, the rule of law, accountability and reconciliation. The study was therefore guided by the following objectives: (a) to analyse the reasons why Kenya established the TJRC? (b) Interrogate whether the TJRC process facilitated Justice, how it did it and why? (c) Explore whether the TJRC process facilitated reconciliation, how it did it and why? Moreover, (d) to investigate whether the TJRC process played a role in the institutionalisation of participatory democracy in Kenya, how it did it and why? The contribution used a conceptual framework in which *path dependence* and *critical juncture analysis* as applied in Historical Institutionalism (HI) were used in providing the foundational understanding of the trajectories of change and political development and answering the why questions in this study; John Paul Lederach´s Conceptual Framework for Reconciliation was applied in analysing issues around justice and reconciliation as well as answering the how question in this study; and Carole Pateman´s conception of participatory democracy was used in understanding and determining whether a participatory society was the eventual outcome thereby answering the what question in this study. The research was exploratory and used archival records, official documents, sixty-seven semi-structured interviews and four focused group discussions as sources of both primary and secondary data. Purposive sampling was used in targeted Counties of Garissa, Kericho, Nairobi, Trans-Nzoia, Uasin Gishu and Wajir in Kenya, deemed to have been the epicentres of the historical injustices. Snowball sampling was also used and helped in reaching interview participants in the same Counties who were important but had not been targeted earlier. The inquiry found out that overall the TJRC process did not facilitate the prevalence of justice and reconciliation and therefore did not impact on the institutionalisation of participatory democracy. This was due to the involvement of the political elite in the committing of the historical injustices and the fact that the implementation of the recommendations from the process was also entirely left in the hands of the same elite. Their choices and preferences were, therefore *"locked-in"* and inhibited them from taking advantage on the critical juncture that presented itself in the form of the TJRC process. The findings in this study are important for countries that intend to institutionalise transitional justice policy frameworks, particularly in Africa. These countries will have the opportunity to think through the architecture of such processes so that they do not face same the legal and procedural challenges that may come with implementation. The conceptual framework also provides a basis for thinking about the theoretical structure of successful processes in the future by pointing out to the loopholes that may have hindered the recommendations from the TJRC process in Kenya from being implemented.

DANSK RESUME

Der har været adskillige eksempler på at lande i Afrika gennem forskellige institutionelle og økonomiske reformer har forsøgt at institutionalisere demokrati med høj grad af direkte folkelig deltagelse, men de fleste har slået fejl. På trods heraf vokser antallet af lande, der kommer fra hvad man kan kalde "den mørke fortid", og som forsøger at implementere overgangsmekanismer til at håndtere tidligere uretfærdigheder for på denne måde at institutionalisere en demokratisk styreform. Selvom litteraturen om retfærdighed og overgangsmekanismer vokser befinder sig den stadig på et embryonisk stadie og er baseret på forskellige modsatrettede perspektiver. Derfor mangler der ny viden om blandt andet, hvorvidt resultatet af de nye institutionelle mekanismer, der forholder sig til sandhed kan bidrage til udbredelsen af mere retfærdighed, forsoning og efterfølgende påvirke en institutionalisering af demokrati baseret på deltagelse.

Formålet med denne afhandling er at afdække i hvilket omfang overgangsmekanismer, der fremmer retfærdighed, medvirker til øget institutionalisering af demokrati baseret på øget folkelig deltagelse. Fokus i afhandlingen ligger på the Truth, Justice and Reconciliation Commission (TJRC) og indeholder herunder et forsøg på at besvare to overordnede forskningsspørgsmål: (i) Hvorvidt TJRC-processen vil føre til udbredelsen af retfærdighed og forsoning? (ii) Hvorledes har TJRC-processen påvirket overgangen til et mere institutionaliseret og deltagende demokrati?

Omstændighederne under hvilke Kenya påbegyndte processen hen imod en søgen efter sandhed, retfærdighed og forsoning har været unikke både historisk, politisk og strukturelt og erfaringerne herfra kan således potentielt angive nye retninger og ny viden. Det antages, at sådanne processer fører til fremme af en menneskerettighedskultur, retsstatsprincippet, ansvarlighed og forsoning. Afhandlingen bygger derfor på følgende grundspørgsmål: (a) At analysere årsagerne til at Kenya etablerede TJRC? (b) Analyse af om TJRC-processen har ledt til større retfærdighed, herunder hvordan den gjorde det, og hvorfor? (c) Undersøge om TJRC-processen leder til større forsoning, hvordan den gjorde det og hvorfor? Ydermere (d) at undersøge, om TJRC-processen har spillet en rolle i institutionaliseringen af demokratisk deltagelse, hvordan det gjorde det og hvorfor?

Bidraget anvender en begrebsmæssig ramme, hvor stiafhængighed og kritiske tidspunkter, som anvendt i Historisk Institutionalisme (HI), benyttes til at tilvejebringe en grundlæggende forståelse af forandrings- og politiske udviklingstendenser og besvare de enkelte forskningsspørgsmål i undersøgelsen; John Paul Lederachs konceptuelle ramme for forsoning anvendes til at analysere spørgsmål omkring retfærdighed og forsoning; og Carole Patemans opfattelse af demokratisk deltagelse bruges til at forstå og afgøre, om et deltagende samfund var det endelige resultat og dermed besvare det overordnede forskningsspørgsmål.

Forskningen er baseret på en eksplorativ metode og anvender empirisk materiale fra arkiver, officielle dokumenter, 67 semistrukturerede interviews og fire fokus-gruppediskussioner, som kilder til både primære og sekundære data. "Purposive sampling" eller bevidst strategisk sampling bruges i en række udvalgte repræsentative amter, nemlig Garissa, Kericho, Nairobi, Trans-Nzoia, Uasin Gishu og Wajir, der anses for at have været epicentrene for de historiske uretfærdigheder. "Snowballing metoden" blev også benyttet for at nå ud til interview deltagerne.

Konklusionen viser at TJRC-processen generelt set ikke har ført til udbredelsen af øget retfærdighed og forsoning og derfor ikke har indflydelse på institutionaliseringen af demokratisk deltagelse. Det skyldtes inddragelsen af den samme politiske elite, der i vidt omfang har været

involveret i de historiske uretfærdigheder og det faktum, at implementeringen af henstillingerne fra processen, ligger i hænderne på samme elite. Deres valg og præferencer er derfor "locked-in", hvilket har forhindret udnyttelsen af det kritiske tidspunkt, der fremkom i kølvandet af TJRC-processen. Resultaterne i denne undersøgelse er vigtige for lande, især i Afrika, der har til hensigt at institutionalisere overgangs institutionelle mekanismer, der har til hensigt at fremme retfærdighed. Disse lande vil have mulighed for at gennemtænke arkitekturen af sådanne processer, så de ikke står over for de samme juridiske og processuelle udfordringer, der muligvis kommer i forbindelse med implementeringen. Den begrebslige ramme giver også grundlag for at nytænke det teoretiske grundlag for gennemførelsen af en succesrig proces i fremtiden ved at påpege de problemer, der kan have hæmmet anbefalingerne fra TJRC-processen i Kenya fra at blive implementeret.

Dedication

I wish to dedicate this work to my family especially to my wife Benedine Jepkemoi Kipruto and our two children Adrian Hawi and Ashley Owiso. Their support during the time of my studies was immense.

I also wish to dedicate the work to my late parents Margaret Ambani Owiso and Lucas Owiso Ndeda who died in the first and second year of my studies respectively. Their encouragement and support during my education cannot be measured.

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ABBREVIATIONS

AAU	Aalborg University
ACP	Africa, Caribbean and Pacific
ADC	Agricultural Development Corporation
ADM	Adversely Mentioned Persons
AFP	Agence France Press
AFRICOG	African Center for Open Governance
BBC	British Broadcasting Corporation
CDA	Critical Discourse Analysis
CIA	Central Intelligence Agency
CIPEV	Commission of Inquiry into the Post-Election Violence
CNBC	Consumer News and Business Channel
COMESA	Common Market for Eastern and Southern Africa
CONADEP	Argentine National Commission on the Disappearance of Persons
CPJ	Committee to Protect Journalists
CPR	Civil and Political Rights
CRA	Commission for Revenue Allocation
CRECO	Constitutional and Reforms Education Consortium
CSO	Civil Society Organisation
CSO-RG	Civil Society Organisation Reference Group
CVR	Civil and Political Rights

DPC	District Peace Committee
DPP	Director of Public Prosecutions
DTM	Development through Media
DW	Deutsche Welle
DwP	Dealing with the Past
EACC	Ethics and Anti-Corruption Commission
ECOSOC	Economic, Social and Cultural Rights
EMA2	Erasmus Mundus Action 2
FGD	Focused Group Discussion
FIDH	International Federation for Human Rights
FPE	Free Primary Education
GDP	Gross Domestic Product
GEMA	Gikuyu, Embu, Meru Association
GNU	Government of National Unity
GOK	Government of Kenya
GPPAC	Global Partnership for the Prevention of Armed Conflict
GSU	General Service Unit
HI	Historical Institutionalism
HRW	Human Rights Watch
ICC	International Criminal Court
ICJ	International Commission of Jurists

ICLD	Swedish International Center for Local Democracy
ICTJ	International Center for Transitional Justice
IDMC	International Displacement Monitoring Center
IDP	Internally Displaced Person
IDPSI	Internally Displaced Persons Support Initiative
IEBC	Independent Electoral and Boundaries Commission
IFMIS	Integrated Financial Management System
ILC	International Land Coalition
IMF	International Monetary Fund
IMLU	Independent Medical-Legal Unit
IPA	Information Africa
ISK	Institute of Surveyors in Kenya
ISS	Institute for Security Studies
IT	Information Technology
KACA	Kenya Anti-Corruption Authority
KACC	Kenya Anti-Corruption Commission
KANU	Kenya African National Union
KHRC	Kenya Human Rights Commission
KJTN	Kenya Transitional Justice Network
KLA	Kenya Land Alliance
KNBS	Kenya National Bureau of Statistics

KNCHR	Kenyan National Commission on Human Rights
KNDR	Kenya National and Reconciliation Dialogue
KPTJ	Kenyans for Peace with Truth and Justice
KYSY	Kura Yangu Sauti Yangu
MDG	Millennium Development Goals
MRC	Mombasa Republican Council
MP	Member of Parliament
MUHURI	Muslims for Human Rights
NAI	Nordic Africa Institute
NARC	National Rainbow Coalition
NASA	National Super Alliance
NCCK	National Council of Churches of Kenya
NCLR	National Council for Law Reporting
NDR	National Dialogue and Reconciliation Process
NFD	Northern Frontier District
NGO	Non-Governmental Organisation
NLC	National Land Commission
NPI-Africa	Nairobi Peace Initiatives-Africa
NPSC	National Police Service Commission
NRC	National Reconciliation Commission
NSAC	National Security Advisory Council

NSVN   National Victims and Survivors Network

NYS   National Youth Service

ODPP   Office of the Director of Public Prosecutions

OHCHR   United Nations Office of the High Commissioner for Human Rights

PB   Participatory Budgeting

PBO   Public Benefits Organisation

PC   Provincial Commissioner

PEV   Post-Election Violence

PS   Permanent Secretary

SDLF   Sabaot Land Defence Force

SID   Society for International Development

STF   Settler Transfer Fund

STI   Science, Technology and Innovation

TJDB   Transitional Justice Database

TJR   Truth, Justice and Reconciliation

TJRC   Truth, Justice and Reconciliation Commission

TRC   Truth and Reconciliation Commission

UK   United Kingdom

UN   United Nations

UNDP   United Nations Development Programme

US   United States

USAID United States Agency for International Development

CHAPTER 1. INTRODUCTION

1.1 CHAPTER PREVIEW, AIM AND SCOPE

This chapter presents the research context: it problematizes the puzzle of democratic institutionalisation in Africa and Kenya and the different attempts at doing this. The chapter also situates Kenya geographically, historically, socially, politically and culturally to contextualise the research site. It then presents the historical context of transitional justice and in particular the establishment of the Truth Commission in Kenya about the institutionalisation of participatory democracy. The chapter demonstrates that there is a puzzle in the relationship between truth commissions and the institutionalisation of participatory democracy. By doing this, the need for the inquiry is rationalised. The chapter further specifies the overall research question as well as the specific research questions guiding the study. Finally, the chapter outlines the remaining chapters in the thesis. This is done with the aim of providing the logical sequence of the research.

1.2 BRIEF OVERVIEW OF KENYA

Kenya attained independence on December 12, 1963. The country had been under the British Protectorate since 1895. Compared to the other countries in East Africa; Tanzania in 1961 and Uganda in 1962 Kenya the last in this region and one of the last colonies in Africa to gain independence (Hornsby 2011: 19). Geographically the country is well endowed with coastlines, forests, mountains, deserts, the huge Lake Victoria in the western part as well as the Great Rift Valley running from the north down south. (Hornsby 2011: 20). Five countries share borders with Kenya. These are Tanzania, Uganda, Sudan, Ethiopia and Somalia.

At independence, the country had a population of about 8.6 million. The majority of this population lived in rural areas and practised small-scale agriculture as well as pastoralism. The land was owned by families or collectively by communities (Hornsby 2011: 21). According to Haugerud (1995), Kenya´s population can be classified into 40 distinct groups. Currently, the number of these groups is placed at 44 with the Asian Community having been recognised as a tribe in 2017[1] (Dahir, July

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[1] Rasna Warah writes that *"Kenyan Asians are an extremely diverse group of people who do not all speak the same language or follow the same religion"*. Neither do they fit to be described as a tribe in the anthropological sense. At the same time the Asian community in Kenya has traditionally been marginalized yet they have been within the East African precincts since the eighteenth and nineteenth centuries (Warah, July 31, 2017). Roychowdhury agrees with this and indicates that the Indian presence in Kenya dates back to the seventeenth century. The presence of the British in India and East Africa provided impetus for the migration of Indians to Kenya. And, the community contributed immensely to the liberation struggles against British rule in Kenya (July 25, 2017). Rasna continues that configuring the Asian community as a tribe only reinforces the entrenched tribal identity in Kenya where tribal identity *"is used to oppress or marginalise those who do not belong to the bigger, more dominant tribes; the numerical strength of your tribe determines your access to opportunities"* (Warah, July 31, 2017). Agence France Press (AFP) indicates that the

25, 2017). The main groups are the Kikuyu, Luhyia, Luo, Kalenjin and Kamba (cited in Gifford 2009: 1). Apparently, six out of the now 44 tribes occupy 70 percent of the total population and therefore dominate public service jobs. Another reality is that tribalism and ethnic affiliation in Kenya are the main arbiters of social, political, and economic life[2] (Dahir, July 25, 2017). This partly explains the obsession with tribal purity as experienced in Kenya. Basse (2010), indicates that the last population census conducted in 2009 placed the population at 38,610,097 people. The census posted the following numerical composition of ethnic communities; the Kikuyu - 6.62 million, the Luhya - 5.33 million, the Kalenjin - 4.96 million, and the Luo - 4.04 million. The Kamba - 3.89 million, the Kenyan Somali - 2.38 million, the Kisii - 2.21 million, the Mijikenda - 1.96 million, the Meru - 1.65 million - the Turkana - 0.99 million, the Maasai - 0.84 million, the Teso - 0.33 million and the Embu - 0.32 million (Basse, August 31, 2010). The World Bank (2017), estimates that Kenya has a population of 46.1 million and this figure is growing by an estimated one million persons every year (March 7, 2017). The steady growth in population suggests that by 2018 the population will be at about forty-seven million. This might be a source of more competition and may then intensify the ethnic tendencies and calculations of informal networks and patronage in the bid to access or benefit from government jobs, tenders and services.

According to Haugerud (1995) before colonialism, none of the ethnic groups in Kenya had a unified patriarchal descent and did not practice a common way of fending for life. Neither did any group have a common language. It is important to note that the largest unit of power was the community and there were no structures for competition amongst the existing communities (cited in Gifford 2009: 1). Gifford continues to write that colonialism specially affected these communities because none of the communities had the position of the chief as created by the British. Few exceptions could only be found among the Luo and the Luhyia groups (2009:7). This meant that a disruption of the social and political structures that held the communities intact (either individually or collectively) happened (it can also be argued that these structures contribute to the cohesion, homogeneity and unity of the said formations). Again, before monetarization, wealth was in

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2009 census in Kenya showed that the South Asian community numbered 46000 while it is estimated that another 35000 are in Kenya without papers (July, 22, 2017).

[2] The move by the President did not go without criticism. It was viewed as a ploy to *"sway the support of the Asian community in the August 8, 2017 elections"* (Mwere, July 22, 2017). This is particularly so because the community has for decades suffered *"certain invisibility in the political and historical discourse of the nation"* although they have been historically present and have greatly contributed to the socio-economic and political life of Kenya (Roychowdhury, July 25, 2017). The irony in this is that Kenya has had Members of Parliament who are of Asian descent. Shakeel Shabbir for example became the Member of Parliament for Kisumu East in 2008. Whether Asians in Kenya will now be in the limelight and not be subject to marginalisation as other smaller communities have been is left for future observation. Further, what measures will the incoming regime put in place to ensure that not person or community is marginalised in the face of evident lack of support for the devolved system of government which seeks to deal with issues related to marginalsation as discussed in Section 1.2.1.

livestock. These changed and patronage sources were found in the created chiefs, traders and the newly educated individuals such as clerks and teachers. The newly created categories of classes became the avenues through which individuals could rise to power and later use these positions to manipulate state resources. Gifford continues that the individuals became patrons who had access to state resources at a time when the meaning of wealth was fast changing and the ethnic boundaries diminishing. This also meant that while allegiance to the original social and cultural configurations remained, new forms of allegiance began to emerge and sometimes in conflict with the traditional ones. Constellations and further constellations along these new configurations set in.

At independence, Kenya adopted a multi-party parliamentary system. In this system there were two major political parties, the Kenya African National Union (KANU) and the Kenya African Democratic Union (KADU) (Widner 1992:30-31). Kenya had a *Majimbo* (devolved) constitution in 1963 which devolved authority away from the centre. This however only lasted less than a year before a pattern of the centralised state, reminiscent of the colonial administrative structure was reestablished by the Jomo Kenyatta administration. This structure was in place until a referendum in 2010 adopted the new Constitution (Willis, December 12, 2013). Kamunde-Aquino (2014) notes that prior the adoption of the 2010 Constitution a record twenty five amendments were made to the original constitution of 1963. The amendments had grave consequences for democracy since they were, for the most part, aimed at entrenching an authoritarian state. These changes reflect the contentions and past conflicts around issues such as land governance, which the successive regimes have avoided to tackle. For, example the amendment made through Act No. 28 in 1964 led to the establishment of *"the office of the Vice President who would be appointed by the elected members of the House of Representatives"*. At the same time the Amendment Act No. 38 of 1964 *"weakened the Majimbo system by centralising power"*. The Majimbo system of government was finally dealt a blow through the Amendment Act No. 16 of 1968 which abolished the Provincial Councils and erased laws relating to regional assemblies and reference to them (Kamunde-Aquino, July 2014). The implementation of a devolved government came to be realised after the 2013 elections (Willis, December 12, 2013). The Constitution of Kenya Amendment Act No. 18 of 1966 *"ensured the President could order for detention without trial on his discretion"*. Further, in 1966 Senate was abolished and a unicameral legislature was adopted through the Amendment Act No. 40 of 1966. Kenya became a one-party state in 1982 through an amendment that introduced Section 2A. This Act vested political power the Kenya African National Union (KANU), which was the ruling party. This meant that for one to become a Member of Parliament, they had to first be a member of the

ruling party. This was repealed later in 1991 after pressure from both local and national actors through the Amendment Act No. 12 of 1991 (Kamunde-Aquino, July 2014).

The repeal of Section 2A meant that Kenya was once more became a multi-party state ushering in the realization of freedom to form and join parties. It is important to note that throughout this time there was opposition to the happenings but which was stifled through an authoritarian state. The Human Rights Watch (HRW) (2008), in their analysis of the post-election violence of 2007/8 concluded that the country perpetually remained with a temporary constitution fifty years after independence because of the amendments described above. In their view, this situation ensured that vast powers were assigned to the president while parliament and the judiciary were weakened and compromised (HRW, 2008:15). These amendments further reflected the tensions present in the country, all of which were related to governance. By removing power from the *Jimbos* (regions), for example, the Kenyatta regime sought to reduce the influence of leaders at the regional level and ensure absolute control over the state. Further, these moves legalised and opened the possibilities to entrench the historical injustices such as assassinations, land grabbing, marginalisation of all kinds (political, social, and economic), and detention without trial, corruption and evictions from land.

The Jomo Kenyatta and Daniel Moi regimes birthed the ethnic patronage politics in the country and produced a gatekeeper state under which competition to control the structures of decision-making was greatly stifled. Under this system the government did not provide the needed services and priority was given to the control of channels for the opposition. They used patronage, coercion, scapegoating of opponents to narrow the chances of questioning by those that were discontented (Gifford 2009: 8-9). In fact, opposition was termed as tribal. At the same time the political elite patronised tribe in exchange for loyalty, according to Gifford.

In agitating for reforms the reformers were also branded as saboteurs of development and their communities were consequently marginalised through the lopsided allocation of resources by both Jomo Kenyatta and Daniel Moi. Instead, *"they favoured their native areas and pockets of the country where they drew support from in development and neglected opposition regions"* (Mkawale, September 24, 2017). This demonisation of dissent and the promotion of patronage led to the pilferage of the national coffers because those loyal to the different administrations had to be rewarded. This situation heralded corruption in public offices and by the chief executive of the country. Under Kenyatta, the Kikuyu were seen to be in the center while other communities remained in the periphery. When Moi came to power in 1978, he too surrounded himself with

people from his community, the Kalenjin. Indeed Moi personified the big man syndrome in the country. Authority and money were central to him as opposed to national unity (Gifford 2009:8-9). His philosophy of peace, love and unity was mere rhetoric and aimed at maintaining status quo. Those close to the Moi administration benefited from the plunder of state resources. They both deemed the formations they adopted as more comfortable and cushioning against the rise and penetration of members of other communities to this coveted position of advantage. Gifford (2009) writes that Moi´s clients were given positions in marketing boards, parastatals and other governmental bodies which they, in turn, plundered and enriched themselves (2009:10-11).

The aforementioned happenings contributed to the conflict experienced in the country. Atieno Odhiambo and Lonsdale (2003), while writing about nationhood in Kenya, point out that in the formative years the country did not become an exception in Africa (where public discourse about entitlements - individual and group), that could lead to nations breaking apart found prominence. They underscore that similar discussions are *"about who is to be included, whom excluded; about how equal the rights of citizenship can in practice be; what degree of privileged differentiation is tolerable between regions, languages and personal status"*, found their way in the Kenyan public discourse (2003:2-3). In their contribution Atieno Odhiambo and Lonsdale point out to the contestations that arise with the formation and perpetuation a nation state. They advocate for a political compromise that leads to building nationhood. Although they focus on the place of the Mau Mau in Kenya with respect to their space in the structuring and restructuring of the Kenyan social, economic and political environment, their discussion is of importance in the historical development discourse of Kenya´s peoples. This public discourse has been dominated by feelings of disenfranchisement arising from the perpetual marginalisation of ethnic communities by successive regimes.

Kenya´s Gross Domestic Product (GDP) expanded from 5.7 in 2015 to 5.8 in 2016. In 2016 the information and communication, real estate, transport and storage sectors recorded significant performance while construction, mining and quarrying and insurance sectors decelerated. Kenya recorded an inflation rate of 6.3 percent (KNBS, 2017). The World Bank (2017) indicates that the growth rate projection for 2017 will rise to 6%. The institution attributes these developments to *"the vibrant services sector, enhanced construction, currency stability, low inflation, low fuel prices, a growing middle-class and rising incomes, a surge in remittances, and increased public investment in energy and transportation"* (March 7, 2017). In *The African Lions: Kenya Country*

Case Study, (2016) Kimenyi, Mwega and Ndung'u examine the economic forces that will shape Africa´s future in six countries; Ethiopia, Kenya, Ghana, Mozambique, Nigeria and South Africa. According to their research Kenya´s economy is characterised by a growing financial services sector as well as information and communication technologies sector. This, however, has not led to a decline in poverty for the average poor. The contribution further indicates that Kenya has a large demographic cohort of 0-14 years. This cohort is economically promising provided it is managed. Provision of technical skills can do this through investing in education, development of an efficient bureaucracy and institutions that uphold rule of law and freedoms as enshrined in the Constitution, have low levels of corruption and finally the development of infrastructure. They further indicate that 44.9 percent of the population in Kenya earn between two and twenty dollars a day thereby rendering the count as having the largest middle class in east Africa. They continue that this middle class can be a source of social changes such as institutional reform (ensuring that there is a participatory society) as well as the much-needed economic growth (cited in Copley, November 2, 2016).

The World Bank (2017) supports these findings by adding that potentially, Kenya is poised to become one of Africa´s greatest success stories. This is because of her growing population, dynamic private sector, the new Constitution 2010 and the critical role she plays in the East African region. This can only be hindered by the poverty[3], inequality[4], *"governance, climate change, low investment and low firm productivity"* challenges that at the same time face Kenya (March 7, 2017).

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[3] According to the World Bank (2016), Kenya´s economy remains among the poorest 25 percent of nations in the globe. Poverty is also high and placed at around fourty percent of the population. This is despite the fact that after rebasing the economy in 2014 the country became a lower-middle income nation (2016: iv). In 2017 the World Bank put GDP growth in 2016 at 5.8 percent representing an increase from 5.7 percent in 2015 (World Bank n.d., 2017). The Bank also indicated that the occasional violence, crime and structural policy mishaps (2016: vii) have made the country not to grow at the same pace as her peers (Burkina Faso, Senegal, Ghana, Tanzania and Uganda) in Sub-Saharan Africa (World Bank n.d. 2017: ix). Kenya´s growth has been volatile and non-inclusive (World Bank n.d. 2017: x). The country has *"one of the highest youth unemployment and the working age population is projected to be 39.2 million in 2030"*. This is a rise from 25.5 million in 2015 (World Bank n.d., 2017: xiv). The recent discovery of oil and the possibilities that gas will be discovered too place Kenya in a highly probable pedestal for increased growth (World Bank, n.d. 2017: xx). This is because *"oil will have considerable economic implications "*(World Bank, n.d. 2017: xxi).

[4] An assessment conducted by the World Bank in 2009 revealed that there are serious structural inequalities in the country. The report further noted that these inequalities have their roots in the colonial experience of Kenya. In effect the country if experiencing *"vicious circles of elite capture, skewed distribution, social exclusion and poverty"*. By around the year 2005/6 about 45 percent of the country were unable to buy sufficient of amounts of food – one out of every five Kenyans were not able to buy the required bundles of food (2009:x). According to the World Bank the number of people living on less that 1.90 US dollar a day rose from 21.5 percent of the population in 1997 to 33.6 percent in 2005 (World Bank, n.d., 2017). Between 2014 and 2015 the population grew from 44.9 million to 46.1 million (World Bank, n.d. 2017). A vast majority of the poor live in the rural areas at the same time. Many household therefore experience shocks occasioned by *"food price inflation, droughts and floods, illness and death in the family"* (2009: x).

Figure 1: Administrative map of Kenya; the 47 counties as of 2017.

Source: http://ontheworldmap.com/kenya/administrative-map-of-kenya.html

1.2.1 THE DEVOLVED SYSTEM OF GOVERNMENT

As shown in **Figure 1** the Constitution of Kenya 2010 provides for a decentralized system of government structured around fourty seven political and administrative Counties (alongside the national government) as provided for under article 6 (GOK, 2010). According to the National Council for Law Reporting (NCLR) (2017) decentralization devolves *"power, resources and representation to the local level"*. There also exists other legislations such as the *"Basic Education Act No. 14 of 2013"*, *"Constituencies Development Fund Act, No. 30 of 2013"*, *"County Governments Act, No. 17 of 2012"*, *"County Governments Public Finance Management Act, No. 8*

of 2013", "Intergovernmental Relations Act, No. 2 of 2012", "National Government Coordination Act, No. 1 of 2013", "Public Finance Management Act, No. 18 of 2012", "Transition to Devolved Government Act, No. 7 of 2013", "Urban Areas and Cities Act, No. 13 of 2011" and the *"Public Service (Values and Principles) Act No. 1A of 2015"* created by parliament and which outline strategies for the implementation framework. These legislations are expected to work in tandem with the Constitution of Kenya 2010 to deliver devolution (NCLR, n.d). The devolved system of government was one of the major reforms that was intended solve some of the long standing issues around resources and the lack equity in the country. These were also identified as some of the root causes of the violence that engulfed the country after the announcement of the presidential results in 2007 elections.

Article 174 of the Constitution of Kenya sets out the following objectives:

> (a) to promote democratic and accountable exercise of power; (b) to foster national unity by recognising national diversity; (c) to give powers of self-governance to the people in the exercise of powers of the State and in making decisions affecting them; (d) to recognise the right of communities to manage their own affairs and to further their development; (e) to protect and promote the interests and rights of minorities and marginalised communities; (f) to promote social and economic development and the provision of proximate, easily accessible services throughout Kenya; (g) to ensure equitable sharing of national and local resources throughout Kenya; (h) to facilitate the decentralisation of State organs, their functions and services, from the capital of Kenya; and, (i) to enhance checks and balances and the separation of powers (GOK, 2010)

The same Article also lists values and principles which capture the transformational spirit around which devolution was envisaged (GOK, 2010).

The system was also adopted as a way of solving the marginalization problem experienced during the previous regimes. In their research Cornell and D´Arcy (2016) however observe that although devolution has helped in breaking up the centralization of power there has also been a backlash from the center thereby rendering the success of devolution uncertain. They also raise the question of *"trapped minorities"* within the Counties, a phenomenon which has gained currency in public discussions in the county. They also note that *"when it comes to developing participatory practices*

at the local levels current developments", especially during the 2013 elections were wanting. Issues of patronage and public organizing mirrored some of the problematic issues such corruption and nepotism found at the national level (2016:1). In their analysis determination by the central government to undermine the functioning of the devolved system are evident and bound to continue. This situation is partly because the devolved system lacks institutional protection by the Members of Parliament and Senators at the national level. This will have great ramifications on the institutionalization of devolution (Cornel & D´Arcry 2016:15). This lack of support is indicative of the presence of a document into which the political elite do not have faith and consequently have not breathed life into.

1.3   BACKGROUND TO RESEARCH

There was an increase in political turbulence in Africa in the first half of the 1990s (Bratton & van de Walle, 1997:3-4). These were occasioned by the autocratic rule in the continent that preceded this period and which precipitated mass protests as well as national and international measures by national and international actors towards African governments in the calls for change. Autocratic rulers in Africa were caused to hold elections only after this domestic and international pressure (Brown 2004: 325). Bratton and van de Walle (1997) further indicate that these calls for change included demands for the opening up of institutions, more inclusive governance, movement from a monolithic system to a more open one, freedoms in communication, association and the respect of individual and community rights. In general, the demands were for fairness, justice, equity and freedoms.

In response, these were followed by a series of political reforms and measures that were aimed at increasing the political space within the continent. The result was increased political competition and leadership turnover that led to *"military oligarchies, civilian one-party states,* or *"hybrids of these two"*. It also resulted in the strengthening of only a few political institutions which would adequately serve the citizens´ needs and demands. Although that was the case, these transitions have not been linear and have been marked with "*descents toward new valleys*". For example, judicial and legislative institutions have remained weak whereas clientelism, rent-seeking and fraud have remained deeply ingrained within the administrations of different countries in Africa (van de Walle 1997: 6-8). Subsequently, this has meant that the path to institutionalisation of democracy remains bleak. Part of the reasons for this could be that regime transitions were partly hurried and were denied the time to take root and this explains the problematic nature democratic

institutionalisation has faced in the continent (van de Walle 1997: 5). Another reason could also be that the transitions have been for the most part imposed by the international environment and therefore did not receive the will of the political elite.

Kenya was not an exception to the calls for change and the transitions that swept the continent during this time. This is because "*the seeds of an autocratic state were planted right at independence in 1964*" during the Jomo Kenyatta regime by making Kenya a "*highly centralised authoritarian republic reminiscent of the colonial state*" (Mutua, 1994:50). Meaningful reforms began with after the re-introduction of multi-party politics in 1991with repealing of Section 2 (A) of the constitution that enthroned the Kenya African National Union (KANU) as the only political party (Brown 2004:326). Although there were policy and institutional reforms beginning at this time, the democratisation agenda remained unfinished. According to Kivuva (2015) while some minimal reforms took place after 1992, the democratisation agenda has waned and in fact reversed in some areas. Kivuva opines that while Kenya holds elections regularly, the "*purpose for which elections have been held has remained extractive*". The institutionalisation of democracy in Kenya has faced challenges because the "*elite seem concerned about consolidating power than democratising the state*" and in this situation "*ethnicity takes precedence over the nation, ideology and political parties*" (Kivuva, January 2015).

Elections in Kenya appear to be periods when people pour out grudges and settle scores against neighbours through violence. Maina Kiai aptly puts it that "*Elections are Kenya´s almighty trigger for violence. This is because we – rightly or wrongly – take elections as the root to addressing some of our age old grievances*" (September 30, 2017). These grievances also take the ethnic form, thanks to the leadership and the different ways they have marginalized ethnic communities historically. The result has been the creation of strong ethnic cleavages with deep-seated historical grievances towards one another. Another phenomenon has been the formation of political parties out of historical grudges and thereby inhibiting the making of choices and the subsequent public participation in politics. Kivuva (2015) continues to write that such politics have been characterised by the exclusion of certain communities and groups since independence. According to him this has been particularly overt during the multi-party era and was epitomised in the registration of voters, the delineation of constituencies which were curved out purposely to benefit and disadvantage different groups. The multi-party democracy has therefore been one which is not ideological but rather based on these calculations.

Violence after elections experienced in 1992, 1997, 2002 and 2007 was only a pointer to the deep-seated grievances. In 1992, for example, following the legalisation of competitive politics, ethnic cleansing of Rift Valley and Western provinces erupted. A total of 1,500 died while another *"300,000 were forced to flee their homes"*. This period also heralded an era of informal government repression which was aimed at stemming the tide of democratic campaigns that were designed to consolidating a multi-party culture, reasserting state authority and intimidating those sections of the society that were opposed to government (KHRC, 1998:1-2). Informal repression of any dissenting opinion by the government, therefore, became the tool used under the Moi regime which lasted for twenty-four years. Towards 1997 Kenya became the theatre of violent incidences related to land, cattle rustling and vigilante violence (KHRC 1998: 2). To castigate pluralism, politicians instigated violence and blamed it on the multi-ethnic identity of the country. This instigation of violence *"took advantage of the long-standing, but latent inter-ethnic disputes relating to land, religious rivalry, cultural differences and political differences, sometimes within the same ethnic group, to ferment ethnic violence"* (KHRC 1998: 3-4). All this was done to maintain restrictive structures that stifled the presence of a participatory society. Cheeseman (2008) agrees with this by positing that as a fragile democracy Kenya has certain political characteristics which include regional ethnic identities which are "*reinforced by historical grievances over land ownership, economic inequality and political exclusion*" (2008:167). He argues that understanding the crisis that engulfed Kenya after the elections of 2007 should be done with this complexity in mind. These complexities resulting from regional ethnic identities became central to the crisis in Kenya in 2007. They point out to the fact that the conflict was unprecedented and the election violence in the 1990s was a forerunner to the violence in 2007.

Resolving these grievances is one of the paths to institutionalising participatory democracy in the country. This is however possible first by ensuring that some form of justice is attained and second by putting in place a framework that will ensure that the nation is reconciled from the deep-seated tensions and animosities occasioned by the past regimes. Once this is done then an atmosphere that allows for the institutionalisation of participatory democracy[5] will prevail. The participatory society is inspired by the need for social change that is rooted in the transformation of governance values and the institutions of society. In the participatory society, the citizens eventually become committed to the values of that society as a result of a governance system that embraces and practices equity and diversity. Donati and Minnerath (2017), note that at the heart of a participatory

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[5] As inspired by the writings of Carole Pateman (1970) & (2012). The concept is analysed later in the conceptual framework.

democracy is the clear attention given to the poor, marginalised and those that suffer all forms of injustices in society. They further indicate that the dignity of humans can only be achieved when they actively participate in economic, cultural, political and social life equally; that is when they are involved in all spheres of civil and political society. Structural inhibitions, however, hinder this in society.

As already indicated, the above can be attributed to have partly triggered the post-election violence (PEV) that happened in 2007/8. In support of the position taken by KHRC above, Cooke (2009) also indicates that the violence left over 1,000 dead, and about 350,000 displaced. Further, the violence also resulted in *"rape and other forms of sexual violence"* as well as other grave crimes (FIDH/KHRC, 2017:8). According to the report of a fact-finding mission by the United Nations Office of the High Commissioner for Human Rights (OHCHR) of 2008, the post-election violence, which was triggered by the botched electoral process, can only be construed in the context of "*the long-standing conflict over land rights, prevailing impunity for human rights violations, and highly unsatisfactory fulfillment of economic and social rights*" (2008:5). Additionally, the Commission of Inquiry into the Post-election Violence (CIPEV) (2008) found out that certain factors explain the root causes of the violence and it´s spread. These include "*the growing politicization and proliferation of violence in Kenya", the "growing power and personalization of power around the presidency*", the "*feeling among certain ethnic groups of historical marginalization arising from perceived inequities concerning the allocation of land and other national resources as well as access to public goods and services*" and, the growing levels of poverty and unemployment, especially among young people (educated and uneducated) who, because of this vulnerability, willingly agree to join militia groups (2008:22-23). It is for this reason that Cheeseman (2008) writes that the declaration of Kibaki as the winner in the 2007 elections, therefore, became such a powerful trigger for the violence. He states that this was precisely because this announcement tapped into an already rich mine of historical grievances (2008:170) which in turn explains the continuous use of force to coerce the sections of the discontented population.

According to OHCHR there were spontaneous attacks which were in reaction to the announcement that was contrary to the perceptions within the opposition strongholds, organized attacks against targeted communities which occurred in the rural setting of Rift Valley and which were targeted at perceived opponents of the opposition and, organized retaliatory attacks led by mobs of youth from the Kikuyu community in Nairobi, Naivasha and Nakuru (2008:5). The Kenya National

Commission on Human Rights (KNHCR) agrees with this as indicated in their report of 2008 that the violence erupted *"almost within minutes"* as soon as the pronouncement of the presidential election results in the *"theatres of violence"* which included *"Nairobi", "Rift-Valley", "Coast"* and *"Western"* regions. The report by KNCHR (2008) indicated that the violence impacted *"136 constituencies in six of Kenya´s eight provinces"*. Like Cheeseman, the KNHCR also agree that the character of the violence was akin to the experiences of the 1990s although they also point out that there was evidence of organisation and a methodical approach to the violence. This is because the *"attacks and counter-attacks"* seemed to be *"carried out with military discipline"*. This is because for example:

> attackers in the Rift Valley participated in oathing ceremonies and donned a semblance of uniform; their attacks anticipated the need to mobilize reserve forces to assist the main attackers. Both the attacking Kalenjin forces and the counter-attacking Kikuyu forces were transported into areas of operation in vehicles. A strategy common throughout the theatres of conflict was the barricading of roads by young men intent on identifying, killing or otherwise injuring travellers from non-local communities. This pattern of behaviour is especially notable in Rift Valley, Nyanza, Western, Coast and Central Regions (KNCHR 2008:7)

The report further indicates that the infrastructure and the financing of the violence were premeditated by local politicians who also instigated the violence throughout the campaigning period by incitements to hatred, according to KNCHR. The acts constituted crimes including *"murder, manslaughter, attempted murder, conspiracy to murder, grievous bodily harm, robbery with violence, arson, malicious damage to property, theft and related offences, incitement to violence, illegal oathing, illegal possession of firearms, and sexual crimes such as rape"* (KNCHR 2008:9). These are offences under the Kenyan law. All in all, the major findings of the report indicated that there were traceable patterns in the post-election violence, concerns relating to the conduct of state agencies such as the security forces that were expected to protect the citizens, criminal culpability on the part of the alleged perpetrators, the probability of genocide happening in Kenya in the future, the commission of crimes against humanity as well as a pointer to the wider issues of governance that needed attention.

According to the OHCHR (2008) a political framework between the government and opposition on 24th January 2008, through the Kenya National and Reconciliation Dialogue (KNDR), was arrived

at to address the violence. The ultimate goal of the KNDR agreement was "*to achieve sustainable peace, stability and justice, through the rule of law and respect for human rights*". In the agreed framework "*commitments to address long-standing issues such as land reform, police and judicial reforms, socio-economic inequalities, corruption, accountability and the disarmament of militias*" were arrived at. An agreement was further made to "*establish an independent review mechanism to investigate all the electoral aspects of the 2007 presidential election, conduct a constitutional review process to be completed within 12 months, establish a Truth, Justice and Reconciliation Commission and a Commission of Inquiry*". "*The mandate of the Commission of Inquiry was to investigate the facts and circumstances*" relating to the violence that happened between 28 December 2007 and 28 February 2008 (2008:5) while that of "*the Truth, Justice and Reconciliation Commission was to inquire into the events which took place between December 12, 1963, and February 28, 2008*". The truth commission was also mandated to "*look at antecedent to this period were necessary to understand the nature, root causes and context that led to such violations, violence or crimes*" (TJRC Report, Volume I: 18-19).

The Truth, Justice and Reconciliation Commission process is one such mechanism whose outcome was expected to suggest measures to resolve some of the historical grievances which are seen as inhibiting democracy. According to Ong´ayo (2008), the hope of the society to address these historical grievances was exhibited in the overwhelming vote of 2002 which brought President Mwai Kibaki into power. However, Kibaki squandered this chance and Kenya continued to experience tribalism, inequity, corruption and stifling institutions. Kenya therefore still needed a mechanism that would address these grievances. Donati and Minnerath (2017) also argue that such challenges in society are derived from economic, education, cultural and political roots. The violence was indeed an expose to Kenya´s fragile democratic trajectory epitomised by grievances over land, privilege and inequality and on which ethnicity forms the praxis for mobilisation rather than vision of national unity (Cooke, 2009). This study viewed the TJRC process as a critical juncture in the history of Kenya which was expected to resolve these critical challenges before moving forward into a more stable and participatory democracy. The process was to ensure that the nation moved from the unfairness of the past to a situation that is acceptable to all. Thus, the TJRC process meant that,

> To the citizens of a new free nation, independence meant the return to lands from
> which they had been forcibly evicted and of which they had been dispossessed in

order to pave way for British settlers. It was supposed to be the beginning of political and economic emancipation; the start of respect for the rule of law, human rights and dignity and the laying down of the foundations and tenets of democracy (TJRC Report. Vol. I. 2013:ix).

The people of Kenya have spoken...The overwhelming majority of Kenyans, over 90 percent of those who submitted their views to the Task Force, want the government to establish an effective truth commission, a vehicle that will reveal the truth about past atrocities, name perpetrators, provide redress for victims, and promote national healing and reconciliation (Report of the Task Force on the Establishment of a Truth, Justice and Reconciliation Commission, 2003:9).

This is because Kenya´s history is plagued with gross human rights violations, corruption, impunity and a general legacy of executive despotism. In, *Development and Democracy in Africa*, Claude Ake (1996) indicates that the African expectations at independence, was the improvement of political, social and economic rights earlier denied by the colonial government. This was however not the case. David M. Anderson (2014), for example, writes about the Wagalla violations which happened between 1962 and 1991 in which the state orchestrated calculated violence against the Wagalla people in northern Kenya on the grounds of curbing insecurity in the region. Other examples of violations of human rights have included detention without trial, torture and displacement of people from their lands. David Musila (2009) alludes that detention without trial was used by both the Kenyatta and Moi to subdue and eliminate dissent in the country.

The colonial, Jomo Kenyatta, Daniel Moi, and Kibaki regimes, exemplified recurrent gross abuse of human rights and authoritarianism. In *Not Yet Uhuru: An Autobiography* (1967) Jaramogi Oginga Odinga writes about the seeds of estrangement planted between the elite and the people and which, according to him continued to bedevil the Kenyan nation after independence as the educated came under the illusion that they needed not be answerable to their subjects. Cox, Ndung´u and Njuguna (2017) argue that Kenya has *"a long history of big man presidentialism, patronage, clientelism,"* and the giving of handouts which render *"access to political power"* as a sure route to *"access to scarce economic resources"* (2017:95). Peter Wanyande (1987) augments this by positing successive regimes have used their power as well as the institutions they control to subdue peoples´ rights and freedoms. This is characteristic of the category of *"centralised-bureaucratic regimes*

marked by; the retention of clientelism, the centralization of power in an executive, the displacement of the party by bureaucracy answerable to the head of state and the downgrading of representative institutions" (Allen 1995:305-7), as witnessed in post-colonial Kenya. With the political elite *"remaining beholden to political myopia and moral bankruptcy, it becomes impossible to prevail upon them to imagine a larger national interest"* (Mutua 2008:3). This situation culminated in the creation of an imperial presidency as noted by Ajulu (2000) which in turn stifled and, was non-responsive to any demands from the citizenry. Cox, Ndung´u and Njuguna (2017) further argue that the above situation continues to create and present fertile ground for violence as a result of the discontent it breeds in the country (2017:95).

The above *"calls for accountability for human rights violations had been made by civil society organisations as early as 1992, after the violent land clashes that accompanied the first multiparty elections"* (Musila 2009:448). The leadership of the civil society has been crucial in calling for reforms and *"it is the only sector that could fundamentally renew the political class"* (Mutua 2008:1). Different voices within Kenya such civil society, opposition politicians and the foreign nations, have from time to time made efforts to call for reforms towards democracy. However, this authoritarian inclination, coupled with deep structural causes is the panacea of the violence that engulfed the country after the bungled elections of 2007. In its *Volume I* the Truth, Justice and Reconciliation Commission Report of May 2013 states:

> Although the post-election violence was the trigger that led to the establishment of the Commission, proposals for such a Kenyan truth commission had been on the agenda since 1990s as part of the campaign for a new constitution. The pursuit for a national transitional justice mechanism entered official circles following the election into power of the National Rainbow Coalition (NARC). In April 2003 the NARC government established the Task Force on the Establishment of a Truth, Justice and Reconciliation Commission to ascertain public interest in the establishment of a truth commission. After a period of collecting and collating the views of Kenyans from across the country, the Task Force concluded that indeed a truth commission was necessary. It recommended the establishment of such a commission not later than June 2004. However, this was never to be. Instead the report and the recommendations of the Task Force were shelved by the NARC government (2013:vi).

From the above it was therefore not surprising that *"following the announcement of the presidential results of 2007 Kenya, initially viewed as the island of peace, slowly slid to violence after there was contestation of the results. Many of the victims were targeted by their ethnicity and perceived support for rival politicians"* (CIPEV Report 2008:305). Makau Mutua in a clear reference to Kenya as an island of peace expresses thus: *"it was among a handful African states that had not experienced a coup d'état, a crippling civil war, or failure as a state"* (Mutua 2008:4). The violence greatly revealed the undergarment that is Kenya characterised by a government system that is corrupt, inept and full of impunity. So far the country is yet to account for the violence that took place while failing to address the issues around which the violence was hinged adequately. It was further proof to the existing injustices within the society which are deeply embedded in the system since independence.

In an attempt to restore normalcy in the Kenya, political leaders negotiated a political settlement. This settlement was brokered under the chairmanship of Kofi Anan, former UN Secretary-General. The settlement resulted in the signing of the National Accord and Reconciliation Agreement. The accord was unanimously passed by the National Assembly as the National Accord and Reconciliation Act (2008). The Accord recognised the crisis in the country and the need for a political solution. It further sought to address what was considered to be the underlying causes of the post-election violence. Some of the problems identified in this process included injustice and the unfair sharing of national resources and income amongst ethnic communities. This is coupled with the lack of equity across the country and along gender lines. Another problem identified in the accord is the inequities between the rural and urban areas in the country as well as the skewed advanced development of some areas in the country as compared to others.

The National Dialogue and Reconciliation Process (NDR) identified four agenda items to be discussed in the settlement. The *first* agenda included the *"immediate stop to the violence and the restoration of rights and liberties"*; the *second* agenda involved *"resolving the humanitarian crisis, promoting reconciliation, healing and the restoration of calm in the nation"*, while the *third* agenda involved *"overcoming the political crisis"* that had engulfed the country. The content of the *fourth* agenda recommended that the country need to deal with long and outstanding issues such as *"undertaking legal and institutional reform"*; *"tackling poverty, inequity as well as combating regional imbalances"*; *"tackling employment, particularly among the youth"*; *"consolidating*

national cohesion and unity"; *"undertaking land reform"*; and *"addressing transparency, accountability and impunity"* (NDR, 2008, n.d.). It indicated that Kenya had undergone a period of authoritarian rule and hence been politically unstable and undemocratic since independence in 1963. It presented an avenue for the long-wanted process of transitional justice to begin in Kenya.

To address issues around instability, Kenya instituted a range of transitional justice mechanisms to help her consolidate peace, stability and democracy. Among the mechanisms initiated was the constitutional review process which culminated in the promulgation of a new constitution on October 27, 2010. Other mechanisms included reforms in the police sector and the judiciary which are still ongoing. It is supposed that these processes of *"transitional justice represents the midwife for a democratic state in Kenya. The script for the construction of such a phase is regarded as an indispensable building block for constitution-making, peace-building, and national reconciliation in states emerging out of dictatorship"* (Task Force on the Etablishment of a TJRC, 2003:24). It is against this backdrop that the Truth, Justice and Reconciliation Commission was established with the broad mandate of inquiring into the historical injustices and human rights violations that had taken place since 1963 to 2008, the time of the post-election violence (PEV).

1.4   RESEARCH CONTEXT AND PROBLEM

This study contributes to the discussion on transitions to democracy in Africa in general and Kenya in particular where engagements with the institutionalisation of democracy project have yielded mixed results, legacies and prospects for democratisation. African transitions to democracy have produced divergent outcomes that depict either the restoration of or institutionalisation of authoritarian, democratic or mixed regimes signifying a combination of both change and continuity (Bratton & van de Walle, 1997:6). The transitions have resulted in variations of democracy that have been categorized as *pseudo, virtual, illiberal, semi and embryonic democracies"* (Kaiser & Okumu, 2004: 3), *fledgling, delegative, hybrid, democradus, façade, patrimonial*[6] (Bratton & van

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[6] Patrimonial is a general reference to systems that operate informally and with little regard for the officially sanctioned rules and regulations put in for the conduct of public officials within a state. Max Weber (1978:1031) coined the term partrimonialism to denote a system of personal rule. The rulers in this system dispense *"offices and benefits to their subordinates in return for loyalty, support and services"*. The political elite in this system use their offices (public authority) for personal benefit. The Weberian model is however considered ideal and no system matches the exact characteristics described by Weber. In his ideal partrimonial system government is based on a personal ruler, there is no separation between public and private in the operations of the public officers, public offices are regarded as the private property of their occupants who patronize the offices, patron-client networks are paramount in the operations of the public offices and public authority is used for the benefit of public officials (as cited in Ikpe, 2000:147-148). Ikpe further argues that numerous African states exhibit patrimonial tendencies and are as such either labeled so or called neo-patrimonial. Although these countries have constitutions, the patrimonial acts take sway of government operations and serious government decisions are made outside of the official political and the legal-administrative structures (as cited in Ikpe, 2000:149). Although patrimonialism seems to have a variety of traits this contribution aggregates such traits as clientelism, patronage and informalism as exhibited in the Kenyan political structure and refer to the system as patrimonial.

de Walle, 1997: 236) weak or fragile (Mcloughlin 2009: 8-10). In some cases, only minimal effort is put in transitions while in some others it can be short-lived. In some cases, their full implementation is obscured and results in new dictatorships. Different models have therefore yielded different outcomes (Rudra, 2005:704). Indeed it is only an indication that democracy is *"superimposed on authoritarian practices and a clientelist political culture"* (Bratton and van de Walle, 1997:236). This situation then leads to the above categorisations of democracies especially in Africa and the implications that democratisation has been problematic in the continent.

Before proceeding it is important to define participatory democracy as used in this study. This research recognises that a definition of democracy is problematic, contested as well as a value-laden term. In many cases, the definition of democracy has been limited to liberal democracy. In this light, the study adopted the meaning of democracy as articulated in participatory democracy. In this view, the term takes a social democratic approach that is underpinned by a specific body of rights and a distinct social and economic order that has the empowerment of the citizens through their participation at its heart. At the same time institutionalisation involves legitimising democratic principles and practices over time. This is also *"buttressed by the widespread adoption of democratic values"* (Bratton and Van de Walle, 1997:235). It is a situation where key political institutions function effectively and nurture broad-based participation which emanates from the emergence of a distinct political culture as suggested by Bratton & van de Walle. At the same time the need to resolve conflicts peacefully in society, such as the historical grievances, is accepted by the citizens and political elite alike, and they both work in tandem towards their resolution, according to van de Walle. Solidarity and commitment to resolving the historical grievances, a situation which then paves the way for the achievement of a participatory society, is therefore of crucial importance in the process of institutionalisation.

Kenya has been in a transition to democracy for decades (Brown, 2004) and the changes experienced have been the result of pressure from opposition and the donor community (Kaiser & Okumu, 2004:1-2). The democratization process has been influenced by the country´s historical context, political parties, national leadership, constitutionalism, civil society, the donor community and political legitimacy (Kaiser & Okumu, 20014:4-7), as well as reforms in security sector and judiciary and structural adjustments, all acting in synchrony. These factors continue to play critical roles in the institutionalisation of participatory democracy or the lack of it. They provide an enabling environment and also provide explanations to why and how the institutionalisation of

participatory democracy may vary from country to country. Under the single-party system in Kenya the public realm was monopolised by the ruling party. An example is the secret ballots system which was replaced by a queue voting system that undermined the rights of the citizens to participate in parliamentary and civic primary elections. The security of tenure for the judiciary, members of the Public Service Commission and the Auditor General, were also removed during this time (Nyanchoga 2004:105). This situation, therefore, called for intervention by local, national and international actors who pressured for various kinds of reforms which would then lead to the ushering in of a democratic process.

It is in this context that this study sought to interrogate the outcome of such procedures. The truth, justice and reconciliation commission process which came into being after the PEV, and find out whether this mechanism facilitated the prevalence of justice and reconciliation and subsequently impacted on the institutionalisation of participatory democracy in Kenya. In other words, how did the TJRC process help in resolving the past grievances to set the atmosphere for the institutionalisation of participatory democracy? The prevalence of justice and reconciliation means addressing the ethnicization of politics, the historical grievances such as political, social and economic marginalisation, the political assassinations and the widespread violations of human rights as presented in the TJRC report of May 2014 (TJRC Report, Volume I:vii). This is in addition to the land grievances issues which were expansively covered in the Report on the illegal/irregular allocation of public land of 2004 and also covered by the TJRC report.

Reconciling the nation would set the template around which people are free to participate in the democratic process. It is noteworthy that participatory democracy is not the direct result of the truth process, but rather democracy is inhibited by the grievances around the land, the continued marginalisation as well as other abuses of human rights. These grudges prevent people from becoming or feeling like a part of the system. They, therefore, form stumbling blocks for the institutionalisation of participatory democracy. This should then lead to a change in attitude on the part of political actors and their preferences to better reasoning in the allocation and distribution of resources with the view to address the above issues. Indeed part of the recommendations of the TJRC report called for the same. A participatory society therefore only translates to equity and egalitarianism. The institutionalisation of a participatory society is achieved through an emancipatory process that addresses the above issues such as grievances from the past by establishing institutions, structures and processes whose aim is to bring about equity. The process

should lead to profound changes in political and economic practices within society and regarding state-society relations and which are anchored on participatory values.

It is the above challenges that brought the need for the TJRC process in Kenya. This is because, in as much as the political space where the presence of a new constitution, reforms in the judiciary and the security sector, the presence of a devolved governance system are present in Kenya today, the historical grievances continue to blur the institutionalisation of participatory democracy. Moreover, hence the need for the TJRC process through which justice and reconciliation would be attained and the citizens then feel liberated and begin to participate in the civil and political spheres of society. We can only claim that participatory democracy has been institutionalised once this has happened.

Processes of transitional justice are therefore established to intervene and help societies break away from the past. In all instances, they have been the result of periods of internal unrest, civil wars or authoritarianism. The idea behind their mounting is to reveal past wrongdoings by a government and society (depending on the circumstances) with the hope of resolving past conflicts and building statehood. Attempts towards transitional justice have been employed with mixed successes particularly since the fall of the Nazi regime. The best example within Africa has been the South African Truth Commission of 1995 while others around the world include the Nuremberg Trials in Germany in 1945-46, the Argentine National Commission on the Disappearance of Persons in (CONADEP) 1983, the Chilean Truth and Reconciliation Commission of 1990, the National Unity and Reconciliation Commission in Rwanda in 1999, the Truth-Seeking Commission of Sierra Leone in 2000, Ghana's Truth Commission of 2002 and the Liberian Truth and Reconciliation Commission in 2005.

The National Truth and Reconciliation Commission´s role in Chile was to investigate the deaths and disappearances, particularly for political reasons under Augusto Pinochet's rule. A Report on this was released in 1991. Additionally, there was also, the National Commission of Political Imprisonment and Torture (Valech Report) that was tasked with investigating human rights abuses from the reign of Augusto Pinochet´s military regime between 1973 and 1990, a report which was released in 2004-2005. This report differed from the previous one because it investigated non-fatal violations of human rights such as torture, children whose parents had disappeared or had been killed. The report was used by the Chilean government to compensate victims and survivors. In South Africa, the Truth and Reconciliation Commission (TRC) investigated politically related human rights violations.

With the growing proliferation of transitional justice processes around the world, it is logical to raise questions related to their impact and efficacy in the institutionalisation of participatory democracy. Thoms et al., (2010) in their survey of transitional justice literature confirm that it is still difficult to establish the claims of either positive or negative contribution such processes make to post-conflict societies in bringing about justice, reconciliation and thereby impacting on transitions to democratic practice. The same concern is echoed by Olsen, Payne & Reiter (2010) who argue that although there has been growth in studies of transitional justice, there are still gaps in this discourse. These are related to the systematic evidence supporting the claims under which transitional justice processes are mounted and clarity on the circumstances under which the end goals of justice, peace and democracy can be achieved (see also De Greiff 2010). What kind of literature is available that is geared towards ascertaining that the outcomes of these processes are the ones stated from the onset? Have scholars and practitioners alike tested the claims, for example, that truth and reconciliation commission processes will lead to the end goal of democracy? This study takes its cue from this gap in the literature and seeks to provide this systematic causality between the democratic institutionalisation as a political outcome of truth, justice and reconciliation commission processes.

After the post-election violence in 2007, Kenya, through an act of parliament, instituted the Truth, Justice and Reconciliation Commission (TJRC) with a specific mandate of investigating, analysing and reporting on the violations of human rights, economic related crimes, illegal and irregular acquisition of public lands, marginalization of people and communities and ethnic cleansing that took place between 1963 and 2008 (GOK, 2008). With no prosecutorial powers, the body was expected to make recommendations for prosecutions, reparations, institutional reforms and provision of amnesty in exchange for truth for perpetrators (GOK, 2008). Addressing these historical grievances through the achievement of justice and reconciliation should have impacted the institutionalisation of participatory democracy. The expectation of the society was a no return to the circumstances around which it became possible for the elite, for example, to commit the injustices. This can therefore only be achieved once a participatory society which has embedded in it the structures, processes and values that are based on the conception of participatory democracy. A study of the TJRC process concerning establishment, mandate, operations and implementation calls for an academic investigation particularly on whether it has facilitated justice and the implications of this to the institutionalisation of participatory democracy. As already argued the

absence of a participatory society gives room for further perpetration of injustices by the political elite. This happens because parts of the society do not value justice and reconciliation. This is well argued by Gibson (2004) who indicates that *"justice is not an end in itself; instead, reconciliation is valuable because it contributes to the likelihood that will then consolidate democratic transition"* (Gibson 2004:6). A transition to democracy guarantees virtues such as the respect for human rights and the rule of law. Once the citizens and the political elite alike have valued the need for justice and reconciliation, they are then able to work together towards their realisation within the society. It is this realisation that ushers in the sense of belonging and commitment on the part of both towards building the nation. This process thus creates a participatory society in which democratic values and practices are embedded and embraced by all in a free and interdependent atmosphere.

The main question of this study was, therefore: did the process of the TJRC facilitate justice and thereby mediate the institutionalisation of participatory democracy in Kenya? What impact did truth commissions have on the institutionalisation of participatory democracy in Kenya? Questions have been raised on the outcome of this process and the fact that there are elite contestations on the outcome of the report. Davis M. Malombe (2012) indicates that *"all along the political elite in Kenya have been averse to the truth and justice agendas due to their possible complicity in the violations or crimes being targeted"* (2012: 106). Did the ruling elite have faith in the processes to deliver the long-awaited justice, reconciliation, and peaceful coexistence, or even understand its implications to democratic institutionalisation? Did the idea resonate with any other local processes native to the people?

The thesis contributes to the body of literature that seeks to evaluate the impact of transitional justice processes on justice, reconciliation and subsequently the institutionalisation of democracy. It also aims to bolster efforts of transitional justice researchers by providing an additional approach -- historical institutionalism -- in studying transitional justice. Buckley-Zistel, Beck, Braun and Mieth (2014) in their introductory remarks argue that the field is characterised by a relative lack of theoretical frameworks. Hayner (2011) on the other hand has advocated for research involving deeper case studies over extended periods of time as well as broader studies across more countries. This study sought to fill these gaps by delving deeply into the TJRC process in Kenya and unearthing the dynamics relating to the process and the impact on the institutionalisation of participatory democracy.

1.5 PATH DEPENDENCE, CRITICAL JUNCTURES, INSTITUTIONS AND DEMOCRATIC INSTITUTIONALISATION.

Taking a political economy approach this thesis aids in understanding the drivers of political behaviour and how they shape policies and political outcomes, the actors involved and the implications this has to the institutionalisation of participatory democracy. In so doing the study sought to understand the dynamics of transitional justice within the wider framework of political change and development. Part of the change involves the opening up of political space and thereby institutionalising participatory democracy thus demarcating a shift from the "dark past". It does this through the prism of New Institutionalism theory, particularly historical institutionalism. It also employs political systems theory to evaluate decision-making within the political system.

Barahona de Brito, Gonzalez-Enriquez & Aguilar, in *The Politics of Memory: Transitional Justice in Democratizing Societies* (2001) conclusively asserts that:

> the key obstacle to theorizing about this topic is the enormous influence of the particular historical evolution of each country, and various factors emerging therefrom, on policies of truth and justice in transition…..what a new democracy does or does not do about past repression depends not only on factors linked with the recent past; the solutions adopted are also largely conditioned by the experience and memories of past events and developments (2001:303).

They, however, seem to have taken a variety of cases which are in themselves distinct and therefore difficult to catalogue and characterise. This study recognised the need to selectively make the Kenyan case and conduct a comprehensive study taking into account its unique historical antecedents as well as the crisis emerging out of this and the critical juncture that it led to. Studying the critical junctures assisted the research in establishing whether or not the TJRC mediated the institutionalisation of participatory democracy in Kenya and if so, the conditions that led to this. By studying critical junctures, the inquiry looked at the actor choices as well as the structural transformations and the effects they had on the institutionalisation of participatory democracy in Kenya.

The key concepts in this study were *path dependence, critical junctures*, *institutions*, and *democratic institutionalisation*. From the outset, it is important to show the intricate connectedness and relationships among the concepts while justifying their relevance for the study. Ideas about path dependence as applied to the discourse on democratic institutionalisation were explored. The core of this inquiry was to explain the outcomes of processes and the reasons behind the outcomes regarding the institutions, actors and actor choices and the environments prevailing in making the choices. What are the path-dependent explanations of democratic institutionalisation given the TJRC? According to James Mahoney (2001) path dependence occurs when *"choices of key players at critical junctures lead to the formation of institutions that have self-reproducing properties"* (2001:111).

The inquiry also sought to identify actors, the decisions they make around crucial moments and the impact of those decisions on the future of participatory democracy. In studying the actors and the decisions, they make the study also sought to identify the constraints within which such decisions are made during the crucial moments (critical junctures). It attempted to implicate the importance of choices made by the political elite at critical junctures – especially the implications on state-society relations to understand the trajectories that ramify from these actions. The institutions, therefore *"lock-in"* whole societies into frames which they may find themselves in for prolonged durations in history.

At the same time, the constraints on which these decisions are made in Africa vary from the west as indicated by Stephen Brown (2004) who asserts that African states practice neo-patrimonial forms of governance that coexist with a formally democratic system. *"Neo-patrimonialism assumes the presence of personal rule, in which the authority of the leader, who is beyond question, is personally in control of running the affairs of the state"* (Hyden 2006:96). *"In Africa political institutions have evolved within patrimonial rather than corporatist regimes"* (Bratton & van de Walle 1994:457). Executive authority is maintained through personal patronage as opposed to ideology or law (Bratton & van de Walle 1994: 458). Goran Hyden (2006) further describes the formal institutions in Africa as embryonic and weak and often undermined by informal institutions. In Africa, *"abstract constitutions and formal institutions exist on paper, but they do not shape the conduct of individual actors, especially those in power. African leaders treat constitutions and formal rules seriously only when it suits them"* (Hyden 2006:98). This greatly affects the

institutionalisation of official standards and ultimately behaviour of actors within these environments. This is crucial in determining whether democracy is working and vice versa. Analysing politics in the formal/informal contexts in Africa aids our understanding of how decision-making works in Africa and particularly Kenya.

The literature on transitional justice relating to Africa and particularly on truth commissions has grown with time. Mostly, they tend to focus on the structure and mandate of truth commissions. However investigations on how, why and when institutions, both formal and informal, as well as why actors make certain choices critical in shaping the outcomes of truth commissions. In particular about the institutionalisation of participatory democracy are scarce. Anna MacDonald conducted a study on the distribution of literature by region. In her findings in *Local Understandings and Experiences of Transitional Justice: a review of the evidence* (2013) she confirmed that Kenya is one of the countries under-researched while the literature on other nations such as Chad where transitional justice has been widely debated is unrepresented. This study sought to patch this gap by providing a basis for which other studies can be adjudged.

1.6   RESEARCH QUESTION

This study aimed at responding to the question: *did the TJRC process facilitate transitional justice and what are its implications for the institutionalisation of participatory democracy in Kenya*? In doing this, the inquiry sought to answer four sub-questions.

1. Why did Kenya establish the TJRC?

2. Did the TJR process contribute to justice?

3. Did the TJR process contribute to reconciliation?

4. Did the TJR process contribute to the institutionalisation of participatory democracy in Kenya?

1.7   JUSTIFICATION

The available literature on transitional justice has not illuminated the extent to which the attainment of justice mediates the institutionalisation of participatory democracy. Thoms et al., (2010); Olsen, Payne & Reiter (2010); De Greiff 2010 and Hayner 2011 all agree on the need to establish the claims that transitional justice leads to democratisation in a systematised way. In the Kenyan case,

there are also elite contestations evident in the dynamics that continue to unfold. This is because while the TJRC and other mechanisms of transitional justice such as institutional reforms have been established, there still seems to be a lack of commitment to them particularly when it comes to implementation. Is this reality or a façade? This study sought to fill this gap and particularly establish when and how it might do so. A comprehensive and analytical study of the process of the TJRC was, therefore, necessary and informed the core of this study. This study contributes to a deep institutional understanding of the circumstances surrounding truth commissions and particularly the actors and actor-decisions and the dynamics surrounding these critical moments. It will also systematically reveal the factors encouraging or hindering the implementation of the recommendations of the TJRC report. The qualitative data emanating from the field-work generated a stronger, more grounded conceptual framework for understanding the phenomenon of TRCs. The findings inform policymakers in countries that are in transition in their anticipation and institution of transitional justice processes. This research offers valuable lessons for future engagement with TRCs about the supreme attainment of their objectives. This is against the background that Truth Commissions, though associated with bringing about change from the past are not a sure mechanism to bring about this change (OHCHR 2006).

1.8   OUTLINE OF THESIS CHAPTERS

Chapter One presented the research context: the historical background of transitional justice and in particular the establishment of a truth commission in Kenya. It further problematized the research topic by demonstrating that there is a puzzle in the relationship between truth commissions and democratic institutionalisation. This rationalises the need for the study. It has also specified the general objective as well as the specific objectives of the research and curved out the research questions that guided this exploration. It finally presents the remaining chapters in this research. This is done with the aim of providing the logical sequence of the inquiry.

Chapter Two presents theoretical perspectives and contemporary scholarly works on transitional justice. Since the field is under-theorised the chapter seeks to bring out the different conceptualisations of transitional justice existent and assert the need for theorising in the field. It looks at liberal conceptions, legal conceptions, globalization/international conceptions, institutional conceptions, socio-cultural conceptions, historical conceptions and normative/ethical conceptions. It then proceeds to discuss the discourse on transitional justice in Africa and still look at the

approaches and attempts at theorising in the field. This is followed by a discourse on Kenya, which is the mainstay of this study before it finally looks at transitional justice and democratisation. This is done to identify the different research gaps as well as justify the need for this study.

Chapter Three presents and discusses the conceptual framework used in this study. The theoretical review of institutions focused on three institutionalisms: rational choice, sociological institutionalism and historical institutionalism (as explained by Peter Hall, 1996). It also presents the standpoints of historical institutionalism bringing into focus institutions, actors, path dependence and critical junctures. This provides the study with a conceptual model for discussing the subject. The chapter further discusses the path-dependent analytical model as framed by Barringtone Moore (1966); Collier and Collier (1991); Gregory M. Luebert (1991) and James Mahoney (2001) and its core arguments and the basis upon which the thesis proposes to adopt it. Further, the limitations of historical institutionalism and this model are examined in light of proposing additional complimentary concepts. The chapter further presents the conceptual framework for reconciliation as envisaged by John Paul Lederach (1997). This presents the contribution with the possibility of situating and discussing the concepts of justice and reconciliation which are central to realising the goal of the inquiry. It then discusses the relevance/application of historical institutionalism and the concepts therein, as well as the other concepts within the framework. A distinction of formal and informal institutions and their relevance to studying decision-making in Africa is also visited. This then leads the research to its hypothesis.

Chapter Four presents the research design and methodology on which this study is anchored. It seeks to describe the exploration site in detail as well as strive to justify the methodology in general as well as argue for the population and sample size, methods used in data collection, analysis and interpretation regarding the subject of study and appropriateness of methods. It also presents the ethical issues that the researcher encountered and how they were addressed during the research. In summary, it presents a research protocol with the following items: aims and objectives, background, methods, ethical issues, resources, timescale and dissemination and output. It also puts into perspective the processes of verification and validation of the research findings. In summary, this presents the steps that the inquiry follows.

Chapter Five utilises the historical institutionalist approach to trace the antecedents leading to the establishment of the Truth, Justice and Reconciliation Process in Kenya. It further identifies the distinctive features of the historical institutionalism approach of the relationship between

institutions and individual behaviour, the asymmetries of power associated institutional development, path dependence and critical junctures and the role of ideas in political outcomes. The chapter seeks to answer the first research question: *Why did Kenya establish the Truth, Justice and Reconciliation Commission?* The chapter contextualises government and politics in Kenya and put into a historical context. According to Historical Institutionalism, an understanding of transitional justice in Kenya is incomplete without putting it in the perspective of her political history. The chapter traces past injustices in Kenya in pre-colonial Kenya; 1865 – 1963, Jomo Kenyatta´s era; 1963 - 1978, Daniel Moi´s era; 1978 - 2002 and Mwai Kibaki´s; 2002 – 2008 regimes. It seeks to bring out the personalised rule under these regimes and the political manoeuvres such as the constitutional amendments and the high levels of corruption as well as ethnicization of politics that led to the culture of impunity in the country. The chapter then examines the democratisation process in Kenya as well as the antecedent challenges that have faced it. Cumulatively the nexus of this history subsequently led to the violence after the contested elections of 2007. The chapter then proceeds to examine the TJRC and its establishment process, its structures and implementation as well as briefly highlight the findings of the report presented in May of 2013. It is meant to reinforce the theoretical and empirical relevance of the study.

Chapter Six presents the research findings and seeks to answer the second research question: *Did the Truth, Justice and Reconciliation process contribute to justice?* The chapter utilized both primary data from the interviews and focused group discussions, as well as secondary data from various reports by civil society organizations and other literature such as newspaper articles and Journal articles, the chapter explores the concept of justice as understood by different actors and presents the perceptions from the interview participants on whether justice was delivered and why. This is then followed by a discussion on the concept of justice and understood by various scholars and the implications of this on truth commission processes.

Chapter Seven seeks to answer the third research question: *Did the Truth, Justice and Reconciliation process contribute to reconciliation?* The chapter used both primary data from the interviews and focused group discussions, as well as secondary data from various reports by civil society organisations and other literature such as newspaper articles and Journal articles. The perceptions of participants in the interviews and focused group discussions are relayed. This is then followed by a debate on the concept of reconciliation as it has unfolded in the Kenyan process.

Chapter Eight analyses the outcome the TJR process in Kenya. The chapter answers the fourth research question of this study: ***Did the TJR process contribute to the institutionalisation of participatory democracy in Kenya?*** The analysis relied on interviews and focused group discussions conducted during the research period as well as documents such as journal articles, reports from various organisations, newspaper articles as well as policy documents which discuss, analyse and present the prevailing situation in Kenya, particularly after the presentation of the report. To do this, the chapter utilises the participatory democratic theory as postulated by Carole Pateman in 1970 and 2012.

Chapter Nine summarises the findings of the study. The chapter seeks to demonstrate the contributions of the inquiry. The chapter also outlines the contributions that the research has made empirically, conceptually, analytically and methodologically. The contributions made to the social science discipline are also discussed in the chapter.

CHAPTER 2. LITERATURE REVIEW

2.1 CHAPTER PREVIEW, AIM AND SCOPE

This chapter seeks to illuminate different theoretical and conceptual perspectives of transitional justice as applied by scholars from various disciplines. The concept emerged in the period of the 1990s. The chapter begins by attempting to define the concept and thus provide a basis for further understanding and theorisation. It then proceeds to explain the different mechanisms employed in transitional moments. The chapter tackles the different theoretical/conceptual standpoints adopted by various scholars in debating the concept as exhibited by various literature. Perspectives of transitional justice as employed in Africa and within the Kenyan context are also tackled in the same light. Finally, the chapter examines the literature on transitional justice and democratisation and concludes by identifying the gaps and possibilities for further research in this field.

The study sought to add to the conceptual approaches to the subject and contribute to the body of literature proposing different approaches. The contribution is therefore in congruence with David Mendeloff´s assertion that "*there is need to design studies that can systematically test the truth-telling claims and their assumptions*" (2004:376). This is against the background of assumptions that indicate that truth commissions do play a role in conflict prevention and thereby contribute to democratisation. In their 2014 publication, Buckley-Zistel et al., echo the same arguments by indicating that the range of activities and vibrant academic debate are some of the signals that the field is growing. They, however, fault the dearth of theorisation. They argue that the field is characterised by a relative scarcity of theoretical frameworks. In the Second Edition of, *Unspeakable Truths: Transitional Justice and the Challenge of Truth Commissions*, published in 2011, Priscilla Hayner reiterates the need for more research that involve closer case studies with deeper analysis and with broader research sites revealing complex nuances of the phenomenon as needed. This study also took a cue from this call and sought to broaden the research by doing data collection in five counties in Kenya to arrive at conclusions that represent the spatial representativeness of the country under study. The following section identifies the different conceptual approaches applied in the discourse on transitional justice and transitions, in general, to arrive at the theoretical framework which is discussed and applied in chapter 3.

2.2   TRANSITIONAL JUSTICE: UNPACKING THE CONCEPT

Transitions can be traced back in history to the very existence of humans within society. Events such as the French Revolution of 1789 to 1799 were characterised by the decline of great epochs and a rise in people power. They signify an increase in democratic practice and a high sense of participation and representation. Historically, therefore, states have had to grapple with issues of governance and have constantly been embroiled in moments of transition in the search for a stable future.

Democracy spread in three waves during the twentieth century and exhibited similar features across the globe (Avritzer, 2002:11). Events such as World War I and II and the ramifications that these two wars had on the world society did necessitate this change. The third one, and which sets into motion discussions around the concept of transitional justice occurred in the 1980s. The phase is related to the changes in *"Latin America and Eastern Europe"* as contemplated by Huntington in his book, *The Third Wave, Democratization in the Late Twentieth Century*, published in 1993 (see also O`Donnell & Schmitter 1986:28-36; Stepan 1989:vii-xvii; Herz 1979 & 1982). However, transition theory did not take into account issues related to coping with the past as possible prerequisites for the institutionalisation of democracy and the improvement of civic virtues (Arenhovel 2008:571). This trajectory is what informs the basis for this study.

Transitions, in the context of this study, have to do with the quest and manner in which states deal with their dark past and usher in a new era that is committed to principles of justice, equality and the rule of law. Various literature in the different fields of social science shows that from history societies have undergone some repression, domination and suffered different kinds of atrocities in the hands of the ruling elite. Such societies have tendencies to want to liberate themselves from the yoke of oppression and in so doing may adopt different methods ranging from drastic and violent measures to mediated and negotiated ones. Transitional justice, therefore, can be closely associated with periods of political change within states, usually associated with a movement from war to peace or dictatorship to liberal and social democracy or otherwise.

The concept of transitional justice emerged *"as a consequence of new practical conditions that human rights activists faced in countries such as Argentina, where authoritarian regimes"* were replaced by more democratic ones (Arthur 2009:321). Incoming regimes have always had to deal with issues on how to respond to demands from the citizenry emanating from charges of gross

violations during the authoritarian rule. Dealing conclusively with the perpetrators of injustices is one way to distinguish clear break between the old and the regime. This kind of tension runs through each of the building blocks of transitional justice (Kritz: xxi). In the Kenyan context, transitional justice is associated with dealing with the historical grievances caused by acts such as the historical marginalisation of particular regions and sectors of the population as well as the grand corruption and nepotism which have led to the high levels of poverty and illiteracy amongst these areas and sectors.

Transitional justice engages with the legal, moral as well as political dilemmas that states seeking to redress the past find themselves in. These derive from the objectives that they seek to achieve which range from making individuals and institutions accountable, deterring future violations, addressing the victims´ losses, establishing a historical record, reconciling people and the society, and creating institutions that guarantee the future sustainability of the society and state in general. In a nutshell, they seek justice for the past wrongs as well as the reordering of political structures to ensure a non-return to the past.

Transitional justice embraces an emancipatory framework where states move from one extreme – autocracy – to another – liberal democracy. Shaw and Waldorf, in their book, *Localizing Transitional Justice*, 2010, suggest that transitional justice "*embodies a liberal vision of history as progress, a redemptive model in which the harms of the past may be repaired in order to produce a future characterized by the non-recurrence of violence, the rule of law, and a culture of human rights*" (Shaw & Waldorf 2010: 3). Ruti Teitel compliments this view and asserts that in political theory the dominant account of how transition occurs comprises a sequence in which political change comes first, and that law is a mere product of political change (2003:3). In other words, once a society addresses the structural and systemic issues that bring about discontent within it then this leads to the rule of law and accountability. In turn, peace and stability become feasible.

The concept can be defined "*as the process of redressing past wrongs committed in states shifting from a violent, authoritarian past toward a more liberal, democratic future – though more recently the term has been defined more broadly and extended to encompass a larger set of outcomes, such as advancing development and social justice*" (Mani 2008) which is at the center of this study. This reflects a burgeoning field that has grown most rapidly since its first coining around 1991 at the time of the Soviet collapse and in the heels of the transition to democracy in late 1980´s Latin America (Teitel 2008:1). Kimberly Theidon while referring to its phenomenal growth has labelled it

as the transitional justice industry (2009:1-2) given the phenomenal growth in the number of scholars focusing on the subject. This is also symptomatic in the varied attempts at defining it based on the worldviews of academics and practitioners alike. In this sense, therefore, different authorities and scholars have defined transitional justice variously. Teitel, for example, defines transitional justice from a legal outlook. According to her this form of justice is connected with times of political change. During these times legal responses come into play in an effort to confront the past wrongs of repressive predecessor regimes (2003:69). She, therefore, takes a purely legalistic stance in defining the concept.

The United Nations Security Council asserts that "*transitional justice comprises the full range of processes and mechanisms associated with a society´s attempts to come to terms with a legacy of large-scale past abuses, in order to ensure accountability, serve justice and achieve reconciliation*". The processes and mechanisms "*may include judicial and non-judicial mechanisms, with differing levels of international involvement (or none at all) and individual prosecutions, reparations, truth-seeking, institutional reform, vetting and dismissals, or a combination*" of two or one of them (2004:4). This definition, on the other hand, takes the governance purview.

The International Center for Transitional Justice (ICTJ), posits transitional justice responds to methodical or extensive human rights violations of the past. In this process recognition for the victims is sought and possibilities for peace, reconciliation and democracy are encouraged. In this way it is not a special kind of justice, rather such processes seek to adapt transformational processes in society after periods of persistent abuses of human rights. Such processes in their view are either sudden or may come through over decades (ICTJ, 2008).

Tim Murithi on the other hand suggests that the concept refers to *"frameworks of the rule of law that enable a political transition to take place within war-affected or authoritarian communities"* (2009:140), while Roth-Arriaza defines refers to a *"set of practices, mechanisms and concerns that arise following a period of conflict, civil strife or repression, and that are aimed directly at confronting and dealing with past violations of human rights and humanitarian law"* (2006:2).

An attempt at defining transitional justice therefore plunges one into this contestation of meaning, variety, scope and appropriateness. However, from the various attempts made by various scholars and authorities, this study argues that transitional justice involves the legal and non-legal mechanisms that states employ in the process of trying to deal with a unjust past. The field further

claims that transitional justice entails a range of mechanisms which vary from *"criminal prosecutions, truth commissions, reparation programs, gender justice, security system"* reforms and *"memorialization efforts"*. In fact, the conflict-ridden literature agree that "*a transition will encompass a **justice** process, to bring perpetrators of mass atrocities to justice and to punish them for the crimes committed; a **reparation** process, to redress victims of atrocities for the harm suffered: a **truth** process, to fully investigate atrocities so that society discovers what happened during the repression/conflict, who committed the atrocities, and where the remains of the victims lie; and an **institutional reform** process, to ensure that such atrocities do not happen again*" (OHCHR, 2009). This definition captures a wider conception of transitional justice. It is this definition that this research adapts and uses in its analytical core. The conceptual framework (discussed later) emerging also seeks to take this all-encompassing approach in defining the trajectories that this study attempted to explore.

2.3 THEORETICAL AND CONCEPTUAL PERSPECTIVES ON TRANSITIONAL JUSTICE

From the review of the various literature, it is evident that the theoretical and conceptual framing of the subject available within the extant literature is varied. The topic has been approached from a variety of the fields in an issue such as political science, political economy, law, psychology, anthropology as well as sociology, amongst others. The levels of analysis reflect a growing field which, in essence, is informed extensively by practice. The tendency to institute transitional justice processes across the globe as well as scholarship on the subject is also growing. This signifies the vastness and diversity of literature available. This diversity can be seen in the form of theoretical-conceptual frameworks, methodological and empirical underpinnings, and levels of analysis, thematic categorisations as well as the disciplinary approaches evident in the literature. This study sought to review extant literature dealing with the legal, globalisation, institutional, socio-cultural, historical and normative conceptions evident in literature to prompt a justification for the conceptual model adopted in the inquiry. Priscilla Hayner commends the interdisciplinary attention as a great asset because it brings on board this kind of variety (2011:237). By bringing together different conceptualisations to arrive at a conceptual model as used in this study, the study sought to fulfil the need for variety to reaching a comprehensive exploratory approach to the subject. In the following sections, the research sets out to explore the extant literature by reviewing the approaches taken and creating a justification for the conceptual model adopted in this study.

Legal approaches to transitional justice address the role of law in dealing with the past. They follow an international law paradigm and seek to define how justice should work in transitional moments. Scholars such as Ruti Teitel assert that law plays an important part in bringing about political change. In other words, the legal frameworks adopted during transitions provide for the purging of societies from the past. She seeks to explain how transitions happen through the legal actions taken by different states for societies to transit to more liberal outcomes.

Teitel looks primarily at the nature and function of law in transformative periods. As such therefore the resultant in the deliberations on history, the present and future, which often result into trials, lustrations et cetera, culminate into the legal processes that ensure during transitions. Teitel poses the questions: "*How should societies deal with their evil pasts? How is the social understanding behind the new regime committed to the rule of law created? Which legal acts have transformative significance? What is law´s potential for ushering in liberalisation*" (2000:3)? Further, she points out that "*transitional justice is an imperfect and partial conception of justice, which does not easily conform to the `ideal rule of law*" (Teitel 2000: 76; 2008: 2).

According to Teitel, this feature constitutes the characteristic of transitional justice which is typically shaped by the circumstances and the parameters of the political conditions in question. Teitel is here referring to arguments about whether there is an ideal norm or whether each society should chart its path in dealing with the past. In other words, she questions the universality of justice leading to the question: of whose justice is being sought.

In the same vein, Jonathan Sisson asserts that the *"process of Dealing with the Past (DwP) is a necessary precondition for the establishment of the rule of law and the pursuit of reconciliation"*. He strengthens his position by lauding the steps taken by the United Nations (UN) in making significant steps towards providing international standards with which to deal with the past which embrace inclusivity and seek to be comprehensive in the sense that they engage all relevant actors both state and non-state in crafting a nationally owned "*strategic plan*" (2010:11). The UN Report of the Secretary-General on *Rule of Law and Transitional Justice in Conflict and Post-Conflict Societies* recognises the role of transitional justice processes in ensuring stability in post-conflict societies and echoes the need for establishing national comprehensive and inclusive processes (2011:6-8). In essence, the legitimacy and sustainability of such processes can only be anchored on how inclusive they are.

Jonathan Sisson uses this evolving rules and principles to articulate a conceptual framework for transitional justice (2010:12). Citing the Swisspeace Project of 2006, Sisson refers to four principles; *"the right to know, the right to justice, the right to reparation and the guarantee of non-recurrence"*. This position also points out that there is a transformative dimension in the concept of DwP in order to ameliorate the political and social dimensions of democratising post-conflict societies (2010: 13). Democratisation is long-term. Efforts to democratise seek to end impunity and strengthen rule of law. Ultimate fostering the transformation of conflict and the delivery of justice and reconciliation in societies emerging from a dark past is the intended goal (Sisson 2010:12).

2.3.2 UNIVERSAL CONCEPTION

The continued interactions of both states and non-state actors across varied fields and on a variety of issues are closely associated with the concept of a global village. The experience is that these interactions are increasing and human beings can no longer lay claim to the "local" which in essence does not exist. What is local also has an international dimension and vice versa. Globalization, therefore, encapsulates the widened responsibility of actors across the international system for the actions and outcomes of statehood. The same applies to transitions.

Rosalind Shaw, in her Special Report on Sierra Leone titled *Rethinking Truth Commissions: Lessons from Sierra Leone*, produced in 2005 for the United States Institute of Peace indicates that fundamentally, the concept of truth-telling, healing and reconciliation are about dealing with memory and deeply rooted in North American and European practices of dealing with the past (2005:7). She concludes that truth-telling is either western or designed for western-influenced audiences as models of redemption and providing for closure. This is the conviction shared by Weinstein, Fletcher, Vinc and Pham that *"the past must be addressed internationally, lest stability be purchased on the cheap, grievances left festering, and violence simmering just below the surface"* (2010:33). This notion, therefore, lends credence to the growing assumed international responsibility that states have to ensure that various forms of transitions take place in the interest of the global citizen.

It is in the same vein that the international donor community has played and continues to play an ever-increasing role in the transition of states from conflict to peace. This has taken different shapes and has also been peculiar depending on the state and the intervention in question. Alina Rocha Menochal (2011), while concentrating on the experiences in Guatemala since the 1990s analyses

two leading approaches namely peacebuilding and state building. She undertakes to analyse the debate between state-building and the consolidation of peace efforts and looks at the similarities, opportunities and challenges. According to her "*the international community faces the dual task of promoting peace while helping to build more effective, inclusive and responsive states and this has led to the growing realisation among donors that their peace-building and state-building interventions ought to be brought closer together*" (2011:1716). This resonance is of fundamental importance to the realisation of peace and stability within and amongst states in the international system.

While analysing the dynamics of peace-building and state-building and concentrating on the role of the donor community, she argues for increased support and accompaniment of such processes. She highlights insights from her analysis which call for improved international policy coordination amongst the donor community. She suggests both a top-down as well as a bottom-up approach working with both state actors as well as civil society. This flexibility suggests inclusive approaches that take into account all the players and levels of involvement in the peace-building and state-building project.

The UN participation in transitional justice processes has also been ubiquitous. UN interventions have come at times when local initiatives alone could not bear fruit or are compromised due to the intensity and complexities of the conflicts. Buergenthal explains for example that the El-Salvadorian example is one where the population was deeply polarised by the armed conflict and by life in a climate of distrust and suspicion (1995:323). In this case it was only viable that an external intervention was made for success to be registered. Douglas W. Cassel Jr. contemplating on the success of the El-Salvadorian truth commission commends it for already achieving partial justice (1995:326) and relates this to the high international support regarding finances, diplomatic support and ultimate international credibility for the potentially controversial findings (Cassel Jr. 1995:332). The international support, according to him, enabled the commission to carry on its work to a conclusion. The unfolding disastrous scenario in El-Salvador (where despite the intervention is still suffering from deep divisions) remains an issue of further research for scholars investigating the outcome of international intervention.

The United Nations acknowledges the role of external actors in supporting truth-telling processes while at the same time cautioning the involvement strategies adopted to ensure they do not add to the complexities of the conflict (UN Doc S/2004/616 para.50; Vincencio-Villa: 66). The Sierra

Leonean experience raises the issue on the nature of collaboration between international NGOs and local actors during transitional justice processes. As a result, they tend to eclipse the voices and visibility of local groups. When this occurs, it becomes problematic to galvanise local ownership of the process and its outcomes (Ekiyor 2009:162; Hirsch 2009:202). This then complicates transition processes and tends to prolong them and make them protracted.

Specifically, Hirsch argues that the histories of different countries are context-specific and need the interpretation and intervention, first, from the locals. He thus concludes that it is evident that there does not exist a "*one-size-fits-all*" template for post-conflict justice in Africa. It is, therefore, an important variable whether post-conflict justice decisions are internally decided, or whether they are internationally driven (2009:216). The over-reliance on western models precludes the local-internal dynamics that are otherwise necessary for a more comprehensive conceptualisation of the conflict in question and therefore will have implications on the success of interventions.

On another note, Priscilla B. Hayner provides certain minimum guidelines as recommendations for establishing a truth commission. This is in against the burgeoning number of truth commissions around the globe thereby requiring the setting forth of international guidelines for their establishment and action. Her propositions come alongside those contained in guidelines published in 1996 by the United Nations Sub-commission for Prevention of Discrimination and Protection and Promotion of Human Rights through Action to Combat Impunity. The set of principles therein *"outlines a right to the truth, recommends a universal standard for the protection and accessibility of documentary evidence, and calls for extrajudicial commissions of inquiry to be set up to establish the facts"* (1996:174). She also proposes adherence to implementation and the role of the international community as among the crucial considerations that need to be made when taking the path of truth commissions (Hayner 1996:178-180).

In discussing the role of truth commissions Hayner, seeks to establish the role played by international actors in past conflicts and abuses. She lauds the Commission in Chad as being the first of such to confront this issue. "*Its report in1992 named the exact amount of external financial backing provided to the regime, as well as the extent of training for the intelligence service responsible for the worst abuses*" (Hayner 2011:78). International norms and their proponents are dynamic, not static. In this emerging structure of international justice (Arriaza 2001: 63), which is characterized by the increased interventions by external actors, the matter is *"not just in putting human rights abuses on the table at the time of transition, but, as importantly, in keeping them there*

as the democratic process moves from transitional to normal politics", according to Melissa Nobles (2010: 174).

2.3.3   INSTITUTIONAL CONCEPTION

Institutions, their design and the processes therein have implications on the outcomes of transitional justice processes. Reflecting on the institutional implications within the state Acuna H. Carlos (2006) conducted a comparative study of Argentina and Chile and addressed the dilemma of the political elite from former regimes flexibility in accepting the verdict of transitional justice measures. He looks at the dialectical nature of internal and external institutions and the frictions that may emerge when for example an external judicial ruling contradict the internal political system and structures (2006:237-8). Each democratic transition has its own dilemmas occasioned by internal institutional constraints. Such predicaments include punishment and the demonstration that all are equal before the law. Constitutional rulers may not be able to punish past crimes when the perpetrators still hold political power (2006:206). Acuna explains the political dynamics that result from the choices that each state makes in the process of implementing transitional justice measures and points out to the impending institutional constraints that accompany the making of such decisions. In summary, the complexities surrounding institutions and the processes of decision-making also determine the success of transitional justice measures taken by different states. Sometimes the various institutions within the state end up in a competition similar to the dynamics that the presidency and the judiciary became engulfed in the Argentine case.

Attafuah agrees with this conception as he interrogates Ghana´s National Reconciliation Commission (NRC) through the institutional prism. He reviews the purpose and mandate of the NRC, the role of civil society and the politicisation of the process (2009:188). He adduced that "*truth commissions can also serve the purpose of democratic stabilization and consolidation, healing the body politic and invigorating and renewing broad consensus in societies on the virtues of national unity*" (2009: 200). The impact of transitional justice processes here will rely so much on the institutions and the dynamics that characterise the same institutions. Such dynamics emanate from the systems and structures of those institutions as well as the interactions of the different parts of those institutions about how they work together and complement one another.

Hayner, on the other hand, concentrates on the role of truth commissions and the contributions that they make to the lives of individuals and that of the state. She asserts that "*in Argentina, Chile and*

Morocco, largely on the basis of the findings of these countries´ truth commissions, the state has paid significant reparations to thousands of victims or families of those killed or disappeared" (2011:5). Hayner further posits that "*judicial reforms in El Salvador, as well as recognition of the egregious past in South Africa, have been made*" (2011:5). In doing this Hayner hopes to provide lessons for future commissions not to make the mistakes made by past commissions – she does this in a bid to suggest more robust frameworks for the workings of such commissions.

She does this while cautioning on the importance of the political context (both national and international) and the differing circumstances prevailing at the time. Hayner also addresses some critical questions: what are the objective(s) of a state in responding to past abuses, what are the larger aims of the state, what mechanisms or policies will a state seek to reach these objectives (2011:8). At the same time, Yasmine Sooka also affirms this when she indicates that positive peace, as an end to the pursuit of transitional justice, should be the ultimate goal and she equates this to democracy (2009:24). This raises the question as to whether the state, in commissioning transitional justice mechanisms, has the same intentions as the victims or other actors involved in the process. This affirms the extent of influence that the state, therefore, has on processes of transitional justice.

Once all these questions are answered then the formation, structure and effectiveness, and efficacy of truth commissions become clear in the mind of the state and the citizenry. In this way, practical issues to do with the mandate, methodology and operations, scope and methods of accessing the truths can be addressed to making them strong, efficient and with considerable impact. A key concern here would perhaps be the results of such processes, and the outcomes that they yield in as far as building future generations on strong foundations are concerned. In adopting the conceptual framework and the methodological stance (which has historical institutionalism as the overall meta-theory and critical theory in the overall philosophical approach – as discussed later) in this study issues surrounding formation, structure, effectiveness, efficacy and so on are brought to light and tackled.

2.3.4 SOCIO-CULTURAL CONCEPTION

Rosalind Shaw conducted an ethnographic study on the truth commission in Sierra Leone in the year 2005. She places cultural considerations at the heart of the success of transitional justice processes. She, for example, concludes that from the cultural point of view the Sierra Leoneans preferred to "*forgive and forget*" as opposed to opening up of wounds that had already covered. The

ethnographic approach, as opposed to the quantitative methods, is more appropriate for populations emerging from mass violence which, for historical reasons, may not to trust any exercise resembling official information gathering (2005:5-6). The ethnographic approach can reveal the hidden nuances and perceptions that, victims, for example, harbour about such processes. In this way, the differences, similarities and so on about the process are accessed.

Joanna Quinn writes about traditional mechanisms of acknowledgement in Uganda and registers her conviction that "*the repair of the social infrastructure is crucial in rebuilding societies that have experienced horrors of mass atrocity*" (2009:196). According to her the imposition of externally conceived processes does not enhance the reconciliation of societies. A move to validate the use of traditional systems (customary law) is therefore necessitated in countries such as Uganda, and indeed most of Africa, where their prevalence is still felt. Alexander, L. Hinton, argues that justice need to relate with the local realities. Further, such processes are often quite messy and sometimes fail to respond to "*critical on-the-ground realities, ranging from social structure to local knowledge, to complex histories, and to the assumptions that underlie such endeavours*" (2010: 17).

John Paul Lederach, on the other hand, while writing in 1997 takes an inductive approach while writing *Building Peace: Sustainable Reconciliation in Divided Societies* and focuses on intra-state conflicts. He asserts that conflict denotes the fact that relationships have been broken. The same view is shared by Hamber and Kelly who, based on their research in Northern Ireland, view reconciliation as a process of "*addressing conflictual and fractured relationships*" which "*includes a range of activities*" (2009:291). Hamber and Kelly, like Lederach, point out that there are however paradoxes and complexities in dealing with the concept of reconciliation. Such complexities emanate from the socio-cultural contexts of the conflicts.

In his 1997 publication, Lederach seeks to learn from life experiences in countries such Nicaragua, Somalia and Mozambique between the 1980s and 90s. He observes that building peace has at its core the rebuilding of relationships within society that are otherwise broken in the process of conflict or war. From a structural-functionalist outlook he conceives the society as divided into three social levels, top, middle range and grassroots and encourages the participation of all these levels in peace-building while at the same time emphasizing the involvement of the middle level whom he sees as crucial to providing the support to both the top and grassroots. By doing so, Lederach is suggesting a move beyond the statist diplomacy. This approach augments the overall conceptualisation adopted in this study that insists on a bottom-up/empowerment view of transition

processes as well as takes into account the historical explanations to the conflict as determining the trajectories taken by the conflict.

Peace-building requires long-term commitment with proper structures at all levels that can tap into the resources for reconciliation as well as maximise from contributions made by the external environment (1997: xvi). Lederach proposes a comprehensive process that engages with all the actors from the local, national and international systems to achieve sustainable peace.

Villa-Vincencio, on the other hand, refers to the need for a national conversation, conducted in both formal and informal ways which can lead to the restoration of African societies and achieve the level of reconciliation desired (2009:65). David Mendeloff supports this view while qualifying the utility of truth-telling processes. Although his assessment of truth-telling and truth commissions paints a gloomy picture referring to them as imperfect institutions lacking in regular tests, he still accepts that "*such processes may help build group security especially within societies that have been divided across cultural lines*" (2004:375). The resultant environment is one that enables the institutionalisation of a participatory society that can be described as reflecting the interactions across the three levels in the society described by Lederach.

Boege, Brown, Clements and Nolan (2009) agree that major donors view development assistance, functioning and effective institutions as central in processes of state-building and this acts as a guide to development assistance (2009:559-600). They see the agenda of such states as presenting challenges to policy-making within the donor community. They posit that peace-building can no longer be viewed within the brackets liberal peace and the liberal state. In their view, Boege, Brown, Clements and Nolan maintain problem lies with over reliance on alien political structures and institutions by developing societies. They draw extensive examples from East Timor, Bougainville and Somaliland and call for a need to more attention to cultures and social relations to inform statebuilding. To them imposing structures such as the Westminster type of democracy on states that have a different historical development does not obtain. This is the case with countries in Africa which have undergone varied political histories, such as the colonial experiences, which are not comparable within the continent in the first place. Desmond Tutu argued that the South African experience calls for a South African response that would restore the social balance of society (Minnow 1998:81; Waldorf 2006). Boege, Brown, Clements and Nolan, caution against donors and external actors teaching recipient states on how to adopt western public institutions more efficiently (2009:611).

Weinstein invites us to reflect on the impact of non-western cultures and different beliefs as well as the local practices of justice (2007:2). The same is echoed by Thelma Ekiyor (2009) who while reflecting on the Sierra Leonean process points out that Sierra Leoneans were divided on the issue of whether truth-telling and recounting the past were necessary for reconciliation. He adds that support for the TRC was high among religious leaders, non-governmental organisations (NGOs) and educated Sierra Leoneans unlike many people in local communities who favoured a more culturally accepted approach of *´forgive and forget´* (2009:159). How therefore do we engage individuals and communities in a process that ensures they construct a shared future (Rigby 2001)?

2.3.5 HISTORICAL CONCEPTION

Scholars who conceptualise the transitional justice discourse from a historical standpoint seek to underscore the view that societies can learn from history. They unravel the different nuances of the subject from an evolutionary perspective and hope to elucidate knowledge through historical accounts of any given phenomenon. Along these lines Hayner (1996) provides a historical presentation on the commissioning of truth commissions around the world and seeks to draw lessons from the 19 truth commissions that have taken in place in 16 counties within 21 years by the year 1996. She draws examples and experience from truth commissions in Chile, El Salvador, Uruguay, Bolivia, Philippines, Germany Chad and Zimbabwe (1996:20).

From this historical account, Hayner can define truth commissions, the purposes they serve and she offers a summary of lessons learnt. She is also able to expose the gaps for further study within transitional justice using this approach. Her submission, however, is that truth commissions enable societies emerging from a dark past the opportunity to undergo a catharsis and renew commitments towards future peace. This historical approach is further echoed by John Elster in his edited volume of *Closing the Books: Transitional Justice in Historical Perspective* (2004) who not only emphasizes the fact that nations can learn from experience but also seeks to reiterate that transitional justice is not only exceptional to modern regimes but is an old phenomenon that can be traced as far back as to the Athenian democracy in 411 and 403 B.C.

Elster seeks to analyse and empirically present the conceptions of justice as is guided by motivations which dictate the ideologies behind the pursuit of transitional justice. In this sense, *"three institutional forms of justice; legal justice, administrative justice and political justice"* can be identified, perhaps within a continuum (2004:84). In this discussion, Elster concentrates *"on*

measures of transitional justice that are enacted by a state and that target wrongdoers and victims who are citizens" of that country (Elster 2004: 93). In a nutshell, Elster provides us with the factors explaining the various outcomes of transitional justice processes. He argues that the *"modalities of transition may constrain the substantive and procedural decisions of transitional justice"* (Elster 2004: 188).

Similarly, Elster (2006) while still maintaining this conception classifies the transitional justice episodes while paying attention to nature and duration to the autocratic regime, and to the nature and length of the process of transitional justice itself. Here the regime, as well as the process, may be classified as endogenous or exogenous (2006:6). The endogenous processes are conceived locally while the exogenous processes are conceived externally by actors such as international organisations. Tyler Cowen addresses the question of how far back restitution should go without being absurd and not taking care of the limitations societies may presently have. An attempt to remedy all previous injustices is, in fact, impractical (2006:33). He seeks to arrive at the best form or available restitution and argues that most restitutive measures find themselves with the dilemma of counterfactuals and the dynamics surrounding it such as the question whether claims to restitution can be inherited and the issue around intergenerational claims (Elster 2006:19-24).

2.3.6   NORMATIVE CONCEPTION

The policy conception of transitional justice often seeks to be descriptive, prescriptive and informative. Scholars using this approach contribute to this discourse by describing how transitional justice ought to be, how to value the process and what is either right or wrong within transitional justice practice. Pablo De Greiff posits that the field of transitional justice has been characterised by centrifugal tendencies and a lack of coherence and therefore seeks to clarify the relationship between its constituent elements (2010:18). He faults the trading off of one measure of transitional justice for the other, as is frequently done and terms it misguided and inappropriate.

The normative approach argues that the implementation of transitional justice is justified by a commitment commitment by states to purge the past. This commitment also guides how states act. De Greiff argues that transitional justice is aimed at attaining two intermediate goals; recognition and public trust, and two end goals, reconciliation and democracy (De Greif 2010; Sooka 2009:38). The mediate goals precede the final goals and serve therefore as the precondition to the final goals. In this way, he can provide clarification on the relationship between transitional justice and other

concepts such as reconciliation and democracy. According to him each of these concepts interacts and presents an incentive for one another for purposes of complementarity. Furthermore, *"if these measures are implemented haphazardly, piecemeal, and in isolation from one another, it is less likely that they will be interpreted as instances of justice, and more as"* cases *"of expediency at best"* (De Greif 2010; Sooka 2009: 38).

In this way, De Greif is suggesting an intertwined interrelationship of the concepts which are implemented about one another. According to him for transitional justice distinguishes between *"an abusive past and a future rights-respecting regime"* through the presence of a political transformation (2010:28) which implies a strong change in the way society is organized politically in order to become inclusive and guarantee rights, participation and freedoms thereby signifying a commitment to the tenets of democracy. He relates rule of law to committing to democratic governance by indicating that *"democracy is both a condition and a consequence of legally"* institutionalised *"efforts to establish justice"* (De Greif 2010: 28; UN Doc S/2004/616 para 25). By so doing, transitional justice can achieve the final goal of democratisation and ideally, therefore, qualify it as a *"holistic"* concept (De Greif 2010: 29).

The UN commits itself to this notion in its Report of the Secretary-General of 2004 where it says that *"justice, peace and democracy are not mutually exclusive objectives"* but rather mutually supporting requirements. The advancement of all the three objectives in post-conflict environments necessitates *"strategic planning, careful integration"* as well as *"sensible sequencing of"* undertakings. Strategies that are narrowly concentrated, or which ignore civil society as well as victims are bound to fail (UN Doc S/2004/616: preamble).

Joanna Quinn studied Haiti and Uganda and argues for the prominence of acknowledgement if truth commissions are to register success. According to her acknowledgement is necessary. It however does not provide adequate conditions necessary for the realisation of social trust and social cohesion….the process of acknowledgement has the potential to effect real and lasting change (2010:33). She is in agreement with De Greif that this then leads to the final goal(s) of transitional justice which, according to her defeat the deep-rooted conflicts that otherwise paralyse the society. Her normative evaluation of the truth commissions as mechanisms of acknowledgement assumes that they are capable of establishing past truths, making perpetrators accountable for human rights violations, suggesting important steps for reforms in the legal and institutional sectors, providing

victims with a a public platform, informing and inspiring public discource, help in the consolidation of democratic transitions and safeguarding against historical revisionism (Quinn 2010: 41).

2.4 TRANSITIONAL JUSTICE AND AFRICA

Different scholars, while looking at the case of the South African Truth and Reconciliation Commission have referred to it as one of the most successful transitional justice processes. Priscilla Hayner (2011) studies the structure and mandate of the commission to arrive at her conclusions. She asserts that *"the commission´s empowering Act provided the most complex and sophisticated mandate for any truth commission to date, with carefully balanced powers and an extensive investigatory reach"* (2011:27). Alex Boraine (2006) looks at the processes leading to the establishment of the commission and writes that it was quite different from other countries. He takes an institutional approach to studying the process and accounts for the progressions leading to the formation of the commission as well as those that characterised it is working. He posits that *"it was democratic and gave as many people as possible an opportunity to participate in the formation of the commission"* (2006:302). He however does not discuss the impact of the process.

While commending the process, Boraine argues that the final model of the commission was the result of consultation across the citizenry with the active participation of civil society engaging in a back and forth interaction with parliament. The truth process in South Africa was made possible by enactment of Promotion of National Unity and Reconciliation Act in in 1995 and a number of processes such as the participation of civil society in the discussions leading to its formation, two international conferences that deliberated on the truth process as well as the long hours of hearings during the lifetime of the commission (2006:27; Sooka 2009:30).

Mindzie (2009) takes a broader geographical coverage of Africa; Liberia, Rwanda, South Africa, Morrocco, Sierra Leone, Ghana and Mozambique and seeks to study the establishment and ultimate successes of transitional justice processes concluding that they have been minimal in establishing the rule of law and democracy. She cites *"the selection process and criteria of commissioners, the establishment of the body, the functioning and handling of the final report as crucial in determining their success"* (2009:128). According to her democratisation is a long-term aim of truth commissions and is perhaps not attainable shortly. This alludes to processes that prevail after a commission has completed and published its report.

Boraine (2006) seeks to evaluate the outcomes of the commission in South Africa and concludes that although it was seen as successful the achievements can only be seen as building blocks that could lead to the possibility of coexistence and mutual respect thereby beginning the long and arduous and painful process of reconciliation (2006:313). Gibson (2004) however conducts a study which he confirms that *"reconciliation was a reality as a result of the truth process"* (2004:335-6). He conducted a cross-sectional survey with 3727 adult South Africans. This also brings to mind the question the South African Truth Commissions struggle with the definition of truth and arriving at moderate truth. Gibson´s view of reconciliation is broad and attempts to be inclusive while accommodating both sides of the coin-the perpetrator and the aggrieved. In a later article and in defence of his earlier position he lauds the issue of *"collective truth"* as arrived at by Commission (2006: 427). It is this element of inclusivity and probably transparency in process and outcome that led to the success of the South African process. In brief, processes defining the design and the structure of the commission enable it to achieve at least modest results which facilitate a country's achievement of the goals of transitional justice.

From a comparative view, Alex Boraine, on a different note seeks to study the South African TRCs´ influence on the processes in Sierra Leone, Timor-Leste and Peru (2009: 137). These processes, enacted after the South African TRC, borrowed tremendously from the South African model (see also Arenhovel 2008:577). He seeks to establish how the model has been implemented in these countries, how it has been reconceived and modified to fit in the relevant national contexts, how these subsequent models have improved upon the South African one and, their successes and failures? (Boraine 2009: 137). He concludes that the model has influenced subsequent truth commissions. Such influence includes the holding of hearings in public as opposed to closed doors, the widespread consultation before the establishment of the commission and the access granted the media (Boraine 2009:149). This, he argues, points to the degree of success achieved by the South African TRC and subsequently to its attainment of both the mediate and the long-term goals. One of the recommendations to the government and people of South African was the need to consolidate democracy, build a human rights culture and focus on economic justice and sustain peace and political stability (Boraine 2009: 150).

While conducting a normative assessment of the intersection between development and distributive justice, Tim Murithi and Yvette Selim argue transitional justice practice has only addressed civil and political rights (CPR) at the expense of economic, social and cultural rights (ESCR). That is,

the processes have addressed the liberal aspects of transformation as opposed to the inclusive, emancipatory needs of societies. Hence, distributive justice has not been achieved in these processes. Their point of departure is that *"distributive injustices have so far been the causes of conflicts in Africa which if not addressed deny the continent the guarantee to sustainable peace"* (2012:58; Villalba 2011:10). Their points of reference are South Africa, Kenya and Liberian examples where victims of transitional justice have criticised the lack of attention to issues of distributive justice in the transitional justice measures (Bell, 2009:6). Murithi and Selim bring to the discussion the peace-building concept which emphasises addressing the root causes of conflict and argues that it is a key pillar of peace-building as it seeks to address the underlying causes of conflict in order to attain justice and long-term peace (2012:60). A discussion on the causes of conflict in Africa gleans more towards the discourse on the structure. In a sense, therefore, they are asking the crucial question in relation to the transitional justice agenda and its ability to address the challenges of the continent and achieve either reconciliation or democracy, or both at the same time. Their conceptualisation of justice, therefore, is underpinned by the structural nature of the conflicts in Africa. Murithi and Selim recommend that future commissions should contextualize pertinent issues such as land, health and education in order to recommend the appropriate utilisation of development tools to bring about distributive justice (2012:67).

2.5   TRANSITIONAL JUSTICE DISCOURSE ON KENYA

David Musila (2009), while writing after the post-election violence of 2007/2008 acknowledges that debate around the need to implement transitional justice measures became pertinent. He, however, laments the lack of a coherent approach within the Government of National Unity (GNU) to it and which therefore hampered the debate in significant ways and would later be the very obstacles to the efficacy of any mechanism sought and implemented (2009:445). In outlining the *"options for transitional justice"* in Kenya, Musila adopts a historical approach to enumerating the journey towards establishing the different mechanisms and sheds light on the prevailing political, social, economic and legal and the role of various actors including external players as conditions which have ´tortured´ this journey. All these factors have from time to time framed the debate on transitional justice in Kenya.

Jonathan Moler (2010) seeks to answer the question whether TRCs contribute to transforming transitional states towards stability and lead to these states respecting human rights and rule of law. He analyses how successful African Truth Commissions have functioned and applied these lessons

to Kenya in the hope that it will inform the process. His focus is on the mandate of truth commissions, how they have functioned, and the findings of their reports and the implementation of these reports. He utilises primary data from the Corruption Perceptions Index, the Ibrahim Index of African Governance and the Worldwide Governance Indicators to discuss the success factors of TRCs in relation to governance. He concludes by suggesting that the TJRC in Kenya should do three things. The first is to complement the ICC process in the country, followed by *"engaging local people in carrying out its mandate"* and lastly, the drafting of realistic and articulate recommendations that can spur reconciliation and assure future stability (2010:39).

Similarly, Tembeka Ngcukaitobi (2009) adopts an institutional approach in suggesting a model for the transitional justice process in Kenya. She asserts that although the South Africa truth-telling process has been held out as a model to be emulated, it had certain gaps that have received limited scrutiny. She analyses the South African process regarding its mandate, its context, and the conceptual and methodological framework that were adopted. She provides food for thought for the Kenyan process. To her, the process should carefully consider its mandate and the desired outcomes, and work in a way that will effectively bring out these outcomes (2009:62).

Thomas Obel Hansen (2013) takes an institutional view while studying the processes of transitional justice in Kenya. He analyses the socio-political constraints existent within the power-sharing arrangement in Kenya and argues that it is in itself the obstacle to achieving the much-needed transition yearned for. Vandeginste and Sriram (2011) expound on this by drawing examples from peace processes in Sub-Saharan Africa – Burundi, Sierra Leone and Sudan – asserting that tensions exist between the two paradigms; transitional justice and power-sharing and that they are therefore contradictory. They call for further research on how the two paradigms can be employed in peace agreements in the future. In a conjunction to this, Henry Amadi (2009) writing about Kenya´s Grand Coalition points out to the wrangling within it and the competing interests as posing a significant threat to achieving a new constitution before the 2012 elections. Hansen relates this to the manipulation by the political elite who also control the justice tools, therefore, rendering the transitional justice processes *"captured"* (2013:307.) Musila is in agreement and states that underlining the arduous history of the transitional justice debate and the political contestation it has elicited points to questions of *"ownership"* of the TJRC narrative and process as well as provides a glimpse into the prospects of success for such initiatives.

Hansen concludes that the engineers of the process only addressed the symptoms of Kenya´s problems. The deeply entrenched political culture which serves as the drivers of conflict was not adequately handled by the Kenya National Dialogue and Reconciliation (KNDR) process. Hansen seeks to unearth issues around the ability of the justice tools in question in promoting different forms of progressive change and whether they were intended to do that (2013:310). He proceeds by analyzing the KNDR and its various aspects including the composition of the mediation team, international pressure and the enhanced normative power of the transitional justice paradigm, the role of civil society, and the perceptions of the partners to the conflict of the proposed transitional justice measures and their contributory participation or influence to the mediation process. Given the nature of the power-sharing arrangement; characterised by elite capture, opposition and manipulation, it has become more of an obstacle to the transitional justice process. It has consolidated a political culture marked by disrespect for human rights, the rule of law and democratic principles (Hansen 2013: 322).

Stephen Kabera Karanja (2010) agrees with Hansen in taking an institutional approach to analysing transitional justice in Kenya. He, however, focuses on the situation of the victims of displacement about the transition process and seeks to identify the challenges then. Kabera notes that the causes of displacement and the design of the transitional justice process have implications on successful restitution. The Truth, Justice and Reconciliation Commission, established in 2008, through an Act of Parliament, *"lacks a clear mandate on land restitution"* (2010:191). He continues that Kenya lacks specific laws on restitution and this in turn has specific implications on restitution claims (Karanja 2010: 179-80). He identifies current violent land conflicts as based on restitution claim justifications and that many communities have harboured interests in making claims for past land related injustices (Karanja: 183-185). According to him the land and displacement of communities in Kenya are historical, legal and transitional and these serve as the constraints which must be addressed by the restitution program in the country.

Lydia K. Bosire and Gabrielle Lynch (2014) in one of the earliest analyses of the role of civil society in search of truth and justice conduct a descriptive study of civil society interventions in the year 2003 and from 2008 to 2013. Their activities in 2003, coupled with the initiatives of other actors such as the international community necessitated the formation of the task force to investigate the need for a truth process. These activities climaxed in the establishment of the Makau Mutua-led task force later in in the same year. Bosire and Lynch assert that CSOs play critical roles

determining truth commissions´ impact. This is usually through collective and personalised *"agendas, reactive responses to government signals and unintended consequences"* (2014:258). In their view CSOs in the process of their work, evolve varied arguments on impact depending on their interests (Bosire & Lynch 2014: 259). Their findings seem to caution against applying the same strategies and tools in a transitional justice process without considering the actors and the effects that they will potentially produce thereby impacting on the process. The internal, as well as external environments of the CSOs, determine the extent to which they influence transitional justice processes.

2.6   TRANSITIONAL JUSTICE AND DEMOCRATIZATION

The need for transitional justice in societies that are coming out of the dark past is gaining prominence because of the assumed role it plays in reconciling and democratising societies. Coalition of states or sometimes bodies such as the UN intervene in states and often install transitional justice mechanisms aimed at building sustainable peace, stabilising the society and fostering democracy (Arenhovel 2008: 572). With the number of societies having had tumultuous past on the increase this need is therefore poised to grow even further. This necessitates reflections on the link between transitional justice and such goals as reconciliation and democratisation.

In her comparative study of fifteen truth commissions conducted between 1974 to1994, Priscilla B. Hayner contemplates on the reasons why truth commissions are formed and indicates that they may serve different and often overlapping purposes (1995:227). This is in line with the literature on transitions which suggest moving away from the past and ushering in new dispositions which are democratic. In her view truth processes recommend military and police reforms, the strengthening of institutions, the promotion of national reconciliation, reparations or judicial reforms (Hayner 1995: 229). While in most cases these are not obligatory, they provide avenues to sustained pressure for future lobbying by either the international community or civil society, in the view of Hayner. In this sense, truth commissions serve as a basis for transition to democracy. The nature of the transition and the history of the state in question are subjects for further investigation.

Barahona de Brito et al. (2000) argue that it appears that trials and truth commissions do not impact on the quality of the new democracies particularly when observed several years later. They base their argument from observing Spain, Hungary and Uruguay where they indicate processes of truth-telling were absent and yet democracy is robust and deep as opposed to Czech and Argentina which

experiences purges and trials (2000:312). Melissa Nobles (2010) is of the same opinion arguing that it is a contested claim that transitional justice measures affect democratic consolidation. Proponents of accountability and punishment presume that these steps are necessary for ensuring a more robust and secure democracy (2010:176; Mendeloff 2004:356-7). She, therefore, advocates efforts to determine the causality.

Olsen, Payne and Reiter (2010) also seek to demonstrate the result of combining transitional justice mechanism and their effects on human rights and democracy. They argue that truth commissions alone cannot produce a positive on democracy in a state. Their project, the Transitional Justice Data Base (TJDB) reveals that two *"combinations of mechanisms – trials and amnesties; and trials, amnesties and truth commissions"* – result in outcomes of human rights and democracy. Their point of departure is that theorising around transitional justice, and the field of human rights so far has adopted four main approaches; maximalist, minimalist, moderate and holistic. They promote the holistic approach which involves multiple mechanisms (2010:982-3). In the project data on five transitional justice mechanisms – trials, truth commissions, amnesties, reparations and lustration – for all countries in the world from 1970-2007 are systematically analysed to illustrate the role transitional justice plays in improving human rights and democracy. They conclude by suggesting the –justice balance- an approach which balances trials and amnesties in combination with, or without, truth commissions and thereby produce positive results regarding the human rights and democracy goals (Olsen, Payne & Reiter 2010:1004-5).

The direction that regimes take in dealing with their pasts can be varied and dependent therefore on a multitude of issues stretching from the nature of the takeover by the incoming regime to the kind and levels of negotiation space available. Andrieu (2011) in her study of transitional justice and democratisation in Post-Soviet Russia investigates the impact of the lack of acknowledgement of the past by a regime on a country´s democratic consolidation and concludes that the lack of it yields negative impact on the democratisation prospects and process (2011:198). Elin Skaar (1999), using empirical evidence from around 30 countries in Latin America and Africa, analyses newly elected democratic governments and how they have handled previous autocratic regimes that committed violations of human rights. She accounts for the policy choices made by these regimes through the interplay between strength and weakness of both governments as well as public demand. This provides both potentialities and limits on the transitional justice initiatives. Skaar´s contribution seeks to test the hypothesis that the path of policy a government adopts is contigent on the amount

of pressure the demands from the public on the past regime yield. Trials are the likely result when the past (outgoing) regime is weak. The resort to truth commissions reflect a middle ground (1999:1110). Her study reveals the variations in policy choices among different democracies which, according to her, are the result of the levels of strength wielded by both government and public demand.

2.7   JUSTIFICATION FOR THIS STUDY

The growing body of literature on truth commissions and other transitional justice mechanisms provides us with the basis for understanding how these initiatives are structured and operate, but more studies need to be conducted on their impact and effectiveness (see Van der Merwe, Baxter & Chapman 2009:4; Nobles 2010:176). Attempts at studying transitional justice has so far been focused on (a) the healing of society; quasi-redemptive terminology (b) reconciling society; ontological terms (c) reestablishing rule of law; normative expressions (d) reestablishing human dignity; ethical terms (e) condemning and judging; legal terms (f) establishing the truth, healing and; philosophical and psychological terms (g) reforming institutions; political terms (Bleeker 2010:vii). The pivotal, but underlying assumptions have been that transitional justice processes contribute to reconciliation and democratisation. However, it is imperative that the extent of impact be studied and documented for purposes of informing future policy amongst states that intend to institute similar mechanisms. In doing so, this study offers a combination of an institutional and social-cultural conception framework for analysing and understanding processes of change. In this same light Mendeloff, for example, advocates the need to do a better job of clearly specifying how truth-telling will benefit peace-building, under what conditions, and after which types of conflicts as well as when it helps consolidate peace and when it does not (2004:356-7). In other words, Mendeloff is of the opinion that scholars have so far overrated truth commissions and their impact. The framework adopted in this study sought to answer these questions and applied historical institutionalism as the overall theoretical underpinning to provide this understanding. The comprehensive framework for reconciliation, as proposed by John Paul Lederach provided for the socio-cultural explanations in the exploration. This necessitated the conclusions whether the end goal of participatory democracy was achieved through the truth commission process in Kenya.

This contribution focused on the relationship between truth commissions, as a mechanism of transitional justice and democratic institutionalisation. The study begins to answer questions on impact and seeks to provide the basis for evaluating such mechanisms. Olsen, Payne & Reiter

(2010) argue that *"despite the proliferation of practices, policies, and studies of transitional justice, two major gaps remain"*. First, there is little systematic substantiation to support the assertion that transitional justice eventually leads to better human rights practice and participatory democracy. Second, if transitional justice does achieve its goals, neither scholars nor policymakers clarify when, why or how it might do so (2010:981; De Greif 2010:18). Their quantitative study indicates that truth commissions, when applied alone, may not contribute to democracy. Rather, it is only when truth commissions are used in combination with other mechanisms such as trials and lustrations that they may produce the anticipated impact.

CHAPTER 3. CONCEPTUAL FRAMEWORK

3.1   CHAPTER PREVIEW, AIM AND SCOPE

This chapter presents the major conceptual underpinnings that guided this study. First, given that the overall objective of this research was to interrogate whether the TJRC process in Kenya facilitated the institutionalisation of participatory democracy, the chapter seeks to bring an understanding to institutional analysis and its application of path dependence and critical junctures in historical institutionalism. A review of the three theoretical approaches to institutionalism: rational choice, sociological institutionalism and, historical institutionalism was conducted. It also illuminates the historical development of the ´new institutionalism´ in the field of political science. Historical institutionalism provided the theoretical base upon which this study was grounded. The first part of the chapter introduces the concept, defines it and presents the typologies of institutions – formal and informal. It then proceeds to analyse the impact of this on governments, politics and public policy.

Further, using the critical juncture analysis framework employed by scholars such as Barringtone Moore (1966); Collier and Collier (1991); Gregory M. Luebert (1991) and James Mahoney (2001), the second part delves into analysing the concepts of path dependence and critical junctures in historical institutionalism. This framework provides the contribution with a conceptual model for discussing the Truth, Justice and Reconciliation Commission (TJRC) in Kenya. The study suggests an adaptation of this model to the study of the TJRC process and its implications for the institutionalisation of participatory democracy. This is against the background that a participatory society is arrived at through the delivery of justice and reconciliation which the study discussed in the context of historical institutionalism. The contribution then discusses the relevance/application of historical institutionalism in Africa as it distinguishes formal and informal institutions and their relevance to studying decision-making in Africa. This is against the background that decisions made at critical junctures are, in the most part, informal and hence leading to the scenarios evidenced by the creation of the TJRC for example.

Further, the limitations of historical institutionalism and this model are examined in light of proposing other theories that support the study. Aware of these limitations this inquiry also employs John Paul Lederach´s comprehensive framework for reconciliation to understand the dynamics surrounding the implementation of the TJRC. At this juncture, the delivery of justice and

reconciliation, which are prerequisites for a participatory society are analysed and discussed. The conception, therefore, helps in debating this component of the inquiry while anchoring itself on history and the decisions and actions of the past and what implications this may have on this delivery. This helps in discussing the extent to which the institutionalisation of participatory democracy has been realized. The conception of participatory democracy is then reviewed and analysed as well as contextualised so that it is in tandem with the overall framework of historical institutionalism. It is in this context that the chapter concludes with the assumptions of this study by creating the conceptual model that guides the entire study. The theoretical framework guiding the thesis is then discussed and explained so that the reader contextualises the grounding around which this study is situated. Further, the theoretical model adopted is presented in a figure to give the reader a visual model of the concepts used and how they relate to one another.

3.2   THE EMERGENCE OF NEW INSTITUTIONALISM

The discipline of political science is known to traditionally analyse institutions. *"The first political philosophers began to identify and analyse the success of these institutions in governing and then to make recommendations for the design of other institutions based upon observations"* (Peters 2012:3). The Greek Philosopher, Aristotle, contributed to constitutional theory and defined the best set of rules for the city-state. He preferred a set of rules and standards that benefitted the majority. If the rules deviate from this aspiration, then it only begets tyranny. According to Martinich and Battiste (2010), Thomas Hobbes argued for a robust and united government in the *Leviathan*. Regarded as a contractarian, Hobbes looked at the structure of society and the resultant state in which relations were kept in place via a social contract. Contractarians argue that there is a benefit in individuals willingly coming together through an agreement; which is natural, rational or conventional and that through this they can better their gains in society. There is more benefit in individuals coming together rather than remaining isolated. This agreement is what they refer to as the social contract. Other philosophers who argued for the structure of society and government as guided by a social contract included John Locke, Hugo Grotius, Immanuel Kant, Jean-Jacques Rousseau, Thomas Aquinas, John Rawls and David Gauthier.

Max Weber´s illustration of bureaucracy as the framework used in studying public administration and management, has featured in literature most outstandingly. His bureaucratic principles lean towards prescribing what administration is and how it should operate. In the traditional sense, therefore, political scientists' primary concern has been phenomena such as the legislative, judicial

and executive branches of government and the way they operate. Traditionally *"the primary questions asked by scholars tended to concern the nature of governing institutions that could structure the behaviour of individuals – both the governing and the governed towards better ends"* (Peters 2012:3). The interaction of these institutions determines the ascribed meaning ascribe to political life. Later, scholars such as David Easton (1957), sought to provide a systemic view of politics by suggesting the need to conduct analyses with other social systems in consideration. In his input and output model, he is fully aware that this happens within a certain environment which produces certain constraints that the analysts should take cognisance of.

Tracking the development of the discipline reveals that *"the concerns of political science were mainly institutional and normative"* (Peters 2012:4). Political scientists were primarily concerned with the structure and how to make better this structure. *"Legal and historical methods dominated, alongside a descriptive idiom and a set of assumptions about what constituted a good political system"* (Lowndes & Roberts 2013:1). It was about *"the formal aspects of government, including law, and its attention was squarely on the machinery of the government system"* (Peters 2012:4). The way governments work, and the relationships existent amongst the different structures within government was at the centre of study. It, therefore, was *"about the attempt by political thinkers to propose and justify norms for the guidance of governments and states"* (Wintrop 1983:1).

This old institutionalism *"was criticized for an over emphasis on the formal, codified aspects of politics at the expense of looking at the nitty-gritty of politics"* (Rosamond 2007:122; Lecours 2005:3). The dynamics surrounding the working of government were ignored, yet they can reveal nuances to the advantage of the political analysis. In summary *"their concern with comparison reflected some extent their collective desire to learn how other governments worked and to see if there were lessons which might make their own function better"* (Peters 2012:13). It, therefore, led to a narrow and simplistic view of politics that does not reflect holistic interactions in society.

New Institutionalism emerged as a critique of the behavioural emphasis of comparative politics in the 1950s and 1960s, *"which often obscured the enduring socioeconomic and political structures that mould behavior in distinctive ways in different national contexts"* (Thelen and Steinmo 1992:1). The behaviouralists were not cognizant of the distribution and contestations of power among actors in different contexts within society as a result of their interests, incentives and institutions that shape political development. Avner Greif puts this succinctly that *"economic institutions (in political economy models are defined as formal rules regulating economic activities)*

are outcomes of political processes; they therefore change following exogenous changes in the decision-making process or the political actors´ interests" (2006:154).

3.3 DEFINITION OF INSTITUTIONS IN NEW INSTITUTIONALISM AND ITS STRANDS

In the old institutionalism, institutions were viewed from the point of solid structures such as *"constitutions, cabinets, parliaments, bureaucracies, courts, armies, federal or autonomy arrangements, and in some instances party systems"* (Lecours 2005:6). It consisted of *"detailed configurative studies of different administrative, legal and political structures"* (Thelen & Steinmo 1992:3). In this view, Lecours further argues that it simply *"referred to state or government"*. This view of politics is narrow and simplistic and does not take the wider view that the policy represents. However, March and Olsen (1989) in a bid to provide a multidimensional definition which attempts to explain and understand the complexity of the policy have defined institutions as *"processes, rules, norms and routines"*. They view the new conception as being *"contextual, reductionist, utilitarian, instrumentalist and functionalist"* (1989:3). According to Hall and Taylor, they are *"embedded in the organizational structure of the political economy"* (1996:938).

While focusing his attention on rules and procedures, Peter Hall described institutions as, *"the formal rules, compliance procedures, and standard operating procedures that structure the relationships between people in various units of the polity and economy"* (Hall 1986:19). On the other hand, Richard Scott´s (2004) definition of institutions spells out people and institutions and their interactions shaping ideas and influencing public policy and administration. The institutionalism scholars are concerned in public institutions *"that shape how political actors define their interests and that structure the relations of power to other groups"* (Thelen and Steinmo 1992:2). In a sense, therefore, institutions will influence the kind of political systems as well as the social organisation of societies. Scott further describes institutions as *"comprising regulative, normative and cultural cognitive elements that, together with associated activities and resources, provide stability to social life"* (2008:48). In this definition, Scott assigns the *"regulative, normative and cultural-cognitive elements"* of institutions a high importance thereby making them crucial pillars that support organisations. Douglas North (1990) on the other hand posits that *"institutions reduce uncertainty by providing a structure to everyday life"*. This is because an *"institution is a web of interrelated norms – formal and informal – governing social relationships"* (Nee & Ingram 1998: 19). Institutions offer the buffer for either social or political uncertainty that would be inherent in societies. It is assumed here that processes will lead to structural outfits that

guarantee the stability of societies. Nee and Ingram further argue that *"in structuring social interactions they produce group performance in organizations and even entire economies"* (Nee & Ingram 1998:19).

According to Lecours (2005), *"the ontological line between state and society"* which is accorded a significant role in analyses that use historical insitutionalism is indistinct (2005:8). This explains the comprehensive definition of institutions that take into account both the formal and informal conceptions. New institutionalism puts forward the idea that institutions *"represent an autonomous force in politics, that their weight is felt on action and outcomes"*. Because of this, he argues that *"political analysis, therefore, should take institutions as the starting point"*. He concludes that new institutionalists *"focus on the impact of institutions on action, rather than the other way round"*. To demonstrate that institutions influence actors, Lecours raises questions that should guide the analyst in utilising the new institutionalist approach: *"what are the mechanisms through which institutions shape action? What is the extent of the weight on institutions on agents? Is the weight felt only on strategies or also on preferences"?* (Lecours 2005:8-9).

In the discussion on the units of analysis where Lecours seeks to investigate how institutions shape action and the relationship between institutions and agents, Lowndes and Roberts have elaborated this further by arguing that:

> Institutionalists contend that the greatest theoretical leverage is to be gained by studying the institutional frameworks within which political actors operate. In short, political behavior and political outcomes are best understood by studying the rules and practices that characterize institutions, and the ways in which actors relate to them (whether they are politicians, public servants, citizens or social movements). The sorts of questions we might ask include: What are the formal ´rules of the game´ within a particular political arena? What are the dominant practices that are not actually written down? Are there gaps between the formal rules and the way things ´really work´? Are there frequently rehearsed ´stories´ that explain why people act one way rather than another? What do actors think will happen if they do not follow rules or observe dominant practices? How do actors circumvent, or seek to adapt, rules and practices? Do different actors relate to rules differently? Are there alternative rules and practices ´bubbling under´? Are new stories emerging about how things could work in the future? How do actors react to those who want to change the rule? (2013:7-10).

Analytically therefore new institutionalism begins with institutions as opposed to individuals in their efforts to understand and explain politics. According to them, the structure will influence the individual and in so doing determine his/her behavior in the making of choices. Actor choices are in this way a function of institutions. This ultimately determines the outcomes of social, political and economic processes in society. From their argument, institutions matter in the way that they influence the behavior of actors in politics.

3.4 STRANDS OF INSTITUTIONALISM

According to Lowndes and Roberts (2013), institutionalism resurfaced in the 1980s and 1990s with a more expansive definition and theoretical framework which included informal conventions as shapers of political conduct, the view that political institutions also embody values and power relationships, and the view that actors shape institutions. They further argue that there emerged different variants of institutionalism, each one defending their position and applying different labels to their particular interpretations. Marie-Claude Djelic confirms the emergence and existence of these variants but argues that *"they have a core dimension: to understand how embedded matters are, how institutions constrain and structure action, create regularities and stability, limiting at the same time the range of options and opportunities"* (2010:16). Lowndes and Roberts posit that *"Hall and Taylor identified three variants in 1996 and by 1999 Guy Peters had discovered seven"* (2013:31).The seven institutionalism defined by Guy Peters included; *"normative institutionalism"*, *"rational choice institutionalism"*, *"historical institutionalism"*, *"international institutionalism"*, *"sociological institutionalism"*, *"network institutionalism"*, *"constructivist or discursive institutionalism"* and *"feminist institutionalism"* (Lowndes & Roberts, 2013).

While seeking to explain how new institutionalism differs from the old institutionalism in political science, Hall and Taylor (1996) outlined the three schools of thought into *"historical institutionalism", "rational choice institutionalism"* and *"sociological institutionalism"*. They further argued that the emergence of three strands be a reaction to the behavioural standpoints dominant in political science before the 1960s. *"The behavioralists argued that, in order to understand politics and explain political outcomes, analysts should focus not on the formal attributes of government institutions but instead on the informal distributions of power, attitudes and political behavior"* (Thelen & Steinmo 1992:4). Hall and Taylor, however, contend that all the three strands *"seek to elucidate the role that institutions play in the determination of social and*

political outcomes" (1996:936). This research took institutionalism as its basis and further adapted historical institutionalism as its framework to explore the TJRC process.

In **Table 1** below (adapted from Lowndes and Roberts 2013) a brief distinctive overview of the three strands is given with the definitions, key objectives, theoretical focus, theoretical assumptions, common methods, time horizons, views on change and the meaning of engagement. Here, Lowndes and Roberts explicitly outline the tenets of each of the strands and provide a basis for discussing the point of departure of each of them according to the tenets.

Table 1: The main strands of institutionalism: key characteristics

	Sociological Institutionalism	Rational Choice Institutionalism	Historical Institutionalism
Definition of Institutions	Cultural conventions, norms, cognitive frames, practices (Scott, 2008)	´The rules of the game in a society´ (North, 1990).	´Formal and informal procedures, routines, norms and conventions´ (Hall, 1986).
Key Objectives of Study	Organizational fields, social movements, diffusion of institutions.	Individual choices and outcomes, collective action problems, games scenarios.	National policy and power elites, the divergent paths and ´varieties of capitalism´.
Theoretical Focus	The institutional and cultural context for, and shaping of, agency.	Institutions to create stability and curb the worst excesses of agency.	The institutional and historical context for, and shaping of agency.
Theoretical Assumptions	Actors follow norms and conventions or ´logics of appropriateness´ (March & Olsen, 1989)	Actors articulate best course of their interests, within institutional framework (Ostrom, 1986).	A combination of cultural and calculus logics (Hall 6 Taylor, 1998).
Common Methods	Case studies, ´thick´ description, interpretive methodologies.	Testing models, use of quantitative data, laboratory and field experiments.	Historical cases, process tracing, cross national comparative analysis.
Time Horizons	The recent past and the future.	The present and the	Long-term in the past[7].

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[7] Traditionally historical institutionalists such as Collier & Collier, Rueschemeyer and Barrington Moore studied long term events that led to political development. This notion is however changing. Erdmann, Elischer & Strogh in, *Can Historical Institutionalism be Applied to Political Regime Development in Africa?*, have argued that although historical institutionalism as an approach studies

		immediate future.	
Views on Change	Change as ´institutionalization´ (Scot, 2008), including imitation, adaptation and the re-use of existing institutions.	Change willed by actors, emphasis on conscious design, rational adjustment, bargaining and ´gaming´.	Change as highly context-specific, focus on formative moments and path dependence (punctuated equilibrium).
The meaning of Engagement	Relatively powerless groups mobilize within an institutional environment shaped by public and private sector organizations.	Small community and business groups design their own institutions without the help of central government actors.	Large groups and coalitions of empowered actors block or promote institutional reform in their own interests.

Source: Adapted from Lowndes & Roberts (2013:32-33).

3.4.1   RATIONAL CHOICE

To understand institutional change and the outcomes of economic processes, a focus on the causes and consequences is necessary. The rational choice approach contemplates on how actors´ preferences shift about changes in institutional rules. For this reason, rational choice institutionalists *"view institutions as governance or rule systems, but argue that they represent deliberately constructed edifices established by individuals seeking to promote or protect their interests"* (Scott 2008:32). Individuals therefore create institutions with the goal of attaining their self-interests as opposed to the benefit of the larger society. In so doing the individuals are calculative about the maximum gain that will accrue from such an engagement. *"The underlying logic is that institutions are arrangements of rules and incentives, and the members of the institutions behave in response to those basic components of institutional structure"* (Peters 2008:3). However, the same rule and incentives are created by the individuals whom they serve therefore rendering individual calculations as a determinant of the rules made (Thelen & Steinmo 1992:7). In other words, the rational choice school of thought focuses on analyses that are interested in the degree to which

long term processes and usually cover at least a century, *"there is no methodological or theoretical reason why one should not be able to use the concepts of historical institutionalism for an explanation of political regime development in Africa"* (2011:14). In their thinking there are no substantial conceptual arguments that should hinder scholars from utilizing historical institutionalism in the African context. This is because a substantial degree of formal institutionalization has taken place in the continent and the "distinction between formal and informal institutions facilitates an institutionalist approach to African politics". There exists critical junctures in the political development of Africa which give rise to legacies (from pre-colonial, colonial, to post-colonial Africa) that have brought into light electoral regimes, the presence or lack of political participation, horizontal accountability of presidents, civil-military relations and general institutions within society (Erdman, Elischer & Strogh 2011:19-23). This thesis took cue from their contribution in recognizing the critical junctures, historical legacies, political outcomes and ideas and decisions that led to path dependence.

institutions shape political strategies and have an effect on political outcomes in societies. Rational choice institutionalists borrow from the field of economics wherein actor choices are deliberate and a result of calculations regarding opportunity costs. According to Scott they *"seek to apply economic arguments to account for the existence of organizations and institutions"* (2008:45). In *The New Economics of organization* (1984) Terry Moe seeks to provide political scientists with an alternative model for understanding to how societies and other aggregates make collective decisions. Moe aptly captures this as an approach perhaps best *"characterized by three elements: a contractual perspective on organizational relationships, a focus on hierarchal control, and formal analysis via principal-agent models"* (1984:739).

For the rational choice theorists *"organizations are formed to participate within the institutional environment which, in turn are created by entities such as markets and political systems"* (Peters 2012:138). Peter equates this to firms which must change if the rules of the market change. The rational choice theorists, therefore, stress on the *"micro-foundations of institutions, asking how institutions are devised to solve collective action problems experienced by individuals"* (Scott 2008:35). Scott impliedly states that actor choices are in this case exogenous and a result of the calculative preferences actors make in given situations. In the words of Guy Peters, *"individuals who interact within the institutions have their own well-ordered sets of preferences"*. These preferences *"remain largely unchanged by any institutional involvement that they may have"* (2008:3).

3.4.2   SOCIOLOGICAL INSTITUTIONALISM

What is the cultural setting of an organisation and what are its influences on the dynamics of communication within the same organization? According to hall and Taylor (1996), sociological institutionalism *"grew within the field of organizational theory"* which studies organisations and their relation to the environment. DiMaggio and Powell (1991) posit that sociological institutionalists study organisations and the dynamics related to them such as their cognitive and normative aspects as well as their relational networks and interests. Hall and Taylor (1996) see its growth as a challenge to the traditional distinction between those *"parts of the social world said to reflect a formal means-ends rationality and those parts of the social world said to display a diverse set of practices associated with culture"* (Hall & Taylor 1996:946). Sociological institutionalists are interested in the actors´ interests which according to them are endogenous. This is as opposed to the

historical institutionalist assumption where reference to exogenous shocks influencing institutional change is made.

According to Borzel and Risse (2000), sociological institutionalists focus on institutional culture and the communicative role played by actors within those institutional settings. In their thinking organisational preferences and choices are influenced by cultures which become embedded in organisations. Hall and Taylor posit that *"the problematic of sociological institutionalists involves explaining how cultures and cultural practices are diffused through organizational fields across nations"* (1996:947). In this way, institutions affect the actors´ preferences and identities, according to them.

From the cultural aspect of society, sociological institutionalists define institutions broadly by including, *"not just formal rules, procedures or norms, but the symbol systems, cognitive scripts, and moral templates that provide the ´frames of meaning´ guiding human action"* (Borzel & Risse 2000:947). They *"undertake case studies of specific organizational ´fields´ in the public, private and third sectors of society"* (Lowndes & Roberts 2013:33). This is either descriptive, explanatory or exploratory analyses of persons or groups and their underlying properties to find causation. Given this *"they use interpretive methodologies to produce thick descriptions of subtle and dynamic processes"* (Lowndes & Roberts 2013: 33). They *"build on a loosely constructed framework of ideas stemming from cognitive psychology, cultural studies, phenomenology, and ethnomethodology"* (Scott 2008:45).

This provides them with the possibility of making inquiry based on the real-life context of the phenomenon they are studying. They make meaning of such phenomenon by providing interpretations. Institutional change is therefore dependent on the interpretations and further reinterpretations made by the sociological institutionalists.

3.4.3 HISTORICAL INSTITUTIONALISM

Historical institutionalism scholars concern themselves with the problem of explaining the change. In *Governing the Economy: The Politics of State Intervention in Britain and France* (1986), Peter Hall sought to explain the economic direction of policy in Britain and France over the post-war period. He pointed out that it was a political process and as such it pointed to the importance of institutions in shaping policies. In his thinking, the policy outcomes of a state are indeed affected by multi-faceted dynamics involving elements such as institutions and actors and which are deeply

embedded in the processes. *"Historical institutionalists work with a definition of institutions that includes both formal organizations and informal rules and procedures that structure conduct"* (Thelen & Steinmo 1992:2) of actors.

The historical institutionalist view is therefore that an understanding of the history of a country and the policies therein is necessary to explain contemporary outcomes. Thelen and Steinmo further argue that historical institutionalists position *"institutions as shapers of politics and political history generally"* (1992:7). In doing this one can deduce existing patterns of behaviour and choice that are influenced by the historical past. Institutions, therefore, are critical in the shaping of political strategies as well as influencing political outcomes.

According to Hall and Taylor historical institutionalism has four distinct features: *"it conceptualizes the relationship between institutions and individual behavior, emphasizes the asymmetries of power associated with the development of institutions, emphasizes path dependence in institutional development, and recognizes contribution of other factors such as ideas to political outcomes"* (1996:938). Lowndes and Roberts argue that historical institutionalism is concerned with *"a whole country´s institutional apparatus and national level building-blocks such as employment rights and welfare provision"* (2013:37), as well as the long-term development of institutions.

Hall and Taylor (1996) further posit that historical institutionalists are interested in the analysis of how institutions affect the behaviour of individuals. The same argument is made by John Zysman (1994) who compliments this by indicating that historical institutionalists start by asking how institutions affect individuals. In doing this the analyst seeks to answer three questions: the behavirour of actors, the actions of institutions and the reasons for the persistence of insitutions (Hall & Taylor 1996:939).

3.4.3.1   POLITICAL ELITE BEHAVIOUR AND THE TJRC PROCESS

This thesis delves into such questions related to the behaviour of the political elite in Kenya, what their alliances prefer and the decisions they make as well as why these alliances and the decisions they make persist over time. This also explains the developments experienced about the non-implementation or the ad-hoc implementation of the recommendations of the TJRC in Kenya. In other words, the questions relating to the reform process and the obstacles to it are well explained from this standpoint.

Another feature of historical institutionalism is *"the prominent role that power and asymmetrical relations of power play in such analyses"* (Hall & Taylor 1996:941). Hall and Taylor further argue that this has to do with the skewed distribution of power across groups in the polity and the advantages this portends in relation to access to decision-making processes. It is from here that we begin to see the asymmetries in power relations in a country like Kenya where, because of the privileged position they found themselves in, a section of the political elite managed to enrich themselves at the expense of the rest of society and continue to use this to sway the reform agenda in the country. They can sway decisions in their favour because, as seen in the contribution, they control the economy as well. This is occasioned by the acts of corruption right from independence which catapulted them in the privilege. This further describes the political life of a society and the nature and structure of the political system regarding who gets what and how.

"Historical institutionalists undertake case studies on the national scale and over significant time frames, examining the unfolding relationships between the formation and implementation of public policy and the large political bodies which form the power constellations within a country" (Lowndes & Roberts 2013:38). The TJRC process in Kenya can be described in terms of the formation and implementation of public policy. It has been influenced by the large formations that form the axes of power in Kenya such as political parties, civil society as well as the international community´s presence in the country. The time frame within which the process has taken place, including the events leading to the decision to form a truth commission, the events that led to its creation such the Kenya National Dialogue and Reconciliation process and the working of the Commission as well as the delayed implementation process, provide a historical perspective within which the Commission process can be studied in the context of historical institutionalism. This responds to questions on the length of time a case qualifies for study and the results yielded by different time considerations as made by researchers.

3.4.3.2   PATH-DEPENDENCE

Path dependence is the *"basic idea that the policy choices made when an institution is being formed"*, or at the origination of policy, *"will have a continuing and largely determinate influence over the policy far into the future"* (Peters 2012:70). While discussing the European integration Mark Pollack (2009) posits that historical institutionalists contend that the *"choices taken in the past can persist become ´locked in´, thereby shaping and constraining actors in time"*. In

explaining path dependence, Guy Peters (2012) argues that this is exemplified by *"paths taken by an organization or government as having inertial tendencies for such policy choices to persist"*.

Kathleen Thelen (1999), on the other hand gives an overview on recent developments in historical institutionalism and indicates that the phrase - path dependence – *"suggests two distinct claims; that the critical founding moments of institutional formation sends countries along broadly different development paths, and that institutions continue to evolve in response to changing environmental conditions in ways that are constrained by past trajectories"* (Thelen 1999:387).

In a nutshell, Path dependency *"creates a powerful cycle of self-reinforcing activity"*.These cycles can be good or brutal depending on the circumstances. *"There is a reason to assume that the option which becomes ´locked in´ is superior to the alternatives that were foregone"* (Lowndes & Roberts 2013:39). This explains the long-term effects institutional choices have once taken. They provide the parameters for future policy processes which, though will be responding to contemporary needs, will be guided by the lock-in. Guy Peters further argues that while this position assumed as a result of path dependence may be altered, it require enormous political pressure to produce this kind of change.

3.4.3.3   CRITICAL JUNCTURES

Societies go through moments in their history that involve junctions at which crucial decisions made produce different economic, political and social trajectories. This conception has been variously referred to as critical juncture, with variety in its application at various analyses. Cappochia and Kelemen consider this analysis as the *"analysis of decision making under conditions of uncertainty"* (2007:354). They argue that this kind of analysis involves each step of the decision-making process, the decisions made and the options available as well as their impact. Social scientists have employed the analysis of critical junctures to the analysis of foreign policy, development of regimes, changing markets, historical analysis of institutional change in societies and so on. This may involve *"process tracing, systematic process analysis, analytic narrative, theory-guided narrative as well as analysis of contingency"* (2007: 355). This study sought to trace the process of the TJRC systematically as well as analyse the narratives that dominate the TJRC discourse in Kenya and how this influence agency on the part of the actors.

Critical junctures have been defined as *"moments when substantial institutional change takes place thereby creating a ´branching point´ from which historical development moves onto a new path.*

Historical institutionalists divide the flow of historical events into periods of continuity punctuated by critical junctures" (Hall & Taylor 1996:942). The period of this moment has been identified by scholars as either brief or extended thereby providing variety in the application. Collier and Collier, in their study of the political development of eight Latin American countries, posit that a critical juncture may be defined as *"a period of significant change, which typically occurs in distinct ways in different countries (or in other units of analysis) and which is hypothesized to produce distinct legacies"* (1991:29).

The TJRC moment in Kenya can be seen as a critical juncture or the ushering in of an epochal moment where the country decided to confront its past. As it were, the TJRC process is beginning to present a distinct legacy on the part of the ruling elite as well as other actors that are involved in the push for the implementation of the recommendations made. The decisions made in relation to implementation or non-implementation are critical for the country because they either set the country on a path for change or continue in the path dependent locked in condition earlier set by the historical legacy.

The *"juncture is critical because once an option is selected it becomes progressively more difficult to return to the initial point when multiple alternatives were still available"* (Mahoney 2001:6-7). Mahoney further argues that these options and the choices made are typically rooted in prior events and processes (called antecedent conditions). Additionally, he argues that the decisions made at the critical juncture are more or less binding and present a `no-return´ option for that society once decided upon. At the core of critical juncture analysis is the *"rejection of a functionalist view of institutions. Historical institutionalists see institutions as enduring legacies of political struggles"* (Thelen 1999:388). In this vein, Mahoney also insists on the power of agency during these moments of critical junctures. Thelen further argues that the historical institutionalist perspective reveal different patterns of interaction between ongoing political and economic processes.

Cappocia and Kelemen on the other hand hinge their definition on agents´ choices and define critical junctures thus *"as relatively short periods of time during which there is a substantially heightened probability that agents´ choices will affect the outcome of interest"* (2007:348). Their definition suggests that the critical juncture period is short and that it is during this time that actor choices produce path dependent conditions which are binding for the future. The other crucial element of their definition is the agent whose choice(s) are based on their interests and which affect

the outcome of the political process. Worth noting is the fact that actors in the political process are also varied and have a variety of interests.

3.5   FORMAL AND INFORMAL INSTITUTIONS

As countries are instituting transitional justice programs, their core idea is to transform the institutions of governance and make them more efficient, responsive, participatory, accountable and inclusive. This is directly related to questions about decision making and politics regarding *who* gets *what*. The sources of power to make decisions are to a large degree derived from institutions. Reforms have therefore been directed at institutions and particularly the formal ones. This overemphasis on formal institutions misses the point because the informal institutions also have a phenomenal bearing on governance not only in Africa but generally. This study recognised the need to address both the formal and informal institutions in society to achieve a better understanding of governance.

Svetozar Pejovich who posits that *"institutions determine the political, economic and enforcements systems of a society"* (1999:167). Helmke and Levitsky (2005) bring in the element of how official these rules are and therefore binding by positing that formal institutions are *"rules and procedures that are created, communicated and enforced through channels which are widely accepted as official"* (2005:5). This argument refers to the legal-rational aspect of institutions and provides a basis for their enforcement.

"Informal norms are rules of a group or community that may or may not be explicitly stated and they rely on informal mechanisms of monitoring, such as approval and disapproval" (Nee & Ingram 1998:19). North further describes informal institutions as *"consisting of sanctions, taboos, customs, traditions, and codes of conduct"* (1991:97). Helmke and Levitsky (2003) argue that in informal institutions aspects of tradition and culture, personal networks, as well as clientelism, corruption and kinship, can be detected. In a subsequent publication, Helmke & Levitsky (2006) define informal institutions as *"socially shared rules, usually unwritten, that are created, communicated and enforced outside officially sanctioned channels"* (2006:5). They provide us with a typology outlining four different types of interactions between formal and informal institutions; *"complimentary, substitutive, accommodating and competing"* (2006:14). Thus the nexus in operations of formal and informal institutions is seen as producing different dynamics by different scholars.

3.5.1 AFRICA: FORMAL AND INFORMAL INSTITUTIONS

In his study of formal and informal institutions in Africa Michael Bratton (2007) specifies informal institutions as related to the patterns of patron-client relations around which power is exercised in Africa. The distinction between formal and informal institutions in Africa is vital for the understanding of society and politics. Although informal institutions lack the formal codification, they have a great bearing on political, economic and social outcomes. Bratton alludes to the operative framework for studying new democracies like Africa. In doing this, he juxtaposes the formalism versus informalism exhibited in the understanding of African politics. In doing this, he poses the question as to *"whether citizens respond primarily to the inscribed regulations of formal institutions or the unwritten codes embedded in everyday social practice"* (Bratton 2007:96).

Derick Brinkerhoff and Arthur Goldsmith (2002) argue that *"In Africa, abstract constitutions and formal institutions exist on paper, but they do not shape the conduct of individual actors, especially those in power"*. They further observe that *"in many cases, informal systems of clientelism and patrimonialism are key contributors to stifling popular participation, subverting the rule of law, fostering corruption, distorting the delivery of public services, discouraging investment and undermining economic progress"* (2002:1). It is crucial to take cognisance of this when contemplating the discourse on governance in Africa. This is because African leaders seem to *"treat constitutions and formal rules seriously only when it suits them"* (Hyden 2006:98). Hyden (2006) further describes the formal institutions in Africa as ´embryonic and weak` and often undermined by informal institutions. In this arrangement *"corruption, clientelism, and `Big Man` presidentialism tend to go together as a package. These practices are ingrained in African political life as to constitute veritable political institutions"* (Bratton 2007:98). Bratton argues that in situations where formal institutions remain weak, informalism can help to secure legalise an unstable democratic regime.

Goran Hyden (2008) posits that *"Matters are less formalized in Africa than in other regions thereby making informal institutions more important and permeating not only society but also the state"* (Hyden 2008:11). To understand and explain politics and policy outcomes in Africa, it is, therefore, necessary to undertake an analysis of the role played by informal institutions. Hyden further argues that *"informal institutions have roots in society rather than the state making it difficult to study politics independently from the economy and society"* (2008:14).

In his discussion about politics in Africa Hyden (2008) presents the salient differences between formal and informal institutions (as presented in Table 2 below). This helps in determining the nature and direction of decisions made by the political elite not only in Africa but also about processes such as the TJRC in Kenya. The distinction further helps in recognising the ambiguities existent in the decision-making processes. On the one hand, there are the formal rules such as the TJR Act No. 6 0f 2008 which is the officially recognised regulation that was supposed to guide the process until implementation. However, on the other hand, there is the silent sabotage of the process occasioned by the political elite either by omission or commission. It, therefore, presents a stark reality of decision-making within the African context. In other words, the decisions are largely unwritten, they remain ambiguous, closed and are not shared in public but only on the basis of who knows who, and so on.

Table 2: Formal and informal institutions in comparison

	Formal Institutions	**Informal Institutions**
Type of exchange	Impersonal	Face-to-face
Approach to rules	Rule of law	Rules-in-use
Character of rules	Written	Unwritten
Nature of exchange	Contractual	Non-contractual
Time schedule	Specified	Non-specified
Actor premise	Organizational goal adherence	Share expectations
Implications of agreement	Precise compliance	Ambiguous execution
Transparency	Potentially open to scrutiny	Closed and confidential
Conflict resolution	Third party body	Self-enforcement

Source: Goran Hyden (2006:84)

3.6 COLLIER AND COLLIER´S CRITICAL JUNCTURES AND HISTORICAL LEGACIES FRAMEWORK

Collier and Collier (1991) used the framework on critical junctures and historical legacies to study labour incorporation in Latin America. They studied the different forms of control and mobilisation of the labour movement among the states in Latin America in the 1960s and1970s which was characterised by various patterns of conflict and accommodation thereby producing various legacies in Argentina, Brazil, Chile, Colombia, Mexico, Peru, Uruguay and Venezuela. They apply the critical juncture analysis and focus on an era of significant change in the relationship between the state and labour movement which were confronted by different crises thereby producing distinct legacies within the political arenas of these countries. Other studies that have applied this framework (path-dependence and critical junctures) to political development include Barringtone Moore (1966); Gregory M. Luebert (1991) and James Mahoney (2001). This study was based on the core arguments of this framework which highlights the causal effects of critical junctures and argues that the unfolding legacies and outcomes are generated during the critical junctures. These junctures have permissive and productive conditions which allow institutions to reproduce themselves.

Path dependence has certain claims:

> Specific patterns of timing and sequence matter; starting from similar conditions, a wide range of social outcomes may be possible; large consequences may result from relatively ´small´ or contingent events; particular courses of action, once introduced, can be virtually impossible to reverse; and consequently, political development is often punctuated by critical moments or junctures that shape the basic contours of social life (Pierson 2000:251).

The analysis of critical junctures and their legacies in development literature helps in hypothesising the patterns of change experienced in a variety of circumstances. It contributes to *"piece together the complex interactions among the characteristics of the antecedent political system, the incorporation period itself and, the legacy of the incorporation"* (Collier and Collier 1991:21). In the figure below James Mahoney (2001), presents an array of path dependence analyses that exposes the variety in application to the study of regime change. His comprehensive presentation is based on four books: Moore´s *"Social Origins of Dictatorship and Democracy"*; Rueschmeyer,

Stephens and Stephens´ *"Capitalist development and Democracy"*; Luebbert's *"Liberalism, Fascism, and Social Democracy"*; and Collier and Collier´s *"Shaping the Political Arena`"*.

Collier and Collier present the issues that arise in the analysis of critical junctures and their relevance to different kinds of study. The issues are outlined as:

1. What is the Hypothesized Critical Juncture and How it has occured.
2. How long did it last?
3. What is the cleavage or crisis?
4. What is the Historical Legacy?
5. What is the duration of the legacy?
6. How does the legacy and the antecedent system compare? Is there continuity or change?
7. What explanations are there about constant causes versus historical causes?
8. What are the rival explanations in reference to the constant causes?
9. How do you assess partial explanations?
10. What are the other rival explanations? e.g Suppressor variables? (1991:31-39).

In order to make this kind of assessment adequate, Collier and Collier (1991) suggest that the researcher *"must devote attention to the identification of the critical juncture and the legacy, the antecedent system, the distinction between constant and historical causes, various kinds of rival explanations, and the problems of assessing critical junctures"* (1991:39).

Table 3: Select Features of Path-Dependent Explanations of Regime Change

	Moore	Rueschemeyer, Stephens, & Stephens	Luebbert	Collier and Collier	Mahoney
Antecedent Conditions	Extent of "bourgeois impulse."	The relative power of different class actors.	The extent of divisions among the middle class.	The political position of the oligarchy.	The political strength of liberals relative to conservatives.
Critical Juncture	Adoption of a coalitional ally by the bourgeois.	Formation of class alliances vis-à-vis democracy.	Liberals´ decision to ally or not with labour.	State policies for shaping and legitimating the labour movement.	Liberal policies vis-à-vis state and agrarian modernization.

Institutional Persistence	Reproduction of relative power of class actors	Reproduction of relative power of class actors.	Reproduction of working-class organizations and movements.	Reproduction of different types of labour incorporation.	Reproduction of different class and state structures.
Reactive Sequence	Class conflict and revolutionary surge toward modernization.	Demands of subordinate classes and response of dominant classes.	Demands of labour movement and response of political parties.	Response/counter-response of labour, middle sectors, an oligarchy.	Response/counter response of democratic movement elites.
Regime Outcome	Democracy, communism, or fascism.	Democracy (in varying degrees) or authoritarianism.	Liberal democracy, social democracy and fascism.	Type of party system heritage.	Military-authoritarianism, democracy, traditional dictatorship.

Source: Mahoney, J. (2001).

As presented in Table 3 above, each of the scholars studies change processes which are occasioned by varying statuses otherwise called the antecedent conditions. In this sense, the critical junctures that emerge are also dependent on the structure and dynamics at play within that particular society. The demands made by the variant circumstances receive different forms of responses and yield certain forms of change. These are in the form of regime outcomes. The figure, therefore, helps in isolating the dynamics that accompany the call for change within different societies. *"The concept of critical juncture contains three components: the claim that significant change occurred, the claim that this change took place in a distinct way and the explanatory hypothesis about its consequences"* (Collier and Collier 1991:30).

Collier and Collier (1991) provide the contribution with the building blocks of the critical juncture framework around which this research was anchored. According to the framework other elements, other than the components explained above, that were considered in this study of critical juncture involved:

a. *The antecedent conditions.* This provided a basis for which the critical juncture was studied. In the case of Kenya, it involved the political history of the country, from the colonial era to the post-colonial era. The antecedent conditions were the human rights violations, massacres, torture, and detention without trial and sexual violence, amongst others. They provided the basis for the crisis that led to the creation of the TJRC.

b. *The cleavage (or crisis).* This was about the post-election violence that took place in the country in 2007/8.

c. The three components of the legacy which include the mechanisms of production of the legacy, the mechanisms of reproduction of the legacy and the stability of the core attributes of the legacy. In *Historical Legacies of Communism in Russia and Eastern Europe* (2014) Beissinger and Kotkin define a legacy as *"a durable causal relationship between past institutions and policies on subsequent practices or beliefs, long beyond the life of the regimes, institutions and policies that gave birth to them"* (Beissinger & Kotkin 2014:7). In this case, the analysis was on state-society relations bearing in mind not only the present but also the past from where they spring. In so doing this inquiry broadly focused on the interactions between state and society.

d. *the rival explanations involving ´constant causes´*, these are other factors that can be used to explain the institutionalisation of participatory democracy in Kenya. They are intervening variables such as the foreign intervention angle to the institutionalisation of participatory democracy in Kenya.

e. *the eventual end of the legacy* which is inevitable and must come at some point in the future.

3.7   THE BARRINGTON MOORE THESIS

This study was concerned with the conditions that lead to institutionalising participatory democracy in societies. In particular, this thesis focused on whether the occurrence of the truth commission process in Kenya has led to the institutionalisation of participatory democracy. In the same vein, the conditions that give rise to democratic principles and practice in the developing world have been a major concern for academics, politicians as well as policymakers (Femia, 1972:21). In the *Social Origins of Dictatorship and Democracy,* Barrington Moore identifies the three paths to modernity; the bourgeois revolution that attains the ´*western form of democracy´*, ´*conservative revolution from*

above´ whose resultant political arrangement was fascism, and the peasants initiate the third pathway culminating in communism and exemplified by Russia and China. The first pathway was followed by England, France and the United States while the second can be attributed to the developments in Germany and Japan (Moore, 1966:413-14). Moore attempts to contrast the political events in India, which did not experience similar processes; *´no bourgeois revolution, no conservative revolution from above, no peasant revolution´*, to the capitalist and communist variants. He concludes that although India did not go through these upheavals and seems to be well on the path of development regarding industry and a working political system the *´appalling problems facing the Indian government are due to these very facts´* (1996: 314). He therefore, suggests certain conditions for democratic development to happen. These are:

a) the development of balance to avoid too strong a crown and too independent a landed aristocracy,

b) a turn toward an appropriate form of commercial agriculture,

c) the weakening of the landed aristocracy,

d) the prevention of an aristocratic-bourgeois coalition against the peasants and the workers, and,

e) a revolutionary breakaway with the past (Moore 1966:430-31).

Moore asserts that the above are prerequisites for a society moving towards a functioning democracy which to him is the desired future. Processes of democratisation should, therefore, be characterised by these five conditions for a society to attain peace and stability (Femia 1972:23). The argument here is that the inability of a regime to make serious political reforms, and by extension, to pursue truth commission processes in earnest, that takes into consideration historical injustices such as those identified in the Truth, Justice and Reconciliation Report in Kenya; land, economic, marginalization and others, eventually leads to more conflict in a society and further demands and grievances which can precipitate into additional instability. It is, therefore, possible that societies coming from similar pasts can overcome this and move towards stability if they can address the public´s demands for social, political, and human rights acknowledgement and redress.

Moore, however, cautions that while the historical conditions in a country can be attributed to the kind of change that happens in that particular country, a consideration of external factors is also necessary as contributing to change (Moore, 1966:427). His view of democracy is purely in structural terms (Femia, 1972:22). This is demonstrated when he writes that the long periods of

violence that characterised ´the Puritan Revolution, the French Revolution, and the American Civil War´ led to change seen regarding the ´modern western democracy´ (Moore, 1966:429). The rudiments of this order of life according to him are:

> …..the right to vote, representation in a legislature that makes laws and hence is more than a rubber stamp for the executive, an objective system of law that at least in theory confers no special privileges on account of birth or inherited status, security for the rights of property and the elimination of barriers inherited from the past on its use, religious toleration, freedom of speech, and the right to peaceful assembly (1966:429).

He further emphasizes that societies, after attaining this order, may from time to time falter and renege on these tenets but that does mean however that they are undemocratic because they have mechanisms that bring them back to democratic practice. Inherent in democratic political systems therefore is structures and corrective functions that remedy and self-regulate relapses from time to time. This is the role of checks and balances in a system.

3.8 CRITIQUE OF HISTORICAL INSTITUTIONALISM

According to Hall and Taylor *"historical institutionalism developed in response to the group theories of politics and structural functionalism prominent in political science during the 1960s and 1970s"* (1996:937). They defined institutions as *"the formal or informal procedures, routines, norms and conventions embedded in the organizational structure of the polity or political economy"*. They generally *"associate institutions with organizations and the rules and conventions promulgated by formal organization"* (1996:938). As a result of this four distinct weaknesses can be related to Historical Institutionalism. They *"tend to conceptualize the relationship between institutions and individual behavior in relatively broad terms"*. Further, they *"emphasize the asymmetries of power associated with the operation and development of institutions"*, as well as the over tendency to have *"a view of institutional development that emphasizes path dependence and unintended consequences"*. Finally, *"they are concerned to integrate institutional analysis with the contribution that other kinds of factors, such as ideas, can make political outcomes"* (Moore 1966: 938).

3.9   THE CONCEPTUAL FRAMEWORK FOR BUILDING PEACE BY PAUL LEDERACH

In order to respond to research questions two and three in this study, John Paul Lederach's comprehensive conceptual framework for reconciliation suggested in 1997 was applied. Lederach begins from the premise that the conflicts in some societies are deep-rooted, have generated intense animosity, fear and stereotyping (1997:23). Under these circumstances, *"rational and mechanical processes and solutions"* are not attainable and are unable to deal with the *"subjective perceptions and emotions"* that result from the protracted nature of the conflicts. He emphasizes the need for a set of concepts; truth, mercy, justice and peace, in the analysis and seeking of solutions to conflicts within divided societies. In his view, this approach is able to engage the *"relational aspects of reconciliation"* which is *"the central component of peacebuilding"* (1997:24). He opines that the conflict experienced is a manifestation of the need for a balancing of truth, mercy, justice and peace in those societies.

Building sustainable peace involves journeying with societies because of the nuanced implications the four pillars have. He goes beyond the statist diplomacy to suggest comprehensive strategies to be used by peacemakers to conflict resolution where top level, middle level as well as grassroots leaders are involved in the spectrum of the society. In doing so, Lederach takes the transformational path in conflict resolution, a framework *"that focuses on the restoration and rebuilding of relationships"* (1997:24). His focus is long term and seeks to address the deeply seated issues in conflict such as the land question in Kenya which also require a social justice approach. He therefore is critical of the quick fix solutions to protracted conflict.

Philosophically, Lederach belongs to the critical school of thought that proposes the bottom up approach which addresses the long-term and systemic issues as opposed to the coercive and manipulative approaches that seek to fix conflicts within societies (Dahl 2012:253-254). In yet another publication he sees the empowerment of people in conflict as critical for conflict resolution practitioners (Hansen 2008:414). This is done through eliciting insights from the victims and empowering them through mutual recognition thereby going beyond the neoliberal emphasis on written statements usually generated by the political elite (Dahl 2012:253-254) and which then ignore the complexities that exist in protracted conflicts. The bottom-up elective approach in conflict resolution helps the victims to gain critical consciousness and a better understanding of

power (Hansen 2008:414). This empowerment makes them define better their needs regarding truth, justice and reconciliation. According to O´Brien (2005), this, in turn, promotes participatory democracy (Cited in Hansen 2008:414). Thus, for reconciliation to happen, Lederach sets out to define these concepts of truth, justice and reconciliation in the following way and insists that they must go together for reconciliation to occur.

Truth

Lederach asserts that to arrive at the truth several things must happen. First, there must be an acknowledgement that atrocities happened followed by the validation of these painful experiences. In other words, it is one thing for victims to come forward and accuse the perpetrators of committing violations against them. However, the perpetrators must also come forward and acknowledge that they did the wrong. According to him, it is only when this has happens that the process of letting go can begin. The denial by the perpetrators, for example, thwarts the process of truth-seeking. This is because such a process does not then lead to the validation of the losses encountered and the charting of a new beginning (1997:29). Justice, therefore, represents *"acknowledgement, transparency, revelation and clarity"* (1997: 30).

Justice

The second thing that must happen is the attainment of justice. In his view underlying the search for justice is the desire to reclaim individual and group rights. This, in turn, leads to both social restructuring and restitution. In the violating, the rights of people and groups perpetrators reorder the social web in society. This leads to an unequal and unjust relationship within the society. Justice, therefore, involves the restoration of these rights hence the restructuring of relationships. At the same time, the search for justice encompasses restitution which can be loosely defined as bringing something back to order. This may involve compensation, replacement surrender, recovery, reimbursement and so on of that which was lost in the process of the injustice happening (Lederach 1997:29). In short, Lederach opines that justice represents a feeling that *"equality, right relationships, making things right and restitution"* (1997: 30) has been made.

Reconciliation

Three working assumptions undergird the conceptualisation of reconciliation: relationship, encounter and acknowledgement (Lederach 1997: 26). This represents three paradoxes (Lederach

1997:31). First of all, reconciliation is about restoring relationships. This can only happen if there is an encounter between the conflicting parties and after an acknowledgement of the past is done. By hearing the story of the other parties in conflict take the first step towards reconciliation. It, however, does not stop there. The parties have to chart a common shared future. In his view, this *"represents a place, the point of encounter where concerns about both the past and the future can meet"*. In other words, in his view, there is interplay among *"truth, justice and reconciliation"* for the securing of the future to happen. None of them can be pursued in isolation to the other if the future is to be stable. This only happens when a society encounters their past, their adversaries as well as their hopes and fears together (1997: 27). By embracing the three paradoxes explained above and offer a new and innovative way of dealing with conflict (1997: 31). This paradox links *"ideas"* and *"forces"* which are *"seemingly contradictory but in fact interdependent"* (1997: 30). This can only be made possible by engaging in an open talk about the past, having a full acknowledgement that certain human rights violations happened and together addressing what the future should be like.

3.9.1   LEDERACH´S MODEL AND THE TJRC PROCESS

The violence after the elections in Kenya, leading to the formation of the TJRC is indicative the levels of division and conflict in Kenya. This necessitates a multi-faceted approach in attempting to attain peace and democratisation. The expectation within society was that the TJR process would initiate mechanisms to deal with the past and facilitate reconciliation. Did the process innovatively *"create a time and a place"* for the citizenry to *"address, integrate, and embrace the painful past"* and chart out a *"shared future as a means of dealing with the present"* (Lederach 1997:5)? This is seen as a prerequisite to the attainment of participatory democracy. This study, therefore, set out to examine whether these hopes had been reached by applying Lederach´s conceptual framework in an attempt to answer research questions two and three.

3.10   PARTICIPATORY DEMOCRACY

In determining whether the TJRC process facilitated the institutionalisation of participatory democracy this study also had to apply and utilise the concept of participatory democracy. The conception adopted in this thesis, therefore, dates back to the 1970s with the notable works of scholars such as Carole Pateman and her *Participation and Democratic Theory* published in 1970 and Crowford Brough Macpherson who wrote *The Life and Times of Liberal Democracy* in 1977

(Aragones & Sánchez-Pagés, 2009:1). The historical antecedents of this theory can be found in the works of Rousseau, Marx, Bakunin as well as John Stuart Mill (Schaffer 1974:495). The participatory democracy conception grew out of the concern that citizens were excluded from processes of governance. According to Schaffer (1974), this only leads to the underdevelopment of individual capabilities which are crucial in the pursuit of the common good. He further argues that by collectively participating individuals become exposed to the possibility of growth given the contractual nature of the relationship they enter. This happens with the development of a *"public-spiritedness"* which is *"infused with social life"* (1974: 495). Isolation of individuals means therefore that their potentials are unrealised and underutilised in the process of developing society.

Participatory democracy later gained popularity among various institutions including NGOs and international agencies including the World Bank (Pateman 2012) and became part of development jargon. According to the World Bank (1996), the essence of participation is so that stakeholders (the poor as well as other groups that have a stake in the process and outcome) can gain influence over and *"control over"* development *"as well as decision-making"* about resources. Processes of participation, therefore, empower the poor, by first of all educating them, and make them part and parcel of decision-making. Schaffer (1974) argues that in the fullest sense participation means that the citizenry defines the problems facing them, make propositions on the way forward, discuss those propositions, plan, make and implement the decisions arrived at (1974:499). In this way, such processes gain more legitimacy, and the outcomes are sustainable. The intentions of the participatory movement were therefore in tandem with the concerns about the place of poor and marginalised in society. Participation involves the *"reorientation of civic life"* in such a way that this increases the *"opportunities to participate"* (World Bank 1996:52), and improves the equality in participation (World Bank 1996:54) so that certain groups are not disadvantaged based on their gender, ethnic, social, religious and class backgrounds. The process further improves the *"effectiveness of participation and democratic responsiveness"* (World Bank 1996:57) by the political elite thereby taking care of the citizens that were otherwise left out.

The participatory democracy conception has a politically active citizenry at its centre (Pateman 2012:7). The conception combines elements of both direct and representative democracy and enhances the citizens´ power in decision-making and constrains discretion by the political elite. By choosing to involve themselves in the process, the citizens can affect policy and determine social priorities (Aragones & Sánchez-Pagés, 2009:1). This is also determined by the extent to which the

state encourages its citizenry to play an active role in its government (Parry & Moyser 1994:46). According to Schaffer (1974), the social, political and economic behaviour of an individual is to a large extent shaped by the social, political and economic institutional arrangement present in that society (1994:497). They, therefore, determine agency on the part of members of society. The more open and facilitative they become the more it is expected that individuals will see the urgency for political, economic or social efficacy. Held (2006), sums it up by indicating that this results in the *"direct amelioration of the poor resource base"* through its redistributive features, increases accountability on the part of the political elite, fosters the creation of an open system of governance that is also accountable and enhances the opportunity for all (men and women) to participate in public life (2006:215). In other words, the model creates what Pateman (1970) calls a participatory society. The participatory society *"fosters a sense of political efficacy, nurtures a concern for collective problems and contributes to the formation of a knowledgeable citizenry capable of taking a sustained interest in the governing process"* (Held 2006:215). In institutionalising this, a society can be said to move towards practising the tenets of participatory democracy. Such a case can be identified in Brazil.

The practice of participatory democracy has been exemplified in the case of participatory budgeting as practised in Porto Alegre in Brazil (Aragones & Sánchez-Pagés, 2009:2) and where it has become a way of life, according to Gianpaolo Baiocchi (Cited in Pateman 2012:10). This means that the participatory democracy version suggests a change in procedures in combination with the form of life that citizenry live (Held 2006:215). The system in Porto Alegre is pyramidal and composed of the regional and thematic assemblies, the Fora of Delegates, and the Council of the *Orçamento Participativo*[8] (Aragones & Sánchez-Pagés, 2009:2). The composition of the three bodies is varied and ensures the incorporation of different representative voices within the society. The practice is essentially bottom-up involving the three layers which give the citizen the opportunity and the right to participate in the government of the city (Pateman 2012:10-11). The effect of this system in Porto Alegre has been that it has reduced clientelism previously practised by politicians and community leaders, reduced corruption and the rent-seeking behaviour previously practised by politicians and, witnessed a massive rise in the number of citizens engaged in the process of governance because of the increased levels of awareness. Those previously disengaged from governance processes such as the poor have in particular become more engaged, and in effect, there has been an increased redistribution of wealth and income in the city (Aragones & Sánchez-

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[8] Translated as participatory budgeting.

Pagés, 2009:3 & Pateman 2012:12) and demonstrated the feasibility of democratisation (Pateman 2012:12). The practice of participatory budgeting in Porto Alegre is, therefore, an example of a case where the components of participatory democracy have been institutionalised. This is because the place of the citizen in decision-making has been established as a right. Most importantly, it is not a process where a few people are selected (Pateman 2012:10) to lock out a certain part of the population. It is rather an all-inclusive structure and process that guarantees the recognition of the entire population.

According to Carole Pateman, the following are the salient elements which distinguish participatory democracy from other conceptions of democracy:

- The capacities, skills, and characteristics of individuals are interrelated with forms of authority structures. Individuals learn to participate by participating (the educative or developmental side of participatory democracy, the aspect most often mentioned). Thus, individuals need to interact within democratic authority structures that make participation possible.
- Participatory democratic theory is an argument about democratization. That is, the argument is about changes that will make our own social and political life more democratic, that will provide opportunities for individuals to participate in decision-making in their everyday lives as well as in the wider political system. It is about democratizing democracy.
- What I called a participatory society (in Participation and Democratic Theory) need to be created.
- The changes required are structural; they necessitate reform of undemocratic authority structures (Pateman 2012:10).

From the above, and as suggested earlier by Schaffer (1974) and Held (2006), among other scholars in this section, the education of individual members of the society is fundamental to participation and through this the individual member see the importance to participate in the collective and deems the decisions arrived at in the collective as binding. This translates to the structures as well as the space availed by the respective government as critical for the realisation of participatory democracy. It is about making participation an everyday life practice and not just a one-off event as is the case with voting, say, every five years and then waiting for the next time to vote. In other words, it is about creating a participatory society, as she argues. In her 1970 publication, she argued

that a participatory society is one which has received training and changed its attitudes and developed its psychological qualities in relation democratic practice. It is the opposite of ethnic mobilization and patronage exhibited in African countries and Kenya in particular. Through such training and attitude change, the polity can develop a common action plan with specific intentions for the development of the polity. It is against these elements that this study proceeded to analyse the data gathered to determine whether the TJR process in Kenya facilitated the institutionalisation of participatory democracy.

3.11   THE CONCEPTUAL FRAMEWORK USED IN THIS STUDY

As mentioned earlier this study is guided in the overall by historical institutionalism. In analysing the TJRC in Kenya, the research dealt with the components explained thus: it sought to confirm whether a significant change occurred in the socio-political landscape of Kenya. The study illuminates the distinctness of this change as compared to other processes. This exploration also hypothesises about the consequences of this change. Further, in adopting the work of Barrington Moore, the study illuminates the extent to which the political elite has been able to ally and frustrate the TJRC process the use of the relative power they wield. This relative power emanates from their control of the economy and other facets of the society such as the media and so on. In the end, the narrative of *"accepting and moving on"* is propagated. In the end, a process which was expected to usher in change is seen as resulting in a reversal.

This research also used other concepts to help in answering the four specific research questions outlined in chapter one. It does this to present the logic that truth-telling processes are supposed to lead to participatory democracy. The conceptual framework, therefore, forms the soul of this study, and it determines how the inquiry formulated the research questions, the methodology used in answering these questions as well as the interpretations that the research attached to the data gathered. The data collected for example include archival data as well as other secondary data produced earlier and which covers the historical aspect of the inquiry. In taking the inductive approach, the inquiry was able to arrive at a conceptual model (discussed later in this chapter) which became the lenses through which this study looks at the phenomenon of truth commission outcomes.

Through the data collected, the inquiry was able to discover and generate conclusions about what was going on around the truth-telling process and the contribution this has made to the institutionalisation of participatory democracy. This was done by examining some historical

decisions and processes related to the past regimes of Jomo Kenyatta, Daniel Moi and Mwai Kibaki. This thesis also relied on the actions and decisions made by the current regime. This, therefore, forms the worldview of this research in looking at the phenomenon of truth commissions outcomes. The study was inspired by and took a cue from the work of David Mendeloff (2004) who discusses the claims about the effects of truth-telling processes in promoting peace. In, *Truth Seeking, Truth-Telling, and Postconflict Peacebuilding*, David Mendeloff (2004) asserts that advocates of truth-telling processes justify why it is essential to account for the past. While doing so, they offer eight primary (but overlapping) outcomes of truth-telling processes as necessitating such processes. The claims are that such procedures, " *(1) encourages social healing and reconciliation, (2) promotes justice, (3) allows for the establishment of an official historical record, (4) serves a public education function, (5) aids institutional reform, (6) helps promote democracy, and (7) preempts as well as (8) deters future atrocities"* (2004:358). Mendeloff presents a general causal logic for each claim. In a follow-up to Mendeloff´s discussion, this study sought to investigate whether outcomes, such as the promotion of justice and social healing and reconciliation ultimately lead to the institutionalisation of participatory democracy.

The conceptual framework used in this study assumes that the truth process eventually leads to the institutionalisation of participatory democracy in societies. In the conceptual model, it is assumed that the lack of justice and reconciliation in societies is the very ingredient of societies that are non-participatory. In this sense, citizens do not feel part of that society and are therefore discouraged from participating fully in their civic duties. Once these discontented sections of the society feel that there is some form of justice and they also feel reconciled with the rest of the society, then the impetus for participate is their civic duties are resumed, and a participatory society is hence arrived at. In this study, Kenya is depicted at this society where historical grievances prevail upon the participation of different sections of the society who have been exposed to the marginalisation of different kinds and have either been tortured, assassinated or have their lands grabbed by the political elite. In this way, therefore, the unresolved historical grievances tend to hinder the instutionalisation of participatory democracy in the country.

The study, therefore, sought first to establish the circumstances that led to the truth-telling process. This provided a basis for retrospection as to whether after the truth-telling process the characteristics of the authoritarian past wherein marginalisation, corruption, high levels of induced poverty and so on still exist. This then helps determine whether the necessary conditions for the

prevalence of a participatory society are in place. To do this, the contribution used historical institutionalism as the meta-theory to establish so. In particular, the work of Barrington Moore which focused on land reforms inspired this contribution. It is important to note also that the land question forms a big chunk of the Kenyan historical grievances as expressed in the data gathered. As such, historical institutionalism serves as the anchor used in understanding the Kenyan process. In the logic of the conceptual framework, the attainment of justice and reconciliation follows. Here the work of John Paul Lederach was applied in first defining what justice and reconciliation are. This is because the two concepts are elusive and problematic in discussion and definition. Lederach´s comprehensive framework provided this research with the lenses to conceptualize these concepts as well as the interaction and interconnectedness that exist between and amongst them.

Finally and in compliment, the concept of participatory democracy as espoused by Carole Pateman was used to define democracy and to help in ascertaining the transformation expected in Kenya[9]. The interplay between and amongst the three conceptualizations, therefore, presents the overall picture of the model. The overall meta-theory is historical institutionalism which explains the history and how this history influences the present regarding both positive and negative outcomes of the process. This is however complemented by Lederach´s framework of reconciliation which explains what is expected regarding both justice and reconciliation and in determining whether this has happened. In the final analysis, the concept of participatory democracy is used to explain the results that come with the attainment of justice and reconciliation. At the same time, the role of history throughout the process is emphasized, and the influence it has throughout the process is explored and explained. This is done through the methodology (relying on induction and which then elicits the findings in the study) discussed in the next chapter of this study. In summary, Figure 2 below suggests that truth-telling processes lead to the attainment of justice, which then leads to reconciliation and that this then facilitates the institutionalisation of participatory democracy. The conceptual model assumes that a society in which justice has prevailed and reconciliation took place, an enabling environment for the institutionalisation of participatory democracy is created. A

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[9] Carole Pateman´s conception of a participatory society is in tandem with Chapter four of the Constitution of Kenya 2010. Pateman conceptualises a society that empowers the poor and the marginalised. This is made possible by reorienting life so that opportunities to participate are enhanced in such a way that no individual or group is disadvantaged based on the gender, ethnic, social, religious or class background. All in all, a politically active citizenry is at its center. In the same way the Bill of Rights in the Constitution of Kenya envisages a democratic state in which the recognition and the protection of human rights and fundamental freedoms of citizens are observed. This is done so that the dignity of individuals and communities is preserved. Above all, the Bill of Rights emphasises the promotion of social justice and the realisation of the potential of all human beings (Constitution of Kenya 2010). The drafters of this primary document envisaged a participatory society and by adopting it the public attested to their anticipation of this kind of a society. The adoption of the document was also a clear indication of the desire by the public to purge the historical legacy of the past.

participatory democratic society is deemed as a long-term goal for truth-telling processes. This informed the conceptual framework for the research.

Figure 2: The conceptual framework

Source: Adapted from David Mendeloff 2004.

3.12   OPERATIONALIZATION OF CONCEPTS USED IN THIS STUDY

This study applies a variety of concepts. In the following section, the concepts are outlined and explained as used.

Transitional Justice

According to the International Centre for Transitional Justice (2009), the term transitional justice refers to a *"response to systematic or widespread violations of human rights"*. This response seeks to recognise *"victims and promote possibilities for peace, reconciliation and democracy"*. It is *"justice adapted to societies transforming themselves after a period of pervasive human rights"* abuses. This study adopted the working definition that transitional justice involves the legal and non-legal mechanisms that states employ in the process of trying to deal with a negative past.

Truth Commissions

This study adopted the definition of a truth commission presented by Priscilla Hayner in her book Unspeakable Truths: confronting state terror and atrocity published in 2001. In her definition she indicates that "a truth commission focuses on the past", "investigates a pattern of abuses over a period of time, rather than a specific event", "is a temporary body, typically in operation for six months to two years, completing its work with the submission of a report" and, is "officially sanctioned, authorized or empowered by the state (and sometimes also by the armed opposition as in a peace accord)" (2001:14).

Justice

This study adopted the definition of justice by John Paul Lederach in his book titled, "*Building Peace: Sustainable Reconciliation in Divided Societies*" (1997). Lederach conceptualises justice as

being one of the four major components in the phrase, *"Truth, Mercy, Justice and Peace"* as enshrined in Psalm 85. According to him Justice which is, ***"making things right, creating equal opportunity, rectifying the wrong, and restitution"*** (1997:28).

Reconciliation

This study adopted the definition of reconciliation as presented by John Paul Lederach in his book titled, *"Building Peace: Sustainable Reconciliation in Divided Societies"* (1997). According to him, reconciliation has got to do with the building of relationships. It involves the ***"engagement of both sides of a conflict with each other as humans-in-relationship"*** (1997:28). It also means an encounters where several streams of activities are interconnected to unlock the past and avoid going back to conflict. ***"People need opportunity and space to express to and with one another the trauma of loss and their grief at that loss, and the anger that accompanies the pain and the memory of injustice experienced".***

Participatory Democracy

The thesis adopted the definition of participatory democracy as anticipated by Carole Pateman (2012). In her view participatory democracy has the following essential elements:

- the capacities, skills, and characteristics of individuals are interrelated with forms of authority structures. Individuals learn to participate by participating (the educative or developmental side of participatory democracy, the aspect most often mentioned). Thus individuals need to interact within democratic authority structures that make participation possible.
- the presence of argumentation about changes that will make our own social and political life more democratic that will provide opportunities for individuals to participate in decision-making in their everyday lives as well as in the wider political system. That is, democratising society.
- the presence of a participatory society
- where structural changes occur to necessitate the reform of undemocratic authority structures (2012:10).

CHAPTER 4. RESEARCH DESIGN AND METHODOLOGICAL CONSIDERATIONS

4.1 RESEARCH DESIGN AND METHODOLOGY

4.2 CHAPTER PREVIEW, AIM AND SCOPE

This study adopted a meta-process of investigation; the critical inquiry approach. This chapter presents an overview of the process of preparations for field study, actual data collection, its analysis and presentation. The chapter covers the instruments employed, the time duration for field work, the sampling techniques and their justifications, the size of the sample as well as the challenges experienced in data collection. Also, the chapter also gives an overview of how data was processed, analysed and interpreted in fulfilling the overarching research question.

4.2.1 THE PHASES

To embark on the research a plan detailing addressing some of the issues crucial to the attainment of good results had to be in place. It is in connection to this that the researcher found it necessary to engage in reflections before going to the field. The following was the detail which proved to be of great assistance to the entire process. The following questions about the work ahead had to be answered:

- How the data would be collected or created (this led to the decision on using semi-structured interviews (audio recordings /transcripts/verbatim recorded/summaries), Group discussions (audio recordings /transcripts/ verbatim recorded/summaries), Participant observation field notes/ Minutes of meetings, Press clippings and naturally occurring speech/conversation.

- What documentation and metadata to accompany the data (This helped to decide on the description of methodology, interview schedule(s)/topic guide,diary format, observation checklist, details of investigation and/or interviewers, communication with informants relating to confidentiality,matrices, other background information, correspondence where available, and references to publications and reports based on the study.

- Management of ethical issues (it led to deciding on confidentiality issues as well as assuring the interview participants of confidentiality. It also resulted in arriving at issues around maintaining participant anonymity. Before the beginning of the interview, the researcher stated the purpose of the research to the interview participants and indicated

what role the interview participant played in the research. A brief of how the information collected would be used also conveyed. Further, the researcher also conveyed very clearly the intent to maintain confidentiality and anonymity. This was then able to get the confidence of the interview participants to open up to the discussion. While the name, address and telephone numbers of the interview participants were taken, they were informed that this was only for purposes of the researcher´s record and that coding of all the interviews would be done to maintain anonymity. The researcher used an audio recorder that automatically coded each interview thereby making it easy in the processing of data. The interview participants were also informed in advance that they were free to withdraw from the interview if need be.

- Management of copyrights and intellectual property rights issues.
- Data storage and backing up during the research (the data was recorded using a voice recorder and then stored in the researchers computer. Additionally, data was stored on CDs and stored away and the transcripts kept under lock and key.
- Responsibility for data management

In answering these questions, the researcher arrived at a six-part research design. The first step was to define the research problem, research question and its sub-questions which then led to the decision that the study would adopt a critical inquiry approach[10]. Having identified the research site, it was then necessary to write to the National Commission for Science, Technology and Innovation in Kenya to obtain the necessary permissions which included obtaining a research clearance permit.

The second section involved the collection of data. Data collection was conducted in three major phases. The first phase was in June, July, August and September 2015. The second phase was in January and February of 2016 while the third phase was May and June of 2016. The researcher, however, had the possibilities to travel in between these periods and collected additional data. Additional data was for example collected January of 2017 as well as March and May of 2017.

The third section involved data processing and analysis and run simultaneously with the second section. This is because the researcher engaged in an iterative process of moving data collection and analysis and synthesising. In these two sections, constant comparison between new frameworks

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[10] This was also as a result of reading other literature which research on transitional justice and which to a great extent are descriptive and also do not question why such processes bring about certain outcomes. The overall research question was also informed with the apparent attitude of the political elite towards the implementation process which led the research to contemplate what the underlying reasons for this would have been.

(codes and themes) and new data was made simultaneously. The fifth section was a continuation of the iterative process where synthesis and conceptual conclusions took place. The sixth section was divided into two – the presentation of interim findings of the research as well as the writing of the final thesis. A basis for the final drafting of the thesis was thus created through this last section.

4.3   RESEARCH DESIGN

The success of any investigation involves some logic of appropriateness, whether implicit or explicit. It is the *"logical blueprint"* (Yin, 2011:75 & de Vaus 2005:9). Yin asserts that "*logic involves the links among the research questions, the data to be collected, and the strategies for analysing the data*" – so that the findings of a study are able to address the research questions formulated (Yin 2011: 76). It follows therefore that, for the findings of research to be viewed as valid, the researcher must, at the beginning have clarity of the research questions and align them to this logic. The research questions form the basis of the research design. "*The function of a research design is to ensure that the evidence obtained enables us to answer the initial research question as unambiguously as possible*" (de Vaus 2005:9). For this to happen the researcher has to, of necessity, ask the question: "*given this research question (or theory), what type of evidence is needed to answer the question (or test the theory) in a convincing way*" (de Vaus 2005:9). Yin further posits that in qualitative studies, establishing the research questions before-hand is not mandatory because they vary in design and change in the course of the study.

Although there is variety regarding the paradigms of inquiry in the social sciences, two main traditions or paradigms are cited - the quantitative and the qualitative. These are also known as the positivist and the interpretive respectively.   However, Guba and Lincoln (1994), in their classification of paradigms in the social sciences present four categories; positivism, post-positivism, critical theory and constructivism. In *The Structure of Scientific Revolutions* (1962) Thomas Kuhn challenged the idea that the development of science was based on accumulating truths and presented his thesis on scientific paradigms which advocated for revolutions leading to new thinking and development of knowledge and hence a change in paradigm. In the traditional conception of science, "*single inventions and discoveries would be added to the previous body of knowledge in the same manner as bricks are placed one on top of another in the construction of a building*" (Corbetta, 2003:9). To Kuhn therefore, a paradigm is related to a set of beliefs, procedures and practices, which inform and shape the evolution of science. Kuhn (1971) concludes that "*paradigms provide scientists not only with a map but also with some of the directions essential*

for map-making. By using a paradigm the researcher "*acquires theory, methods, and standards together, usually in an extricable mixture*" (Kuhn, 1971:109).

In their contribution to the debate on paradigms in social science research, Guba and Lincoln (1994) define a paradigm "*as a set of basic beliefs (or metaphysics) that deals with ultimates or first principles*" (1994:107). Crook and Garrett on the other hand indicate that, "*a paradigm is nothing more or less than a conceptual framework, providing a model from which spring particular coherent traditions of scientific research – such as Newtonian physics or wave optics*" (Crook and Garrat 2005:207), which in turn "*inspires and directs a given science*" (Corbetta, 2003:9). Guba and Lincoln further elaborate that "*it represents a worldview that represents, for its holder, the nature of the ´world´, the individuals place in it, and the range of possible relationships between that world and its parts, as for example, cosmologies and theologies do*" (1994:107). For the researcher, the paradigm informs him/her as to "*what is important, what is legitimate, what is reasonable*" (Sarantakos, 1993:30) regarding the study being undertaken. In their argument, the researchers´ responses to the ontological, epistemological, as well as the methodological questions are pertinent in determining their paradigmatic persuasion. In the view of Guba and Lincoln, "*any given paradigm represents simply the most informed and sophisticated view that its proponents have been able to devise, given the way they have chosen to respond to the three defining questions*" (1994:108).

The positivist tradition, elaborated by Auguste Comte sought to follow in the footsteps of the natural sciences. In his thinking, the understanding of the social world should be driven by empiricism and by extension, laws governing the social world derived from nature. On the other hand, the Kantian thinking expresses the need to understand the social world not only from observing nature but rather interpreting the human experience and making meaning of it. This tradition became known as the qualitative tradition. Snape and Spencer (2003) have argued that Kant propose the following in the qualitative tradition:

- Perception relates not only to the senses but to human interpretations of what our senses tell us,
- Our knowledge of the world is based on understanding which arises from thinking about what happens to us, not just simply from having had particular experiences,
- Knowing and knowledge transcend basic empirical enquiry,

- Distinctions exist between scientific reason and practical reason (2003:6-7).

"*Qualitative and quantitative methods involve collecting data in different ways, and the crucial question is whether the choice of method is appropriate for the theoretical and empirical questions that the researcher seeks to address*" (Devine 2002:202). Despite differences in approach, all research, therefore, aims at investigating social realities about the world and the different traditions, which keep evolving in nature and approach, are viewed as avenues used by various scholars to arrive at this social reality. Halfpenny P. (1979) has identified the differences like both qualitative and quantitative methods. In this categorisation qualitative methods are described as "*soft, flexible, subjective, political, case*" studies, speculative and grounded, while "*quantitative methods are described as hard, fixed, objective, value-free*", surveys, "*hypothesis testing and abstract*" (1979:799).

4.3.1 THE POSITIVIST PARADIGM

While this study uses the qualitative approach, it is important to distinguish it from the positivist paradigm. In so doing the researcher intends to situate methodological approach of the research. Positivism is regarded as "*the study of social reality utilizing the conceptual framework, the techniques of observation and measurement, the instruments of mathematical analysis, and the procedures of inference of the natural sciences*" (Corbetta, 2003:13). Derived from the natural science method, positivism in the social sciences sought to explain social reality in a manner that conflicted with the explanations offered by the theological tradition. In this view, "*the world exists as an objective entity, outside of the mind of the observer, and in principle, it is knowable in its entirety*" (Della Porta & Keating, 2008:23).

The positivist tradition emphasises the distance between the researcher and the phenomenon under study thereby taking the position that it is possible to study this reality without influencing it. This is as opposed to the qualitative tradition which posits that knowledge is influenced by the researcher as they form a part of the phenomenon under study. In this study, the researcher was aware of this fact and positioned the contribution from this standpoint. The researcher was therefore aware that in the positivist tradition the researcher "*aims at an explanation that is structural and context-free, allowing generalization and the discovery of universal laws of behaviour*" (Della Porta, 2003:24). In this sense studies using this approach start with a theory and then draw hypotheses which are then verified or falsified, hence the inductive approach. In induction generalisations are derived

from empirical observation, "*from the identification of regularities and recurrences in the fraction or reality that it empirically studied*" (Corbetta, 2003:15). "*These generalizations are drawn from specific observations in a large number of cases*" (Della Porta, 2003:26). The qualitative tradition, as used in this study, is explained in the section below.

4.3.2   CRITICAL INQUIRY

This study took the qualitative and embraced critical inquiry. Berg (2004) argues that through qualitative research the proper answers to questions are arrived at by examining different social settings as well as the persons who inhabit them. Through this method the researcher can understand how human beings organise themselves and their surroundings and how they make sense of these settings and their surroundings "*through symbols, rituals, social structures, social roles and so forth*" (2004:7). In adopting the qualitative approach, therefore, the researcher sought answers to the social and political settings surrounding the implementation of the TJRC process report. This was done by delving into the lives of both direct victims and non-direct victims of the historical injustice in Kenya and by seeking to unearth their relation to the process as well as their reactions to the entire process. The researcher also attempted to unearth the meanings that they continue to make the process by finding out how they have hence organised themselves in relation and reaction to the issues surrounding the TJRC process. By so doing the researcher sought to understand their construction of reality.

Although they fall under the qualitative tradition, the critical inquiry is a meta-process of investigation and holds a different position from the interpretive school. The interpretive school, for example, provides a "*thorough description of the characteristics, processes, transactions, and contexts that constitute the phenomenon being studied*" Blanche et, al, (2006:321). Critical inquiry on the other hand questions currently held values and assumptions while at the same time challenging the conventional social structures (Gray 2013:27). The approach is based on the Hegelian dialectical understanding of the world which relied on contradiction as the motor of the history of society and ideas. Marx developed this dialectic further by insisting that there was no best society in existence and there was a need to topple all conditions which created subservience (Rehbein 2010:2-3). In a similar manner, this study also sought to question the assumptions made about the TJRC process, particularly about the outcomes of the process. This was done by looking at the contradictions that exist from the time of the formation of the Commission to the reasons behind the non-implementation of the recommendations in the report.

The critical approach was further developed by the Frankfurt School associated with scholars such as Theodor Adorno, Erich Fromm, Max Horkheimer, Otto Kirchheimer as well as Jurgen Habermas and Alfred Schmidt, all of whom nuanced the thinking in a variety of ways. A study of these variations requires a fully-fledged study in itself and is not in the mandate of this study. Horkheimer for example viewed traditional theory as focused upon developing generalisations about facets of the world. He viewed the researcher as being part of what s/he is researching and that s/he is therefore caught in the historical context of the phenomenon s/he is studying (Carr 2005:470). In the case of this research, the researcher too was part of the research. This was because of the researcher´s previous experiences working on related issues of conflict transformation and peacebuilding with communities in Kenya. As such therefore the researcher could not delineate himself from the phenomenon under study. As Bailey (1996) aptly puts it, "*the object of perception has been performed by the social activity of human subjects, while the knowing subject has been performed by the objective dynamics of the social process*" (Bailey 1996:26). The result is that "*theory conforms to the ideas in the researcher's mind as opposed to the experiences*" (Carr 2005:470).

Critical inquiry "*invites both researchers and participants to discard what they term ´false consciousness´ to develop new ways of understanding as a guide to effective action, confronting unjust social systems*" thereby seeking to change the world. In this way, the approach adopts a critical stance towards the culture being explored and questions the structures and values of society (Gray 2013:27). In calling the approach ´a science after truth´, Patti Lather adduces that "*doing critical inquiry means taking into account how our lives are mediated by systems of inequality such as classism, racism, sexism and heterosexism*" (2004:205) which means that critical inquiry is premised on the belief that there does not exist a "*transhistorical, culture-free, disinterested way of knowing*" (Lather 2004:207). The theory adopts a critical epistemology, rejecting the self-evident nature of reality and acknowledging that reality can be socially constructed and distorted in a variety of ways (Carr 2005:470). The philosophical inquiry in the contribution, therefore, begins by stating the reality is socially constructed. The inquiry must, therefore, begin by interrogating the life processes under which, for example, everyday speech occurs (Berger & Luckmann 1966). Theory, therefore, is a reflection of practice and remains within the boundaries of practice (Rehbein 2010:1). Research and practice are integrated activities while at the same time practice is guided by research (Willis et al. 2007:83). The approach is about "*insight leading to praxis and emancipation*" and a rejection of "*pretensions to absolute truth*" while being critical of the self. Critical theory

encourages the researcher to avoid the entrapment into the existing philosophical mind frames which at time confines the researcher within known structures (Carr 2005:471-2).

This study sought to gain insights into the phenomenon of truth commissions and their outcomes to engaging in a reflection on the power relations existent within such processes and the meaning of this to the desired outcomes of such processes. In so doing the study recognized that the construction within the data collected are related to and subsequently inseparable from the tangible realities of the TJRC process such as the fact that no implementation had been done since the presentation of the report in May of 2014 and the fact that mentioned in the report were certain political figures in Kenya. In this sense, therefore, *"events, persons, objects"* were viewed as real entities (Lincoln & Guba, 1985:84). The *"meanings and wholeness derived from or ascribed to"* the happenings around the TJRC process by the data in this study *"to make sense of them, organize them, or reorganize a belief system"* remain a construction of the data collected in this study (1985:84). In the words of Lincoln and Guba (1985) although there might not be a single reality, the multiple constructions provided by the data in this study present some overall construction of the reality that is the outcome of the TJRC process in Kenya. Applying critical theory in this study helped to arrive at this overall construction of reality.

According to Gray (2013), critical inquiry assumes that:

- Ideas are mediated by power relations in society.
- Certain groups in society are privileged over others and exert an oppressive force on subordinate groups.
- What are presented as ´facts´ cannot be disentangled from ideology and the self-interest of dominant groups.
- Mainstream research practices are implicated, even if unconsciously, in the reproduction of the systems of class, race and gender oppression (2013:27)

Adrian N. Carr (2005) agrees with Gray by citing Raymond Guess´s book titled `*The Idea of Critical Theory*` (1981:1-2). He posits that Guess suggests three fundamental theses that buttress the Frankfurt School notion of critical theory:

- Critical theory aims at producing enlightenment and is therefore emancipatory.
- Critical theory is cognitive in content and is a form of knowledge.

- Critical theory differs from natural sciences which are objectifying as opposed to reflective (2005: 472).

Critical theorists, therefore, concentrate on the impact of power relationships in human cultures. By doing so, the paradigm explores a broad range of power relationships involving gender, race, ethnicity, religion and class. The paradigm seeks to emancipate those that are disadvantaged within these unequal power relationships (Willis et al. 2007:81). The research, therefore, took an emancipatory stance from the beginning in the hope that the findings of the study would lead to processes that empower the victims of the historical injustices experienced in Kenya.

Critical theory draws relevance from occurrences such as the post-election violence in Kenya in 2007-8 which ignited academic discussion and reflection into the "*structural or generative aspect of social reality*" in Kenya around the routes to acquire an understanding of it. Such instances can be of "*suffering, the expression of moral indignation, resistance, struggle, conflict or the like*". They present possibilities for pursuing knowledge about the "*structures or mechanisms generating social reality be rendering uncertain, questioning or problematizing the taken-for-granted background assumptions underpinning everyday social life*". This then calls for "*inquiry, clarification, transformation into a definite problem and the development of a practically meaningful solution*" (Strydom 2011:152).

4.3.2.1   CRITICAL DISCOURSE ANALYSIS

Additionally, this study used discourse analysis and in particular *Critical Discourse Analysis* (CDA) to look at the content of the language used so far in the TJR discussion in Kenya, the themes that arise and the issues being discussed in conversations or newspaper articles as well as other documents that contemplate on the TJRC process in Kenya (Gee 2014:8). By applying CDA, the starting point in the study is structuralist; that access to reality can be gained through language. In this view, it is through language that society creates representations or reality that are never more reflections of a pre-existing reality but contribute to constructing reality. Through language, we, therefore, generate and constitute the social world (Jørgensen & Phillips 2002:9).

The thesis, therefore, uses CDA to address and intervene in institutional, social and political issues, problems and controversies as opposed to the mere description of how language works (Gee 2014:9). This means that CDA is hinged on the relations in society and what reality they reveal. According to Fairclough (2013), CDA is relational, dialectical and transdisciplinary. CDA focuses

on the dialectical nature of social relations to constitute meaning and meaning-making, and this can be done across disciplines (2013:3). This study looked at the controversial character of the social relations in Kenya about the TJR process and sought to make meaning from the interactions that have transpired in the county. This was done through the analysis of texts and how they drew upon and articulated together multiple discourses on the TJR process. In this way, the contribution was able to arrive at the microanalysis of social and political practices, social and political organisations and social and political institutions to understand the relations and dialectics therein (Fairclough 2013: 7). The study focused on what is wrong with society and how this may be made right thereby taking a normative standpoint. In the view of Fairclough, CDA, therefore, involves a critique of how societies produce and perpetuate wrongs and how this is remedied or mitigated upon with the aim of identifying further possibilities for mitigation (see also, Jørgensen & Phillips 2002:2). In essence, therefore, CDA involves the analysis of power relations and inequalities and how this produces injustices (Fairclough 2013: 8).

CDA is therefore not neutral. It is rather a critical approach which aims at social change. It seeks to emancipate by taking the side of the oppressed social groups such as the rural and urban poor, the ethnically marginalised in the society. The critique aimed to uncover the unequal power relations and to better this (Fairclough 2013: 64) by suggesting a rectification to the injustices (Fairclough 2013: 77). By using CDA in this study, therefore, the choice of the research problem and the research design aimed at identifying the problem in the Kenyan process and identifying the obstacles that exist in the attainment of the desired outcomes of the TJR process (Fairclough 2013:78). In this way, the thesis provides an explanatory critique to promote a more egalitarian society and further the institutionalisation of participatory democracy (Fairclough 2013:88). The thesis unmasks and delineates the taken-for-granted issues and seeks to transform them into potential objects for discussion and criticism and, thus, open up to change (Fairclough 2013: 178). Moreover, by doing this, the contribution contributes to the public debate on the subject.

4.3.3 RATIONALE FOR CRITICAL INQUIRY IN THIS STUDY

This study sought to determine the extent to which the Truth, Justice and Reconciliation Commission in Kenya has mediated the institutionalisation of participatory democracy. The topic under discussion, therefore, called for a sophisticated and strategic approach that could elicit quality discussion and responses. Despite the emotive character and the fact that the TJRC process touches on the elite contestations about justice, it also pits whole communities as well as social classes

against one another around unresolved issues such as land distribution, marginalisation and lack of equity, which are long and outstanding.

Snape and Spencer (2003) suggest that under the above conditions call on the researcher to take on the emic perspective to unearth the meanings and frames of the communities being studied. In so doing the researcher viewed social life regarding processes as opposed to viewing it in static terms and therefore provide a holistic view of the contexts in question. In the thinking of Anselm Straus and Juliet Corbin (1990), this study used "*qualitative methods to uncover and understand what lies behind the phenomenon*" of the TJR process, about which little is known. The critical design was used to gain novel and fresh slants on issues less known in the public domain by beginning with what is already known. Further, the qualitative method gave the intricate details around the TJR process that are "*difficult to convey with quantitative methods*" (1990:19). Above all, the process "*described, analysed, and opened to scrutiny otherwise hidden agendas, power centres, and assumptions that inhibit, repress and*" (continue) "*constrain*" (Thomas 1993:2-3) the truth and reconciliation process in Kenya.

In the beginning, the participants´ perspective dominated. The researcher shared in the participants´ feelings, emotions and mood and was dependent on the responses of the participants to become aware of what is happening. The sense of "*unease, lack of well-being or malaise*" which is manifest in particular sections of the society such as the people of Wagalla in northern Kenya who are victims of the 1984 massacre and their "*reactions, responses, resistance, actions, struggles, identity formation, claims, slogans*" served to attract the researcher and spurred "*the pursuit of knowledge that could make a difference*" to the constitution of the Kenyan society (Strydom, 2011:154-5).

As such the researcher adopted a flexible strategy that took into consideration the natural contexts in which the respondents live (Willis, Jost & Nilakanta, 2007: 87). The data was then analysed with the aim of building explanations reflecting the complexities of these relationships and respecting the exceptionality of each case as well conducting a cross-county case analysis. The rationale behind this was that a discussion of the whole, as opposed to descriptions alone, would have subverted "*the researchers´ utility as a tool of knowledge*" because simply narrating the status of things was not the subject of this study (Thomas, 1993:5). In so doing, the researcher was able to capture the nuances involving the issue and arrived at a fuller understanding and explanation based on the reality that led to the anticipation of more efficient policy outcomes.

4.4   SOURCES OF DATA AND DATA COLLECTION

The heart of critical inquiry is ideological as opposed to methodological. The approach does not narrow itself to a limited number of methods. According to the approach, research is not value-free. The values of the researcher were deeply embedded in the research and inform the process (Willis et al. 2007:86). This study utilised people, organisations, texts, events and happenings, as its main data sources. The thesis used a combination of in-depth interviews, focused group discussions and observation to collect data. The research also used secondary forms of data such as documents, books, journal articles, reports as well as other official government documents, such as policy documents, to further "*uncover the hidden power relationships and bring to fore their existence and whether they disenfranchise some groups while giving excessive power and resources to others*" (Willis et. al 2007:85). This was also in line with the conceptual framework applied in this study.

In the conceptual framework the used of Historical Institutionalism, for example, relies on history which can be found in texts, peoples´ memories, other documents such as archival records, reports and other official government documents such as internal memos. These sources of data, therefore, helped in answering the research questions which mainly dealt with historical as well as current experiences. The main research question which inquired whether the TJRC process contributed to the institutionalisation of participatory democracy required the interview participants to rely on their memory and experiences to be able to address the question adequately. Through their answers, the researcher was able to relate to history as well as the current hence the central message in Historical Institutionalism that indicates the *history matters*. In relating to the current the interview participants, as well as the secondary data, were able to speak to the specific research questions which dealt with issues around experiences of justice, reconciliation and the presence of a participatory society.

The use of various sources of data also served the purpose of triangulation to increase the validity of the study. Denzin (1978) presents *"four types of triangulation: data triangulation, investigator triangulation, theory triangulation and methodological triangulation"* (1978:29). In this study, triangulation was done through interviewing both victims of historical injustices and members of the public who were not necessarily victims of the historical injustices under investigation. Triangulation was also achieved by using in-depth interviews, focused group discussions as well as observations. The use of a conceptual framework in the contribution also gave the opportunity for the researcher to analyse the data from three perspectives; historical institutionalism, the

comprehensive framework for reconciliation and the emergent of a participatory society. The researcher analysed the data with these three lenses to arrive at a clearer picture of the outcomes of the TJRC process. Also, by using different interview sites located across the country, the researcher was able to compare and contrast the similarities and differences regarding the outcomes of the TJRC process. This helped to arrive at conclusions about whether there was a consensus about the outcome or whether certain parts of the country had a different experience.

The reasons for the status quo, as presented by the various sites and sources were then also validated. The above process was adopted to create confidence in the research data. It also provided the opportunity to be able to understand the phenomenon in question from a variety of viewpoints as well as point out the exceptions within the data to get a clearer understanding for purposes of interpretation. This is according to the argument presented by Goetz and LeCompte (1984) who posited that through triangulation the research is broadened, refined and the conceptual linkages are stretched. It further provided a variety of standpoints necessary for the findings of this study as argued. Denzin (1978) argues no method can singularly solve the problem of competitive causal factors adequately. This is because each various methods reveal diverse aspects of empirical reality, multiple methods of observation must be employed (1978:28). As discussed earlier, the data collection took place in three phases. The first phase was between June-September, 2015. In this phase, initial data was collected and served to give the thesis an orientation. The second phase took place between January-April 2016, and this served to collect further data. It was also informed by the outcome of the data collected initially. A final phase of data was collected between August-October, 2016. A challenge that was faced in this process involved time. The process was time-consuming and the data sample, as indicated earlier, was considerably large. This meant that the process of analysis also took a considerable amount of time.

Primary Sources of data

The primary sources of information in this study included in-depth interviews, focused group discussions (FGDs) and participant observations. In-depth were conducted in six selected Counties in Kenya; Nairobi, Wajir, Garissa, Uasin Gishu, Kericho and Trans-Nzoia (see **Figure 1**). The FGDs were conducted in Garissa, Wajir, Nairobi and Trans-Nzoia Counties. The criteria for choosing these research sites were first of all based on the geographical distribution of counties in Kenya. The counties chosen would represent a representative cross-section of the country. In other words, the criterion was based on the best case selection basis. Further the sites were also

representative of the various human rights abuses committed in the past. According the TJRC report the human rights violations included atrocities during the colonial era, the Shifta War, Massacres, Political Assassinations, Extrajudicial killings, unlawful detentions, torture and ill-treatment, sexual violence, violence against women, violence against children, denied access to justice, injustices against minority groups and indigenous people, economic marginalization and violations of socio-economic rights, land injustices, economic crimes and grand corruption, forced displacements and the non-release of reports of inquiry. The sites were also deemed to have been the most affected by the historical injustices. For example, out of the seventeen human rights cases of abuse listed by the TJRC report, Garissa and Wajir counties experienced thirteen of them. This presented them as sites where the researcher was able to get a fuller picture of the atrocities committed and a broader response.

In order confirm this selection criterion, the researcher also discussed before embarking on the research about the interview sites with a former Commissioner of the TJRC on the selection criteria as well as other strategic decisions such as whom to be interviewed for which suggestions were made to improve on the research sample. This helped a great deal in the sense that the insightful suggestions led to the final research sample that was arrived at. It is important to note however that certain atrocities stood out more than others in some areas. For example, although Garissa and Wajir may have suffered the thirteen atrocities, the massacres that took place in the two Counties as well as economic marginalisation orchestrated against the people in the area by successive regimes stood out and seemed fresh in the minds of interview participants. In other Counties such as Kericho and Uasin Gishu, the injustices related to land and forced displacement stood out. Interviewing participants from the selected Counties were also considered as the most appropriate way of gathering data that answered the research questions.

The overall research question, as well as the specific research question, sought to interrogate the participants´ experiences with the phenomenon in question. As such the researcher found it appropriate to get these experiences qualitatively as opposed to using the quantitative method which would otherwise not provide the depth required to understand the lived experiences of the interview participants. This was also in tandem with the overall conceptual framework which in itself seeks to unearth the experiences of interview participants about their lived history, the experiences with justice, reconciliation and the actualities of a participatory society as envisaged in the conceptual framework. All in all, a total of 67 interviews were conducted.

Interviews were also conducted with officials in the major ministries such as the Ministry of Interior and Coordination of National Government and Office of the Attorney General and Department of Justice. Staff members in these key ministries have a direct link to the TJRC process, and it is under these ministries that the process lies. In particular officers from the Directorate of Peacebuilding and Conflict Management, the Directorate of National Cohesion and National Values and National Administrative Officers were interviewed. The Directorate of Peacebuilding and Conflict Management in Wajir County was also interviewed. Interviews were also conducted with officers in selected Commissions and Independent Offices of the Kenya Government created by Chapter 15 of the Constitution of Kenya or by Acts of Parliament. They included The National Cohesion and Integrated Commission, The Kenya Law Reform Commission, The Commission on Administrative Justice and The Kenya National Commission on Human Rights. Interviews were also conducted with the principal people in the Truth Justice and Reconciliation Commission Secretariat who included former Commissioners and Staff.

Apart from related government institutions and structures, additional interviews were conducted with civil society. These included the Kenya Transitional Justice Network, The International Center for Policy and Conflict, The Nairobi Peace Initiatives, Chemi Chemi Ya Ukweli, The Peace and Development Network, The Standard Newspaper, The and Nation Media Group, Members of Elders Associations such as the Kalenjin Myoot Council of Elders. Individuals teaching in institutions of higher learning such as Hekima Institute of Peace and International Relations, as constituent college The Catholic University of Eastern Africa and Maseno University were also interviewed. These institutions have worked directly with issues surrounding the TJR process and therefore have followed the process, and, as such, have informed opinions on questions that this research sought to answer. Also, members of the peace committees (community representative institutions that facilitate peace forums at various governance levels under the supervision of the Directorate of Peacebuilding and Conflict Management) in the six counties were also interviewed. Interviews were also conducted with officials in International Non-governmental Organizations such as Amnesty International. The focus was also given to victims of various injustices in the six counties as well as citizens who were not directly affected by the historical injustices.

A total of 4 FGDs were conducted in Wajir, Garissa, Nairobi and Trans-Nzoia Counties. Although the researcher was not able to conduct FGDs in all the Counties listed above, the FGDs also followed the same criteria as the one above. The FGDs brought together select elders, women and

youth from the said counties. In this way, issues of gender, age, centres of power as well as non-familiarity among participants were observed. The selection of the participants to the FGDs was made through the DPCs representatives who were requested to select people who were knowledgeable on the subject. The researcher instructed the gatekeepers to bring in participants who represented different components of the DPCs to ensure variety in the discussion. The focused groups brought together between seven and twelve participants. All in all a total of 37 participants participated in the FGDs. The researcher also participated in forums and meetings organised by the Kenya Transitional Justice Network and the Foundation for Dialogue where matters relating to the TJRC process were discussed. A total of four meetings were attended. The researcher went in as a participant and observed the process and dynamics that unfolded during these meetings. The researcher took his notes during the meetings and forums as well as collected different kinds of materials shared in the meetings and forums. The materials formed part of the data set and were used in further understanding the subject matter and in the analysis.

Secondary sources of data

Additionally, the study used reports, previous research, government reports, historical data and information, web information, memoirs, newspapers, letters and diaries as sources of secondary data from the above institutions as well as other agencies working on similar issues. The secondary sources used in this study included the following documents:

- The Report of the Commission of Inquiry into the illegal/irregular allocation of Public Land of 2004.
- The Report of the Commission of Inquiry into Post-Election Violence of 2008.
- The Report of the Independent Review Commission on the General Elections 2007.
- The Report of the Task Force on the Establishment of a Truth, Justice and Reconciliation Commission of 2003.
- The Report of the Truth, Justice and Reconciliation Commission of 2014.
- Newspaper articles from the major dailies such as The Nation, The Standard and The Star.
- Reports from organisations and institutions such as Amnesty International, member organisations of The Kenya Transitional Justice Network and Transparency International.
- Books and Journal articles.
- Internal memos from both government and non-government institutions.

4.5   DATA COLLECTION TOOLS

4.5.1   INTERVIEWS AND THE INTERVIEW GUIDE

On the most part, the contribution relied on the interview method and used semi-structured interviews as well as focused group interviewing. Interview research involves forming questions and asking them. They may be highly structured, semi-structured, or open, but are "*all interactional by nature*" (Holstein & Gubrium, 2008, 141). This study used semi-structured interviews. The researcher created an interview guide for both the in-depth interviews as well as the focused group discussions. This guide went through a rigorous testing in the first place with discussions being held together with peers on the appropriateness of the questions asked. A review of the same would then be done in readiness for the data collection. The qualitative interview sought to grasp the perspectives of the subjects´ by understanding their mental categories, their interpretations, their perceptions and feelings, and the motives underlying their actions (Corbetta, 2003:264). Michael Patton argues that the qualitative interview allows the researcher to enter into the world of the respondents, coding and decoding their terminologies and how this is a product of their lived experiences (Patton, 1990:290). In Corbetta´s view the qualitative interview ought to be a conversation that has the following characteristics:

1. It is elicited by the interviewer;
2. Interviewees are selected by a data-gathering plan;
3. A considerable number of subjects are interviewed;
4. It is guided by the interviewer;
5. It is based on a flexible, non-standardized pattern of questioning (Corberta 2003:264).

This placed the researcher in control of both the process of collecting the data as well as its analysis. It also required that the researcher be proactive and respond to the exigencies that arose within and during the data collection period. Such exigencies included, for example, the flexibility needed when interviewing different sections of the society such as official in a government Ministry or victims of the Wagalla Massacre. In interviewing the residents of Wagalla in northern Kenya, the researcher found it necessary to be aware of the marginalisation tag that the community has worn since independence. This was partly because it elicits varying dynamics when relating to people who hail from other parts of the country. Moreover, the interviewer hence had to make prior considerations on the avenues to be followed during the study. Interviews with certain Ministry Officials also demanded that the researcher be aware of the inhibitions they had in discussing issues

around the implementation or non-implementation of the TJRC report. It became necessary for the researcher to be aware of the positions they took and to employ tact during the interview process. Such tact included asking the seemingly less direct questions about the TJRC process and making a follow-up to the different nuances in the interview participants´ responses. In this way, the researcher was able to probe the participants on their comments. Of course, the discomfort during some of the interview sessions was evident.

The happening above is what in their view Charmaz and Belgrave (2012) assert that the interview method provided an open-ended environment and the possibilities for a detailed exploration of the interviewees rich experiences with the TJR process. This in turn brought into light considerable insight. Interviews also provide flexibility and control (2012:348). They argue that, in this kind of study, the researcher is more in control of the process than he/she does in other methods and hence more control over the collection and analysis of data. The interviews in this study had four key features as argued in the publication of Legard, Keegan and Ward (2003):

1. They combined structure with flexibility.
2. They were interactive.
3. The researcher used a range of probes and other techniques to achieve the depth of answer regarding penetration, exploration and explanation (2003:141-142).

They conclude by arguing that *"the emphasis on depth, nuance and the interviewee´s language as a way of understanding meaning implies that interview data needs to be captured in its natural form"* (Legard, Keegan & Ward 2003: 141-142). The researcher was therefore aware of this role throughout the process of data collection. In some instances, the interviewees were either willing to give information or unwilling to. In other cases such as when interviewing former Commissioners with the TJRC, the researcher noticed that they sought to defend the outcome of the process in as far as the drafting and presentation of the report were concerned. The researcher, therefore, had to use probing techniques to elicit extensive discussion. A different scenario was experienced when interviewing officers in various government offices, as described previously, who on their part sought to defend the fact that implementation of the recommendations made in the TJRC report had stalled. In these instances, the researcher had to apply various techniques such as letting them speak as the third person before opening up.

4.5.2 FOCUSED GROUP DISCUSSIONS AND THE FOCUSED GROUP DISCUSSION GUIDE

The focused group discussions were conducted in Garissa, Wajir, Nairobi and Trans-Nzoia Counties. They were made of between seven and twelve people, who were enough to encompass various viewpoints and yet small enough to allow participation. They were conducted by participants´ common experiences. As such, they were conducted in the different respective Counties. The participants were selected by their participation in the District Peace Committees (DPC) which comprise of representatives from the communities across the country that are charged with facilitating peace forums at different governance levels in Kenya. The DPCs promote peace education, enhance conflict early warning and response and promote harmonious relationships within the country. They were therefore well placed given their involvement in peace education and enhancement in the country. The researcher led *"the discussion in such a way as to reveal the subjects´ different interpretations, emotional reactions and critical judgements"* (Corbetta, 2003:276; May 1997:113). The study insisted on conducting interaction among members of a group, having similar experiences, to yield deeper discussion around the subject of the TJRC (see also Wilkinson 2008, 177). To prepare for the focused group discussions, the researcher had to conduct an extensive analysis of the topic under study beforehand, as further recommended by Corbetta.

Finch and Lewis (2003) provide the key features of a focus group thus:

1. The interview is done in the context of a group and not a collection of individuals each of them acting on their own. It is therefore not a collection of individual interviews with comments directed solely by the researcher.
2. It is spontaneous and arises from the groups´ social context where the researcher is more in a position of listening (2003:171-172).

They further point out on the need for the researcher to take cognisance of group processes of forming, storming, norming, performing and adjourning, in order to facilitate the group as the researcher goes through the different stages in a focused group of setting the scene, individual introductions, opening the topic, discussion and ending the debate (Finch & Lewis 2003:174-180). It was evident in the different focused panel discussions that these processes were prevalent. For example, during the focused group discussion held in Garissa County on 18th of May 2016, processes of forming and norming were evident to the researcher. In response, the researcher had to

give time before the discussion picked up. Wilkinson (2008) on the other hand points out to the flexibility in focus group research which can range from the nature of the group being met to the number and frequency of meetings (Wilkinson 2008:178).

4.5.3 FIELD NOTES

The researcher wrote notes during the interviews as well as immediately after. The notes taken were reflections by the researcher regarding the reactions of the interview participants, the date and time of the interview, the specific words, gestures and illustrations that were made by the interview participants about the subject of the TJRC. In some cases, the interview participants used powerful metaphors which were laden in meaning. The researcher took note of this and through the processes of abduction, induction and deduction, sought to make meaning from them. An example of the metaphors used included the reference to the justice component in the TJRC as "*the animal in this thing*" being the "*J*" by an official in one of the key ministries who was interviewed. Similarly, a former Commissioner also referred to the justice component in the following manner. "*The problem with the Kenyan process is justice and our perceptions of justice*". All in all, the researcher took note of the general impressions that came from the interview participants regarding different social and political dynamics in the country and specific Counties. In summary, the researcher jotted brief words or phrases from the field, tried to make descriptions of the encounters during the interview processes, related the reactions to the questions asked and made temporary links in the responses given by the interview participants. The exercise also involved making links from one interviewee to another as well as one county to another about the responses and reactions given in the process of the data collection exercise. These provided the researcher with the opportunity to begin reflecting on the possible outcomes of the research. Further, the creation of field notes also led the researcher to ask further questions regarding the topic of study. For example, apart from the outcome of the process, the researcher was able to reflect on the conceptualisation of justice in the different Counties which seemingly depended on the community to community. This seemed also to be shaped by the type of injustice that was dominant in different parts of the country. This was then noted down as a point for future research. The field notes served as an essential ingredient in the analysis of data for this research. The researcher, in conducting analysis, revisited these notes from time to time.

4.6   DATA SAMPLING

Sampling involves picking out, from a set of units that constitute the society under study. The researcher chooses a limited number of cases according to defined criteria that enables the results obtained to be extrapolated to the whole population (Corbetta, 2003:211). According to Corbetta, sampling offers advantages regarding; the cost of data collection, the time required for collecting and processing of data, organisation and the expenses accruing from it, and allows for depth and accuracy (2003: 211). As discussed earlier the researcher identified elders, women, youth, government officials, former staff and commissioners of the TJRC, victims of historical injustices, members of parliament, individuals from institutions of higher learning, media personnel and civil society organisations as samples for this study.

Assumptions of research sample

The purposive, as well as snowball sampling in this study, was based on the following key assumptions:

- That they were representative of the research population and are competent to respond to the research questions.
- That the sampling was adequate and would then lead to saturation and replication because the data covered all aspects of the TJRC process.
- That the sample represented both genders to give a balanced record of the findings.
- That the sample provided a basis for triangulation regarding regions, gender, categories and the injustices committed in the past.
- That the sample contained variety, for example, civil society organizations, government officials, victims and non-victims of historical injustices and so forth so that the data obtained was representative of the variety.

Purposive sampling

A total of 67 interview participants were targeted. Different sampling techniques are used by researchers to accomplish various kinds of studies. In purposive sampling, a selection of those to be interviewed is made according to a known characteristic. It is used when the strategy is fit for the purpose (May 1997:88). Purposive sampling of participants from Garissa, Kericho, Nairobi, Trans-Nzoia, Uasin Gishu and Wajir Counties in Kenya (see **Figure 1**), deemed as the epicentres of the

historical injustices, was done. The sampling targeted particularly elderly people and opinion leaders who have sound knowledge of the history and surrounding terrain. The interview participants were mostly derived from the existing District Peace Committees (DPC). The DPC is a community-driven community management driven structure that brings together state and non-state actors in Kenya. The DPCs have been instrumental in the management of conflict in Kenya. They use both modern and traditional peacebuilding mechanisms to prevent, manage and transform conflict across Kenya. The researcher had the privilege of previously working around these issues and in these regions. He, therefore, used his previously established networks. It was therefore easy to conduct purposive sampling given that knowledge about who would provide relevant information on the subject was already known. This also served to save time. The respondents were accessed through Non-governmental organisations working in the areas as well as the existing County government networks. Identification was also made through the leadership of the current peace committees established in the country. Using the same networks the researcher was also able to target officers in ministries purposively.

Snowball sampling[11]

The researcher also used the basic snowball (sometimes refered to as chain-referral, referral or chain) sampling. This is because in the process of the research the researcher through the conversations with the interviewees realised the need to interview certain participants whom he had not anticipated in the planning. Further, certain participants, such as certain government officials, were difficult to access initially. According to Biernacki & Waldorf (1981) sensitivities surrounding the topic under research necessitated referrals from amongst individuals who had knowledge of possible interviewees that would have been of importance to the research (1981:141). The method was also advantageous *"in reaching populations such"* as *"the elite"* (Atkinson & Flint, 2004:2) most of whom were initially uncomfortable opening up to a person they did not know on such as sensitive subject. This research noted that the political elite were *"hidden"* from (avoided) discussing this subject openly as a matter of choice. From the standpoint of this contribution *"they are not excluded by hegemonic forces, but, being part of the hegemony, exclude themselves"* from discussing this subject in public (Noy, 2008:331).

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[11] This research recognised the varied uses of this term and the different results that this may yield. However for purposes of this contribution a generic use of the term was applied. This generic usage does not have a variant of other usages and as such avoids the tension that goes with every usage.

The researcher therefore relied on personal recommendations made by individuals who knew them personally. They, therefore, acted as gatekeepers. This was especially so because of the sensitive nature of the subject under investigation and the need for participants to have confidence in the researcher. The researcher, for example, observed that reaching out to officials in the provincial administration or those working in the various ministries was particularly challenging. However when introductions were done by people who they were familiar with they opened up to a great extent. To this end, the researcher wishes to point out that it was challenging to reach out to members of parliament and particularly those who happened to be members of the Legal Affairs Committee. This was probably because the implementation of the recommendations of the TJRC reports squarely lied on their desk, and the general public has pointed the finger at their lack of priority when it comes to tabling the issue in parliament. Some of the members even gave the researcher bouncing appointments. One particular member of parliament in the said committee kept the researcher waiting and did not turn up for three consecutive appointments. This denotes the importance of snowballing.

4.7   DATA PROCESSING AND ANALYSIS

By adopting critical inquiry methods in the processing and analysis of data, the researcher begins by formulating a research question and decides what kinds of data would speak in interesting and meaningful ways. Smith (1993) emphasises that the process aims to make a "*critique or make transparent the false consciousness and ideological distortion*" of reality. In this way, interpreting data from a critical view requires "*a thoughtful analysis and reflection*" and "*going beyond knowing something*" (86-7). The process, therefore, requires innovation since the researcher develops knowledge of reality through distinct yet interrelated modes of inference – namely "*abduction, induction and deduction*" (Strydom 2011:148). This research involved drawing an inference in all stages of the project. This meant that the researcher was actively engaged from the conception of the project to the analysis of the data and the final writing. The researcher was therefore involved in actual observation of daily conversations, reading emerging secondary data relating to the project as well as gathering the primary data. The researcher read reports, newspaper articles as well as other material related to the TJRC process in Kenya. In addition the researcher also listened to daily conversations within the political sphere as well as other areas to draw confluence from all this data.

At the same time, the researcher engaged a process of deducing information from the above with a view to arrive at the best way to capture the data needed for this study. This process was

simultaneous and involved the back and forth oscillation from ideation to reflecting on the agency. Further, from the material at hand, the researcher engaged in thinking through the particular incidences in the process of the research and making generalisations around them. For example, while interviewing a participant in Wajir the participant presented the situation using the analogy of placing the implementation of the TJRC report in the hands of those who do not care about the process and instead would be interested in killing it by saying "*how can you place a hyena to look after a flock of sheep*". This was indicative that in general the political elite was not interested in taking the process to its logical conclusion but would rather kill it. Subsequently, the researcher came across other statements and literature that had information's that were similar to arrive at some tentative conclusions. Indeed some statements corroborated the *"hyena"* statement and which led the researcher to make tentative conclusions. Similarly, the researcher engaged in a reproduction of the same assumptions that may have resulted in these tentative conclusions to make certain verifications. This led to the abduction, induction and deduction process.

4.7.1 DATA PROCESSING

The process of data analysis was preceded by processing the data. The researcher did the transcription after each interview. This helped in saving time. This was followed by sorting and cleaning of the data and ensuring that the transcripts were in tandem with the audios. After the transcription of the data, the researcher sorted them out and placed them into folders arranged according to counties, and transcript codes. Further, the transcripts were also saved in CDs and put in safe custody. The organising into counties etc. helped in the actual process of analysis. The analysis was approached on objective by objective basis. The researcher also engaged in memoing – thinking through the data analysis processes and reflecting the process of coding regarding what the possible codes would be developed through simultaneous (descriptive and pattern) coding.

4.7.2 DATA ANALYSIS

Data analysis in this study is structured in the following way and draws on the conceptual framework applied in the study. In the conceptual framework, inspiration is drawn from historical institutionalism to provide the foundational understanding for a change. By "placing in time" the drivers of political behaviour, their influence on policies and political outcomes, the actors involved and the implications this has on the institutionalisation of participatory democracy this inspiration from historical institutionalism seeks to answer the why question in this research. For example, it answers the question why did Kenya need to put in place a truth process as well as why did the

process take a particular trajectory or trajectories as evidenced in the data. Transitional justice mechanisms are intended at bringing about change in societies. On the other hand, historical institutionalism provides the thesis with the overall framework for understanding in the first place why this change was at all needed. Second, it also explains why they change happened? Alternatively, why it did not occur as was the case in the Kenyan context. Therefore, while it is only the first research question that explicitly relates overtly to historical institutionalism, it must be noted that in the contribution, historical institutionalism is embedded in the entire data analysis, all in all, help in answering the why question in this study.

At the same time, this study has got the how component. This is answered by the comprehensive framework for reconciliation. After explaining why the study continues to indicate how this happened or did not occur. The recommendations of the TJRC report were obvious on the way forward. The report was structured such that it provided, in summary, the theme/subject, the recommendations, the responsibility for implementation and the timelines. In this way, it provided a clear way forward. In her wisdom, the TJRC even went further to propose a body that would take over from it and envisaged a proposed bill which was to be discussed in parliament and then passed into law. The comprehensive framework for reconciliation especially deals with the second and third research questions which address the issues of justice and reconciliation and whether the TJRC process contributed to their attainment. The designing of these two research questions is therefore inspired by Paul Lederach´s comprehensive framework. In this way, the reader might tend to ask the question; is this framework the mainstay of this study? The answer to this question is that it provides inspiration for the study and is as well embedded in the entire data analysis and therefore contributes further to the explanations that historical institutionalism provides. In this way, it tends, therefore, to complement the understanding given by the historical institutionalism frame and provides a deeper understanding of how exactly did or was this change expected to happen. In this case, it was expected to facilitate justice and reconciliation in Kenya.

The political economy of Paul Lederach´s work encourages a bottom-up approach to peacebuilding and calls for the questioning of statist models of peacebuilding. In a way, he, therefore, requested the questioning of models that oppress the very people that peacebuilding is expected to empower. In this way, this model fits well with critical theory-which methodologically underpins the approach in this study. Hansen (2008) suggests that critical conflict resolution demands that peacebuilding address and ameliorates societal oppression. Further, he posits that "*oppression and social injustice*

are considered multitiered, nested conflicts, simultaneously existing at the individual, community and societal levels" (2008:414). Similarly, Carole Pateman´s concept (explained below) of a participatory society also calls for the same empowerment of particularly the marginalised and the have-nots in society so that they become uplifted to first feel a part of society before participating in development. Both Lederach and Pateman subscribe to an elective approach to conflict resolution which seeks to empower and build the local. They also fit well with historical institutionalism which explains the change in society by looking at actors and their preferences at different times in the society and how these shape the trajectories that societies take.

What change was expected from the TJRC process? Inspiration was provided by Carol Pateman´s concept of participatory democracy. The settling of the historical grievances, it is anticipated, would set in motion the correct atmosphere for the institutionalisation of participatory democracy. While historical institutionalism in this study explains the *why* on the other hand, the concept of participatory democracy delves into the change that is expected to the end which is the *what* in this study. Once those aggrieved in society feel a part of that same society, this then provides the impetus for them to participate in society. Hence a participatory society is attained. This component in the conceptual framework then sought to answer the fourth research question which dealt mostly with the what question. In the data analysis, this study, therefore, contemplates this but also takes into account the three first research questions which are answered by both historical institutionalism and the comprehensive framework for reconciliation. However, reflections on this issue begin as early in the first research question and remain embedded in all the four research questions.

In summary, the analytical framework in this study took into account the conceptual framework applied in the research and each of the components of the framework remained embedded in the entire analysis to provide a framework for understanding and interpreting truth commission impact. The analytical framework, therefore, can be used in the interrogation of truth commission impact. It is with this in mind that the researcher structured and conducted the data analysis in this study. Diagrammatically the analytical framework used in this study can be explained in **Figure 2** below.

Figure 3: Truth Commission outcome: An analytical framework

Source: Author (2017)

After processing the data, the researcher went ahead and started the analysis by coding the data. Both processes were done throughout the different phases of fieldwork. This is because the researcher regarded the process of analysis as a *"cyclical act"* which required several coding attempts to further *"manage"*, *"filter"*, *"highlight"* and *"focus the salient features"* of the data. This then leads to a better development of the *"categories"*, *"themes"* and *"concepts"*, *"grasping of meaning"* and making generalisations (Saldana 2015: 9). In developing the memos, the researcher was keen to make observations during fieldwork about the participants´ feelings about the subject, the interactions with participants and their general reactions to the topic in question. One salient observation, for example, was that in most cases government officers found the subject uncomfortable to discuss. This could have been due to the sensitive nature of it and the apparent reasons for non-implementation of the TJRC report. On the other hand, the victims of various injustices in Wajir, Trans-Nzoia and Nairobi were emotional and pointed fingers at the political elite. Such observations became important in deducing the important given the implementation of the recommendations in the report by the victims. Interviews were recorded and later transcribed. Transcription was also done within a few days of the interviews to avoid a backlog. It is from here that the processes of coding began.

"Qualitative data analysis is essentially about detection, and the tasks of defining, categorizing, theorizing, explaining, exploring and mapping are fundamental to the analyst´s role". This allows the researcher to perform certain functions such as *"defining the concepts"*, *"mapping the range, nature and dynamics of the phenomena"*, *"creating typologies"*, *"finding associations"* and *"seeking explanations"* and *"developing new ideas, theories or strategies"* (Ritchie and Spencer, 2002:309). This begins with the *"heuristic"* coding of data leading to meaning-making (Saldana 2015:9). According to Saldana (2015) *"code is qualitative inquiry is most often a word or short phrase that symbolically assigns a summative, salient, essence-capturing and evocative attribute for a portion of language-based or visual data"* (2015:4). This was done through reading through the data at least three times before putting pen on paper. Saldana continues to assert that coding is cyclical. This meant that the researcher had to move back and forth in the data to arrive at codes that appropriately described the conversations in the transcripts. For example, codes such as no justice were developed first represent the salience, essence capturing as well as the attributes of identified in the data and later refined.

The researcher then went ahead to develop categories, and themes from the codes developed. When *"codes are clustered together according to similarity and regularity (a pattern)"* they *"actively facilitate the development of categories and analysis of their connections"* (Saldana 2013: 8). *"Patterns demonstrate habits, salience and importance in people´s daily lives"* (Saldana 2015:6). Through this the researcher was able to detect what is salient and therefore important is the discussion and thinking of the research participants about the TJRC discourse in Kenya. The researcher was in this process looking for *"routines, rituals, rules, roles and relationships"* suggested in the data to *"solidify the observations"* he made into *"concrete instances of meaning"* (Saldana 2015: 6).
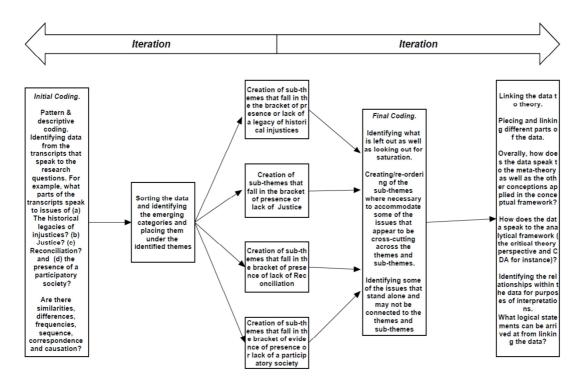
The researcher applied simultaneous coding. In simultaneous coding both descriptive and pattern codes are used. Pattern coding involves looking for similarities, differences, frequencies, sequence, correspondence and causation in data (Hatch 2002:155) while descriptive coding involves provides a summary of the piece of data. This was then followed by the determination of patterns, categories and finally the emerging themes.

The coding process (as visualised in **Figure 4**) was first and foremost iterative and involved moving back and forth through the data as well as the themes and sub-themes created in order to make sense from the whole process. This first step in this process was the opening of four files in the computer

in word format. Each of these files was then labeled according to the research questions in the study. These files were were named, historical legacies, justice, reconciliation and participatory society. An additional word file was also created and named cross cutting issues. It is in these files that the portions of the data from the transcripts were pasted and the sub-themes emerging identified. Initially the data was sorted using descriptive and pattern coding. Through this process sections of the data that spoke to the research questions were identified. The research questions also guided the identification of the four major themes in the data. From this, certain emerging categories were identified and named as the sub-themes. In the final coding data from the five files was brought together and compared for purposes of finding similarities and differences as well as the connections (apparent and hidden) that emerged. At the same time this process was on the constant look for saturation (indicating that there were no further sub-themes, categories as well as any other emergent revelations from the data). The final part of the process involved linking this data to theory. At this point it became necessary to refer back to the conceptual framework as well as the framework for analysis applied in this research. This helped in the interpretation of the data found in this study.

The above process took account of the data from the interviews, focused group discussions, observations made during field work and noted in the field notes and secondary data used in this research. The coding process therefore involved moving back and forth across this set of data and using each source to triangulate the interpretations that were finally arrived at and presented in the findings of this research.

Figure 4: The Coding Process

Source: Author 2017

4.8   THE CHALLENGES ENCOUNTERED

Given the sensitive nature of this study as well as logistical issues, some challenges were experienced in the course of the research. First, the research involved working with communities that have been previously affected by injustices in the country. This meant that some of the participants had psychological and physical effects arising from these injustices. Participants from Wajir and Trans-Nzoia, for example, had suffered in the infamous massacre and the displacement in the subsequent ethnic/election violence episodes that the country had faced. The researcher had to exercise extreme care in the handling of the participants as well as work through local point persons who understand their people and know when and how to ask certain questions. Second, and most critical, was that the thesis elicited negative support from the political elite. This is because the nature of the research suggested that it challenges the status quo. The lack of implementation of the recommendations made by the TJRC has been squarely in the hands of the political elite, and yet this is what the research sought to interrogate. The researcher here developed brevity as well as maintained professional ethics to avoid labelling of the thesis.

This led to the third challenge which was associated with accessing both the communities as participants and government officials for purposes of interviewing, given the nature of the study. In this regard, the researcher used previous networks within civil society and government who acted as link-people to the targeted places and people. This made it easy, for example, to access government officials who would have otherwise been shy to engage in discussions relating to the implementation of the TJRC recommendations. On the other hand, other participants in the various regions such as Uasin Gishu, Trans-Nzoia and Kericho would have found it difficult to engage in the similar discussion given the political atmosphere in the country. Coming from the experience with the International Criminal Court process, which had stopped, discussions around a subject closely connected to the issues that surrounded the ICC cases in Kenya proved difficult. However, it was imperative for the researcher to state the objectives of the study and maintain the ethical requirements of research to assure the interview participants of anonymity as well as indicate that the purpose of the research was purely academic.

The researcher had to make clear his position regarding the unresolved grievances, in all the research sites, and particularly when the researcher encountered the victims of various injustices, there was a sense of apathy. The victims had suffered long as well as lost hope that their grievances would ever be addressed. In fact, in all the instances victims intimated that they were convinced that there was not going to be any positive outcome from the TJRC process. To this end, they saw the researcher as holding the key to the solution of their predicament. They, therefore, sought his intervention on the matter by saying for example "*ukikutana na hao walio juu huko tafadhali waambie kuwa tumeumia kwa muda mrefu na tafadhali watukumbuke*" [when you go and meet with those people at the top kindly inform them that we have suffered for too long and requested them to remember us] (LS_30061 – interview conducted on 2/9/2015 in Wajir County). To this, the researcher responded by indicating that findings of the research would be available to all, including policymakers, and that it was entirely dependent on the legislature and executive to process it.

Regarding logistics, the researcher had to traverse the country, given the locations where the study was situated and the nature of infrastructure. Accessing some regions in the country is particularly challenging because of the lack of/or dilapidated infrastructure. This fourth challenge forced the researcher, in some instances to access cheap air transport to places such as Wajir and Garissa Counties. It also meant hiring of four-wheeled vehicles, which are commonly used by other researchers, NGO workers and government agencies in the regions, to move in the areas. The use of

gatekeepers to introduce the researcher to interview participants helped mitigate the fifth challenge of insecurity in such regions as Garissa and Wajir which had recently been experiencing incidents of terrorism.

4.9   QUALITY CRITERIA

Arguments concerning the quality criteria of the research product depend largely on the design adopted by the researcher. They mainly fall along the quantitative/qualitative divide. In the quantitative school of thought, social scientists judge along with the lines of *"internal validity, external validity, reliability and objectivity"* while qualitative researchers argue along the *"credibility, transferability, dependability and confirmability"* axis. Quantitative researchers aim at generalising findings to diverse populations while qualitative researchers give the issues of generalisation a low priority and view this as unimportant to their goal in researching (Schofield, 2002:172-3).

In their shared framework of quality criteria, Poortman and Schildkamp (2012) suggest certain standards and procedures for ensuring quality in both quantitative and qualitative research. According to them, the first criterion is that the research should achieve *"controllability"* which means that the research should be written and made publicly available. This is closely connected to the detail in the report so that *"the findings can further be examined and replicated"*. Additionally, *"the problem statement, theoretical framework, data collection methods, analysis strategy and related conclusions should be clear"* (2012:1732). This study stated the problem statement, explained the conceptual framework and elaborated on the methods used in data collection as well as the analysis strategy leading to the conclusions made. The research further achieved this by the *"use of objective data"*, interpreted *"data in logical and unprejudiced manner"* as well as provided *"thick description"*. The study went ahead to retain the data for further reanalysis (2012:1733).

The second criteria they present relates to *"reliability"*, that is, *"consistency of the results over time, independent of the researcher"* (Poortman and Schildkamp 2012:1733). This study started out by outlining a *"clear study design that was congruent with the research questions"*, *"made use of audio recordings to avoid influence on the behaviour of interview participants"*. Inspired by Poortman and Schildkamp (2012) the research also *"used multiple sources of data"*. Further, the researcher attended conferences and PhD courses where presentations of the research process and the outcomes were *"peer-reviewed"* from time to time (2012:1733). The third criteria are the

"construct validity" which alludes to the use of *"appropriate operational measures for theoretical concepts being researched"*. This study responded to this issue by explicating the theoretical model underlying the constructs employed in the study. Further, the study also used triangulation by using *"multiple sources of data across time, space and persons"*. The contribution also used interviews, focused group discussions and observation methods of data collection thereby triangulating the data. The researcher further *"retained the raw data"* and *"transcribed interview tapes verbally"* (2012: 1734).

The fourth criteria according to Poortman and Schildkamp (2012) are maintaining *"internal validity"*, that is *"establishment of cause-and-effect relationships"*. In this regard, the researcher *"piloted the interview guides"* by conducting initial interviews in Nairobi before revising the guides. This was also done by sharing the interview guide with peers. This helped in *"establishing phenomena in a credible way"* while *"highlighting the major patterns of similarities and differences between"* interviewee´s *"experiences and beliefs"*. The researcher also ensured there was *"systematization"* in approach to the research, constant *"comparison"*, provided *"thick description"* of the data, engaged in frequent *"peer debriefing and persistent observation"* of the phenomenon (2012:1734). The fifth criterion is achieving *"external validity"* that is, *"the extrapolation of particular research findings beyond the immediate form of inquiry to the general"*. This has been made by generalising particular findings to broader theory. The research compared an initially identified conceptually framework to the empirical results. The conceptual framework used in this study assumed that the delivery of justice and attainment of reconciliation should set in motion the emergence of a participatory society where individuals and communities feel they are a part of society and therefore are compelled, as a result of this feeling to participate in matters of governance. The contribution further provided a thick description of *"time, place, context and culture"* and further described a description of the sampling strategies used and their constraints. The research further provided replication logic (2012:1735). In engaging in the procedures outlined above to respond to the quality criteria in the framework of Poortman and Schildkamp (2012), this research claims quality.

4.10   ETHICAL CONSIDERATIONS

This research did not offer direct benefits to its participants. In this case, therefore, the risks to participants were be minimised at all costs. In this research, for instance, it was possible that comments against the political regime(s) were made given the topic under study and the dynamics

surrounding it. This meant that a breach of an interviewee's confidentiality or anonymity can lead to harassment or imprisonment or violence. On another note, the interviews could have resulted in traumatic individual or collective experiences such as sexual abuse or the massive destruction of their properties and loss of lives as was experienced in Wagalla Massacre of ethnic Somalis by Kenya security forces in 1984, the ethnic clashes in 1991 and 1997, as well as the post-election violence of 2007/8. This research therefore recognized that the disclosure of interview data can have negative professional or social consequences (Mosley 2013, 15). This inquiry therefore maintained the following; it sought the *informed consent from the interview participants, protected their confidentiality and gave the interview participants a chance to assess the risk of being interviewed before the interviews.* This was done through prior contact and stating the intentions of the research through the contact people identified by the researcher. People took their time to explain to the would-be interview participants the nature of the research and the intentions of the thesis.

In other cases, the researcher had several conversations with would-be participants as well as their contact people. This was done through letters and phone calls. Marzano (2012) aptly points out to the dilemmas in social life which make it difficult to arrive at what values are more important than others thereby lacking a one-fit-all magic formula (2012:453). In this sense, therefore, ethical considerations cannot be standardised. While this study adhered to ethical considerations in research, the researcher was alive to these nuances in research processes. At the basic level, however, this research performed the following minimum procedural requirements in research:

1. The researcher wrote to or telephoned the participants in advance informing them of the intended study and requesting their participation in the research.
2. The researcher presented a description of the study to the Ethics Committee of the Ministry of Education, Science and Technology requesting approval to conduct the research.
3. The researcher maintained anonymity and confidentiality about the disclosures by the participants.
4. The researcher used the material obtained from the research only for purposes of the intended study.
5. The researcher treated the participants with the utmost respect for the cultural, social and other diversities.

4.10.1   THE RESEARCHERS´ ROLE

While engaging in this particular study, the researcher was aware of certain ethical and personal issues such as biases, values and personal background that may have influenced the outcome of the research. The researcher was, for example, aware that their involvement in issues around social justice, peacebuilding and conflict management in Kenya might influence the orientation of the study. The researcher had for example worked previously with various institutions involved in issues of transitional justice. The researcher had also previously worked with various individuals in the key ministries as well as other institutions that took part in the data collection process. Further, the researcher was also fully aware of the sensitivity of the research topic and the possibility of exposing the respondents.

To deal with the above, the researcher chose to stick to the ethical requirements of research as discussed earlier. Subsequently, the researcher also subjected the process of this contribution to peer review within his department as well as with other peers. This was to ensure that issues of bias are raised well beforehand and addressed. All in all, the researcher sought to maintain objectivity during the research. The process of data analysis also took into consideration issues on reflexivity to address the same problems and to be clear about the researchers´ position.

CHAPTER 5. ANTECEDENTS TO THE TRUTH, JUSTICE AND RECONCILIATION PROCESS

5.1 CHAPTER PREVIEW, AIM AND SCOPE

This chapter utilises the historical institutionalist approach to trace the antecedents leading to the establishment of the Truth, Justice and Reconciliation Process in Kenya. It further identifies the distinctive features of the historical institutionalism approach of the relationship between institutions and individual behaviour, the asymmetries of power associated institutional development, path dependence and critical junctures and the role of ideas in political outcomes. The chapter seeks to answer the first research question: ***Why did Kenya establish the Truth, Justice and Reconciliation Commission?*** The chapter further links this to the notions of justice and reconciliation and the reasons why the justice and reconciliation components in the TJRC may not have been attained. In so doing the chapter seeks to underline why therefore the end goal of participatory democracy may not have been achieved through the TJR process in Kenya. This, in essence, explains the conceptual framework applied in this thesis. Utilizing both primary data from the interviews and focused group discussions, as well as secondary data from the Report of the Judicial Commission of Inquiry into Tribal Clashes in Kenya of 1999, the Report of the Commission of Inquiry into the Illegal, Irregular Allocation of Public Land of 2004, the Report of the Commission of Inquiry into Post-Election Violence (CIPEV) of 2008, The TJR Act of 2008, the TJRC Report of 2013, newspaper articles and journal articles, the chapter gives an overview of Kenya´s political history illuminating the nature of the injustices as they known today.

The chapter provides a summary of the violations committed during the Jomo Kenyatta regime-1963 to 1978, the Daniel Arap Moi regime-1978 to 2002 and, the Mwai Kibaki regime-2002 to 2013. A descriptive analysis of the injustices ranging from political assassinations, displacement of people, torture, denial of basic rights such as healthcare, food and water, arbitrary detention of people in opposition and, the illegal and irregular acquisition of land by people in political offices is provided in this section. Further, an identification of the perpetrators as well as the victims are made where possible. The impact of the violations is also illuminated followed by a critique of the efficacy of commissions of inquiry in Kenya as evidenced by history. The chapter then gives an account of the establishment, mandate, structure and functioning of the TJRC. This is then followed by a discussion of the data about the distinctive features of the historical institutionalist approach.

5.2 INTRODUCTION

Kenya´s post-independence political and governance history is marked by authoritarianism, political repression, gross violations of human rights and widespread corruption (Musila 2009:447). According to Wanza Kioko (2002), some of the violations that took place in Kenya included *"ethnic cleansing, detention without trial, detention of political prisoners, torture, inhuman and degrading treatment, political assassinations and extrajudicial killings by police"*. In Musila´s assertion, during Jomo Kenyatta and Daniel Moi´s regimes, detention without trial was used to subdue and eliminate dissent within and outside the party (2009:447). In *Remembering the Wagalla: state violence in northern Kenya* (2014) David M. Anderson´s account of the four-day violence committed by the Kenya Army against the male members of the Degodia clan in the north of Kenya in February 1984 further compliments this view.

The primary and secondary data collected during this inquiry revealed that Kenya has a history of gross human violations. This can be traced from the era of colonialism to present. This study, however, concentrated on violations committed since independence in 1963[12]. Data from this period

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[12] The colonial experience in Kenya left a legacy of the historical injustices which cannot be ignored when discussing the remedies to Kenya´s dark past. According to the findings in Volume IV of the TJRC report the colonial administration was *"responsible for unspeakable and horrific violations of human rights"* between 1895 and 1963. During this period violence was unleashed on the local population in order to establish their authority. This violence was in the form of assassinations, massacres, ill-treatment and various forms of sexual violence. The divide and rule tactics employed by the British also created the negative dynamic of ethnicity which continue to plague the country in current times (2013:7). The division of administrative units called provinces and districts was arbitrary and based on language and ethnic community. This act further brought tensions amongst the populations and introduced the ethnic divide experienced currently in the country (2013:11). In Volume IV of the report it is indicated that the colonial government further magnified the differences between the different ethnic communities and stereo-typed certain communities, contribution to the suspicion and hatred amongst different communities. In this way they created the *"otherness"* feeling amongst the public in Kenya today. Further, developing infrastructure and social services in particular regions and leaving others out exacerbated inequality and cemented this feeling of otherness (2013:57). The British also manipulated local populations and imposed local leaders on them and circumvented the traditional structures of authority (2013:11). These acts of violence were also accompanied by the alienation of large parcels of land that was productive for their own used subsequently displacing local populations from their ancestral lands (2013:7). Forcing local populations into submission between 1890 and 1920 involved punishing what the colonialists called *"recalcitrant tribes"*. Military expeditions were also committed at the Nandi population in 1901, 1905 and 1906 while against the Embu population this happened in 1905. The Kisii population suffered the same in 1904, 1908 and 1914. The Kipsigis population suffered the atrocities in 1905 while the Abagishu population was subjected to the injustices in 1907. By working with local agents such as chiefs in the divide and rule approach the British created monsters who in the process of collecting *taxes "confiscated people animals and produce, seized their women and routinely whipped men"* (2013:11-12). Kenya gained independence in 1963 with this feeling of ethnic difference having reached peak levels (2013:58).The Kenyatta administration of 1963 to 1978 continued in the footsteps of the colonial administration. And so did Daniel Moi from 1978 to 2002 and Mwai Kibaki from 2002 to 2008 (2013:7). This exploration also found out that these trends still exist unabated (as will be discussed in subsequent chapters).

[12] Although this contribution looks at the period after independent Kenya it takes cognizance of the history beyond 1963 when Kenya got independence. The thesis acknowledges that a discussion on the historical injustices in Kenya cannot be void of the colonial period because this period informs greatly the trajectories that the different forms of historical atrocities have taken. Notably, the political elite in independent Kenya took cue from the manipulations earlier orchestrated by the colonial regime and simply perfected the same acts. History matters, according to historical institutionalists. It therefore makes sense to approach the subject of historical injustices from the starting point which can be argued to be the colonial period. By premising this research on the conceptual framework guided by historical institutionalism it is important to take note of this while at the same time limiting the study to the

indicate that Kenya has had a history of authoritarianism and a crisis in legitimacy occasioned by the disenfranchisement and oppression of sections of society. The task force on the establishment of the TJRC reported, for example, that *"constitutionalism and the rule of law, which are the central features of any democracy that respect human rights, have been absent in Kenya's history"* (Report of The Task Force on the Establishment of TJRC 2003:20).

Data from the interviews and focused group discussion from the target Counties in this study reveal the awareness of the populace on why Kenya, therefore, needed to establish a truth commission. Participants in these interviews were not only aware of the injustices committed in their locales but demonstrated awareness on the total gross violation across the country as evidenced in the conversation with an informant in Kericho County who recounted the violence after elections as well as the Wagalla Massacre (LS_30029 conducted on 17/07/2015). A review of literature on historical injustices in Kenya, therefore, reveals that there is an agreement that injustices were committed. The victims narrate it from first-hand experience and bitterness.

The focused group discussions conducted in; Nairobi on July 14[th,] 2015, Trans-Nzoia on July 28[th,] 2015, Wajir on September 9[th,] 2015 and, Garissa on 18th of May 2016 seem to agree with this position. Participants in the FGD´s in Wajir and Garissa, for example still had vivid memories of the massacres such as the Wagalla that were committed in the area. They also decried the political, economic as well as the social marginalisation they had suffered in the regimes of Kenyatta, Moi and Kibaki. In Wajir, for example, they cited the poor infrastructure which they termed as *"a deliberate move to marginalise our people since the central government has seen no value in us"*. In fact, when in the northern region, *"we refer to anyone travelling from this region as someone who is going to visit Kenya"*. This is because *"we do not see ourselves as Kenyan's given the extent of marginalisation suffered throughout this time"*. For us, therefore *"the TJRC came as a blessing to us because we thought that finally, the government was going to answer to our plight"*. This, however, remains a dream as *"we are yet to see the report"* and we *"only hear that it is out and that it mentions the injustices committed here and in some parts of Kenya"*.

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post-colonial period. In doing this the research does not shy away from this history but rather attempts to remain within the context of the mandate the TJRC had which was to investigate injustices committed between 1963 and 2008.

The same sentiments were expressed in Trans-Nzoia where issues of displacement from land were raised. The participants in the discussion lamented the perennial displacement from their lands since the multi-party era. The era of multi-party politics in Kenya ushered in the infamous land/ethnic-based clashes which have been witnessed every time there are elections. The participants indicated that politicians, *"in every occasion stir up emotions and evoke the land imbalances which put communities in an awkward position and violence erupts"*. Despite this, they indicated that a permanent solution to the land question has never been arrived at. They also cited the lack of issuance of title deeds for those occupying the schemes in what was formerly occupied by white settlers.

At the same time participants in the discussions conducted in Nairobi, although they were not direct victims of injustices, cited the prevalence of historical injustices in the country. They proved to be aware of the array of injustices committed in the country throughout history. They cited for example that *"injustices have been a part of our history and the strange thing is that nothing happens to those who commit them"*. Issues of marginalisation, for example, have existed in the country and different communities have been marginalised in various ways.

Communities coming from the western part of Kenya have witnessed *"massive economic, social and political marginalisation as a result of their opposition politics"* which has rendered them a *"disenfranchised part of this country"*. This feeling could not be hidden from the reality of the county because the *"machinations of the central government have been both overt and covert"* and they imagine that *"do not see, feel and hear about the sufferings that others are going through"*. As a result, *"certain parts of the country remain discontented with the central government and cannot wait for an opportunity to go to the vote"* with the expectation that they will *"one day vote out this regime that is not sensitive to the plight of its people"*. They also cited issues of corruption in the country and the various scandals such as the Anglo Leasing[13], Goldenberg[14], and scandals related to security contracts and so on, that have dominated public discussions in Kenya from regime to

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[13] According to BBC News (2015), the Anglo Leasing scandal involved contracts being awarded to phantom firms. Anglo Leasing Finance was paid about 30 Million Euros ($33 Million) to supply the Kenyan government with a system for the printing of high-technology passports. Other contracts were also awarded for the supply of naval ships and forensic laboratories. The scandal started under Daniel Moi´s government and continued under his predecessor, Mwai Kibaki who came to power in 2002 (BBC, March 4, 2015).

[14] According the Daily Nation (2012), this scandal was hatched and executed between 1991 and 1993. The company named Goldenberg International would export gold and diamond jewelry and receive compensation from the government for earning foreign exchange. These turned out to be fictitious claims. Kenya lost up to 100 billion Kenya shillings in the scandal. The scandal involved big names like former 'spy chief' James Kanyotu, former Treasury PS Wilfred Koinange and former deputy Central Bank governor Eliphaz Riungu, all senior civil servants in the Daniel Moi government.

regime. According to them, the scandals lead to the massive poverty in the country, and subsequently they form some of the injustices committed which affect the entire population of Kenya.

Secondary data also showed that the above sentiment on corruption and Kenya´s general development had been decried many times. For example, according to BBC News (2012) *"The attitude that what belongs to the public can be taken with impunity has been seen as one of the most serious impediments to development in the country - and by extension, the rest of Africa"*. This is despite the ambitious new Constitution that has the potential *"to reduce the arbitrary and discretionary powers used by politicians and civil servants to steal public money"*. The situation in the country has led to *"state capture"* where politicians and public servants can *"commandeer state resources and keep power within ethnic boundaries"*. This rate of corruption affects the aims of Vision 2030 whose focus is building a globally competitive and prosperous country by bringing the GDP growth to 10% per year beginning 2012 and build *"a just and cohesive society with equity"*. In order to align *"with regional economic communities such as the East African Community, Common Market for Eastern and Southern Africa (COMESA) and Community of Sahel-Saharan States"* this grand plan has put in place *"key flagship projects including Lamu Port and the Lamu-Southern Sudan-Ethiopia Transport Corridor"* which when complete will connect *"Kenya to Bangui in the Central African Republic and Douala across the continent in Cameroon"*. This grand plan is however set to suffer so long as the attitude of *"kwani pesa ni ya mamako?" ("Do public funds belong to your mother?")"*, which translates to idea that the money does not belong to one person and so corruption is justified (BBC News, October 18, 2012).

In summary, the high levels of corruption lead the country to economic plunder and the suffering of the general population. This is indicative that through the TJRC process, Kenya did not open a new page, but rather economic injustices continue. This is particularly true in so long as *"Kenya ranks as a sixth most corrupt nation in the world and first in Africa according to the 2017 biennial EY Fraud Survey"* (CNBC News, April 5, 2017). Corruption, therefore, did not only happen in the long-distant history of Kenya but also in the recent past as well as current as indicated by the data. The data proved that there was an antecedent(s) to the high levels of corruption in the country occasioned a history of path dependence. This happened in Kenya because of the informal rules

practised by the political elite and which were supported by the patron-client relationships occasioned by the "big man" politics.

The interviews on the other hand also revealed similar sentiments. In Uasin Gishu for example, the interview participants related the post-election violence of 2007/8 to historical injustices committed earlier. "*People were not happy especially in Uasin Gishu, if you can mention, is that some people from Central Kenya were brought here into Uasin Gishu...They were given land here in Uasin Gishu so I think some people were not happy....we were happy that Agenda 4[of KNDR process] had to come in and eehh to deal with injustices, especially land injustices.... Moreover, other injustices in the community*" (LS_30022 – interview conducted on 8/7/2015). To support this point another participant from Kericho County equally pointed out to following:

> "*Aaaah sooo, TJRC is a result of post-election violence, and eeeh, TJRC eeh, one of the many, eeeeh, outcomes of what we are calling Agenda 4. Aaaah, Agenda 4 had other issues like eeh, reducing unemployment, land reforms, constitutional reforms, institutional reforms for institutions like prisons, judiciary, aaah electoral commission and electoral processes, political party reforms. It's a long list of things that aah needed to be addressed. Some of those things that needed to be addressed could very well be captured in law like the constitution and other legal frameworks. Some of these required more of a social re-engineering process that would lead to cohesion, aaah, and patriotism that aaah, aaah, well attitude change. But of course there were issues that were linked to historical injustices which meant that we attained independence and things that happened after 1963, and there is a list of grievances that either communities or groups, or nations experienced. Communities I would imagine people living together like in slums. And nations I would imagine the 40 plus tribes that eeh, as defined in Kenya. Those are nations. And those grievances were in many forms. From political assassinations, economic marginalization, political exclusion. And eeeeh, in exclusion from labour, infrastructural development, financial services, aah, and so on. Soo TJRC of course was eeh, a hopeful process to many people*" (LS_30013 – interview conducted in Nairobi on 1/7/2015).

This was, therefore, a confirmation that the injustices had clear antecedents and that the hands of the political elite were therefore tied given the trajectories that constant inaction by the same political elite had generated. The inaction meant that injustices would continue to be committed against the population and further that processes such as the TJRC would only be used by the same political elite to paint a mirage of change whereas not real change was meant to take place. It therefore also meant that such processes would be sabotaged by the same elite as will be seen later in this study.

5.3 SUCCESSIVE REGIMES

From both the primary and secondary data there is a continuum of past violations by successive regimes beginning from independence in 1963. These include the Jomo Kenyatta Regime to 1963 to 1978, the Daniel Arap Moi Regime – 1978 to 2002 and the Mwai Kibaki Regime to 2002 to 2013, which are all culprit to human rights violations. *Volume IIB* of TJRC Report (2013) indicates that during Kenyatta´s era some of the gross human violations committed included; *"killings, torture, collective punishment and denial of basic needs"* such as *"food water and health care"*. Other violations included *"the political assassinations' of Pio Gama Pinto, Tom Mboya and J.M. Kariuki"*. There was also *"arbitrary detention of political opponents and activists"* as well as the *"illegal and irregular acquisition of land"* by people in government offices (2013: vii). This information is in agreement with previous findings (see also KLA, 2004; CIDI, September 12, 2015; CRA, 2012 & HRW, 2016).

The TJRC report also indicates that during the era of Daniel Arap Moi, which lasted 24 years, numerous violations were committed. These included *"massacres, unlawful detentions, and systematic and widespread torture and ill-treatment of political and human rights activists"*. There were also assassinations', including that of the late Dr. Robert Ouko who was Foreign Affairs Minister at that time. There were also the illegal and irregular allocations of land as well as economic crimes and grand corruption which continue to haunt the country presently (2013: vii). The Mwai Kibaki regime was not an exception. It simply followed in the footsteps of its predecessors. During Kibaki´s time in power violations such as unlawful detention, torture and ill-treatment were committed. There were also *"assassinations' and extra-judicial killings"* as well as *"economic crimes and grand corruption"* (2013: viii). This is corroborated by revelation from the primary data collected. From an interview conducted in Uasin Gishu for example a participant stated that:

"I can speak for Uasin Gishu for example. Because in Uasin Gishu the thorny issue has always been land that was never solved. Land from the colonial government as they were handing it over to the Kenyatta government and the Kenyatta government did not solve it. And they handed it down to the Moi government and the Moi government did not solve it and by the time Kibaki was coming in, the problem had already simmered and that is why we had the problem in 2008. Of course land had been thorny. I'm not saying land was the main contributor, I'm saying land was the underlining factor especially in Uasin Gishu County where many of the residents felt that their land had been allocated and taken away from them without their knowledge and approval".(LS_30018 – interview conducted on 6/7/2015).

In the same vein the lack of seriousness by the successive regimes to resolve issues around land governance, for example, land adjudication despite realizing that this was potentially risky and remained latent. It all began with the Jomo Kenyatta regime which arbitrarily allocated land to his ethnic community [the Kikuyu] in Uasin Gishu after independence (LS_30018 – interview conducted on 6/7/2015). And this was part of the kleptocratic[15] tendencies among the pioneer leadership. Majority of the leaders occupying critical ministerial positions came from *"central Kenya and grabbed land and pushed their people to Rift Valley where today they are facing challenges related to land"* (LS_30020 – interview conducted on 7/7/2015). On the other hand, Moi, ruling for 24 years, did not correct this. Other types of injustice were also identified during the

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[15] Literatures on kleptocracies are abundant. They generally refer to the primitive accumulation tendencies witnessed in different regimes and particularly those with autocratic tendencies. The primitive accumulation is intended at the consolidation of power so that the ruler maintains a hegemonic presence in society. According to Acemoglu, Robinson & Verdier (2004) kleptocracy tendencies are found in many regimes in Africa and the Caribbean. In these regions *"the state is controlled and run for the benefit of an individual or a small group who use their power to transfer a large fraction of societys´resources to themselves".* In the end the regimes prove to be disastrous in the economic performance of their nations and further cause impoverishment of their peoples. They further argue that such tendencies tend to thrive where polities are weakly institutionalized while at the same time the formal institutions such as a national anti-corruption commission are designed to fail in their quest to stem corruption (2004:162-3). Charap and Harm agree with the above conception on endogeneity of corruption to the political process. They further indicate that leaders in these societies create rentseeking corrupt offices (occasioned by the low civil service wages) which are then seek patronage from them as a result of their activities (1999:3). They therefore agree that the ruler enjoys maximum benefit from the kleptocratic state (Charap 1999: 6). Their study categorizes the various faces of corruption (rentseeking patterns) witnessed in different political regimes (functioning democracies, weak democracies, benevolent monarchies, strong dictatorships, warlords, weak dictatorships and anarchy) and seek to provide explanations for these categories. In reference to Kenya Roger Southall argues that this primitive accumulation was not only a phenomenon of the Daniel Moi administration but rather it was passed on from the Jomo Kenyatta regime who in turn inherited the practice from the colonialists. The difference was that when Moi came to power he found an impoverished country. He was therefore forced to turn to looting from the old accumulators. For this to happen, he had to intensify kleptocracy and autocracy (1999:94). The practices further led to the ethnic divisions that characterize the politics of Kenya today since, in order to hold onto power through patronage, the rulers rewarded individuals from their ethnic communities (who benefited from the corruption since they were also those in senior public service positions). This explains the prevalence of corruption as illuminated by this study in Section 8.3.2. Although this thesis does not concentrate on the primitive accumulation of the colonial era, it is however cognisant and acknowledges that events from this period also continue to shape the current scenario.

process of this thesis. In the following section this study seeks to enumerate the different types of injustices as it emerged from the primary and secondary data.

5.4   THE TYPES OF INJUSTICES

From both the primary and the secondary data available, the public is generally aware of the types of injustices committed and are able to identify them from region to region. They are also aware that some injustices were more common in certain parts of the country whereas some were only prevalent in other parts. It is generally agreed however that most of the injustices committed cut across the Kenyan landscape. The abridged version of the TJRC report states that the colonial experience of Kenya revealed a series of offences and massacres committed by the colonizer against the natives. It outlines some of these violations as including *"massacres, torture, arbitrary detention and sexual violence"* committed by the British administration in the process of entrenching itself in Kenya as well as in the process of violently bringing down the Mau Mau rebellion (2013:2). The report further indicates that further to the dismay of the public, the Kenyatta presidency did not overhaul the colonial setup. Neither did he seek to redress the land conflict inherited from the colonizers. He instead was keen on consolidating his power by silencing any dissent through reprisals such as harassment, *"intimidation, attacks on the person, detention and even assassination"* (TJRC report (abridged version) 2013:2).

The Kenyatta regime led to the exiling of many in an attempt to flee in fear of their lives. *Volume IV* of the TJRC final report found that between 1963 and 1978 Kenyatta *"presided over a government that responsible for numerous gross violations of human rights including"*; a) *"in the context of the Shifta War, killings, torture, collective punishment, and denial of basic needs (food, water and health care)"*; b) *"political assassinations of Pio Gama Pinto, Tom Mboya and J.M. Kariuki"*; c) *"arbitrary detention of political opponents and activists"* and; d) *"illegal and irregular acquisition of land by the highest government officials and their political allies"* (2013:7). An abridged report of the TJRC indicates that in later years the Moi administration maintained status quo and even became worse after the attempted coup in 1982. Moi, for example filled key *"government positions with loyalists from his own Kalenjin community"* and also oversaw the amendment of the constitution that turned Kenya into a *de jure* one party state and removed tenure of office for holders of constitutional offices such as judges. Additionally, the use of the security forces to

commit atrocities against their own people in places such as Northern Kenya went on the rise (TJRC Report, Volume IV 2013:3).

In summary, *Volume IV* of the TJRC final report found that between 1978 and 2002 Moi "*presided over a government that was responsible for numerous gross violations of human rights*" which included; a) "*massacres*"; b) "*unlawful detentions, and systematic and widespread torture and ill-treatment of political and human rights activists*"; c) "*assassinations, including that of Dr. Robert Ouko*"; d) "*illegal and irregular allocations of land*" and; e) "*economic crimes*" (2013:7). In sharp contrast to the expectations of most the public, the Kibaki regime proved not to be any different from the previous regimes. Under Kibaki, an informal clique of powerful individuals, projecting narrow interests and having hangovers from the previous ruling clique took charge of the state. And so, like his predecessors, Kibaki filled key government positions with members of his Kikuyu community and the larger formation of Gikuyu, Embu, Meru Association (GEMA) communities and perpetrated the same social and economic crimes as his predecessors. This, in return, poisoned ethnic relations in the country (TJRC report, Volume IV 2013: 3) because the administration was viewed as being ethnically exclusive and hostile to the poor (Githongo 2010:4) thereby threatening the unity and cohesion of the fourty two nations that made Kenya. Githongo (2010) supports this point by indicating that within two months in power the Kibaki regime had been entangled in colossal corruption disgraces buttressed by the total impunity which only led to the outrage of the population. Graft spread and became corporatized and individuals were becoming millionaires overnight (Githongo 2010:4).

The participants in the interviews and focused group discussions were also fully aware of the history of violations and to the types of injustices committed against various individuals and groups of people in the country. These formed the antecedents to the situation the country finds itself today. There was a general awareness across the country accompanied with bitterness. Some sections of the society had a fuller picture of the history as opposed to others who only had a picture of their surroundings. Those aware of only a section of the country were however fewer. In Wajir County the participants were able to identify the types/forms of violations such as assassinations, unaccounted for disappearances of family members, arbitrary arrests, forced silence over injustices, massacres, economic, social and political marginalization of whole communities particularly those deemed as anti-government (LS_30061, – interview conducted on 2/9/2015).

The injustices were expressed differently in Trans-Nzoia County where the types/forms of violations were identified as looting and burning of houses, loss of lives, loss of property, loss of self-worth (LS_30039, LS_30042 & LS_30043 – interviews conducted on 29/07/2015). In Kericho and Uasin Gishu counties the injustices identified were somewhat similar. In Kericho County the participants identified the destruction of property either by government agencies, communities or individuals and the subsequent loss of property as well as the grabbing of land as some of the outstanding injustices that were committed historically (LS_30030 & LS_30035 – conducted on 17/7/2015 & 20/7/2015). In Uasin Gishu County on the other hand it was framed as the forceful eviction from houses and farms by the same culprits as in exposed in Kericho County (LS_30020, LS_30022 & LS_30023 – interviews conducted on 7, 8 & 9/07/2015). Another view from Kericho expressed that land injustices were deemed to be the gravest followed by cases of disappearances of those that dissented the impunity perpetrated by successive regimes (LS_30035 – interview conducted on 20/7/2015).

All in all, the land question was at the heart of the injustices committed in these two counties. This could be attributed to the fact that they are both situated in the former white highlands and which have been contentious particularly in relation to the land question in Kenya. In contrast to the other counties interviewed, participants in Nairobi seemed to have a good overview of the injustices committed during the period. They, for example indicated that some of the injustices committed related to the allocation and distribution of resources, psychological torture of dissenting individuals, loss of lives, marginalization, detention without trial, curtailed freedoms and disrespect for human rights (LS_3008 – interview conducted on 30/06/2015).

In examining the roots of the post-2007 elections violence in Kenya the Commission of Inquiry into post-election Violence (CIPEV) isolated factors that explain the root causes of the violence and its escalation. CIPEV also explained why and how violence had become a way of life in the Kenya. The commission isolated the normalisation of violence, personalisation of power around the presidency which then denudated authority and legitimacy of other authorized oversight institutions, historical marginalization which resulted from the perceived inequities in relation to the allocation of land and other national resources, amongst them access to public goods and services and, the growing population of poor and unemployed youth who are both educated and uneducated and who

therefore will willingly join organized gangs and militias (CIPEV 2008:24-25). In the conclusions of the CIPEV report, a combination of the above factors provided a recipe for the spiraling violence experienced at every electioneering period in Kenya together with the accompanying tensions. In this study however, one prominent feature stood out. While there were a variety of abuses committed historically the issue of land seemed not only to be prominent but was also alive in the perceptions of the interview participants in all the counties covered by this study.

5.4.1   THE CENTRALITY OF LAND

The CIPEV report indicates that "*gross corruption in the acquisition, registration and administration of land matters has been a major problem in Kenya*" (CIPEV 2008:33). The culprits "*were senior public servants*" as well as "*local boards, the courts and a range of officials including members of the provincial administration, politicians and others*", according to the report (2008:33). Karanja (2009) traces the land problem to the colonial of displacement of indigenous people as well as the "*land transfer policies and legislation adopted by the independence government*" in 1963, which did not deviate from the colonial mentality (2009:178). The Report of the Commission of Inquiry into the illegal/irregular Allocation of Public Land (2004) (popularly known as the Ndung´u Report) found that since 1963 an estimated 200,000 titles had been illegally or irregularly issued to individuals and corporations through massive grabbing of, for example, "*settlement schemes, trust land*", forest land, "*national parks, game reserves, wetlands, riparian sites, protected areas*" and "*museums*". The Commissions´ mandate included the ascertainment of the beneficiaries, the identification of the concerned public officials and the recommendation of corrective measures. In a salient rendition of land historical injustices the report "*set out in forensic detail the illegal land awards made over the years to the families of president Kenyatta and Moi, numerous former ministers, members of parliament and civil servants, as well as to individuals in the military, and the judiciary*" (Manji 2012: 468).

The Commission was appointed on 4th July 2003 and was mandated to "*inquire generally into the allocation of lands*". This was against the background that many Commissions of Inquiry into land had been previously formed and the land question had forced every epoch to address land related grievances. As a result of these efforts policy adjustments had been made as well as institutional and legal arrangements in the country´s land relations adjusted (Ndung´u Report 2004: xvii). The Commission found that land grabbing had been orchestrated by the executive and public officials to

their benefit and to the benefit of people close to them such as family. In some other instances this was done in exchange for political patronage. Kieya & Mbae-Njoroge (2010) add that the Ndung´u Report simply confirmed earlier findings by the Njonjo Commission of 1999, which inquired into the Land Law System in Kenya and also found out that government officials and the political elite and individuals close to them had benefitted as original allottees of grabbed public land since the time of independence.

The Ndung´u Commission categorized public land that had been subject to illegal or irregular allocations. The categories included *"(a) urban, state corporations and ministries lands, (b) settlement schemes and trust land and, (c) forestlands, national parks, game reserves, wetlands, riparian reserves/sites, protected areas, museums and historical monuments"* (2010:71). The Commission made a raft of recommendations amongst them the revocation of title deeds as a remedy to these irregularities. Further, the team provided an implementation framework into which the expected policy and program objectives were envisaged and the elements, actions, resources and plan were outlined. The implementers of this strategy who included the existing structure of government and new structures required in the overall management of the process were also identified (2010: 193).

The recommendations of the Ndung´u report further supported the recommendations by an earlier Judicial Commission (popularly known as the Akiwumi Commission) which inquired into the tribal clashes in Kenya and which completed and presented its report to former President Daniel Toroitich Arap Moi on 31st July, 1999. The Commission had been set up to "*investigate the tribal clashes that have occurred in various parts of Kenya since 1991 with a view to establishing*" the origin, the action taken by various law enforcement agencies and the level of preparedness as well as the effectiveness of law enforcement agencies. Further the Commission was also mandated to recommend prosecution or further investigations as well as ways, means and measures that needed to be in place to prevent future violence. Inquiry into or investigating any other matter related to the tribal clashes also formed a part of their mandate (2010:1-2).

The Akiwumi Commission found out that ownership of land and its use in the various clash areas had been was one of the causes of the conflict and tribal violence. They then recommended that the Government of Kenya embarks on "*an ambitious program to issue title documents to all people who were either allocated land there by Government or who bought the same from previous owners but have not got title in order to minimize land disputes and conflicts in the areas*" (2010: 285). The

Commission also recommended further investigation into the roles played by various individuals in the said clashes in the Rift Valley, Western and Nyanza provinces, the Coast province and Northeaster and Eastern provinces. Among those whose names were recommended for further investigations were members of the provincial administration, security intelligence officers, police officers, politicians as well as other people who had contributed to the clashes. However, the implementation and impact of these recommendations remain limited.

The above information is corroborated by a United States of America (US) Central Intelligence Agency (CIA) declassified report, *Economic Intelligence Weekly Review* of 31st, August 1978 which states in part:

> *"Kenyatta´s extended family boasts of extensive holdings of farms, plantations, hotels, casinos, and insurance, shipping, and real estate companies….….Family members and close associates control a large part of the land in the White Highlands, the homeland of Kenyatta´s tribe, the Kikuyu. At independence in 1963, the British established a fund to help the Kenyan Government purchase farms from European settlers in this area and redistribute them among land-hungry African farmers. Although hundreds of African farmers were resettled through this scheme, some of the funds allegedly were used by family members and by Kenyatta´s ministers to accumulate land. To protect the holdings of its members and the family, the government blocked every parliamentary attempt to limit land ownership…….Kenyatta himself owned only about a half-dozen properties covering roughly 4,000 hectares, mainly farms in the Rift Valley and in the district of Kiambu, where he was born. His fourth wife, Mama Ngina Kenyatta, however, owns at least 115,000 hectares including a 13,000 hectare ranch in the Kiambu district, two tea plantations at Matu and Mangu, and three sisal farms near the Tanzanian border. She also has considerable holdings in the resort areas around Mombasa and is involved in coffee plantations and in the Kenyan ruby mines"* (CIA, August 31, 1978:15).

The aforementioned is an indication of the magnitude of the enigmatic land question in Kenya. A "*solution*" therefore "*of the land question holds an important key to the future of Kenya as a nation state*" (Kanyinga 2009:326).

The primary data also illuminated the land issue as critical and calling for greater attention. A Commissioner with the National Cohesion and Integration Commission interviewed expressed hence, "*I think everybody will be keen to see how best we resolve the problem at hand, as in, some of those issues around land, because land was the big issue, even during the elections, 2012, you're aware? Land was a bigger issue. Um, but you see the kind of approach we're taking now, eh, we're basically mutilating that report. And eh, you know, because we believe if you issue people with title deeds, you're good, and eh, everything will be sorted. But if you, because issuing title deeds is not necessarily a solution, it's good because you're empowering people, I'm told even the ones we issue title deeds in parts of Coast, some of them are already selling all their land*" (LS_30073 – interview conducted on 22/02/2016).

This sentiment that land occupied a central position was also shared by another government official in the Ministry of Interior and Coordination of National Government (LS_30071 – interview conducted on 12/02/2016). This was augmented by the Chair of the Commission on Administrative Justice [the Ombudsman] who aptly pointed out that, "*Truth in this country is focused on three things. The biggest focus is land. It's actually land injustices. And any time you want to hear historical grievances, you will find that about 70% of them are on land. Everywhere. To a lesser extent, the second aspect is about exclusion. In terms of governmental opportunities....and that exclusion in governmental opportunities leads to the third. Uh, the first two leads to the third, which are atrocities committed in certain places at certain times. But those atrocities are either related to either governmental opportunities or land*" (LS_30072 – interview conducted on 22/02/2016).

This perception that land ranks highest amongst the historical injustice was also held by participants from the counties that were involved in this study. In Uasin Gishu County for example one of the participants had hope in the TJRC to end the recurrent instability and violence that the region has experience over time and particularly "*historical injustices revolving round the issues of land……..we seriously discussed issues that were affecting us in particular the question of land*" (LS_30024 – interview conducted on 9/7/2015). Similarly in Kericho, Trans-Nzoia and Nairobi Counties, the recognition of land as pivotal to the grievances in the country was expressed (LS_30032, LS_30039 & LS_30028 – conducted on 17, 29 & 14/07/2015). The electoral violence that erupted in Trans-Nzoia in 1992, 1997 and 2007 was closely associated to the land question (LS_30038 – interview conducted on 28/7/2015). "*I was chased from my house in Kanyaruka. My house was then burnt*

down with all my property leading to my eviction from my land" (LS_30037 – interview conducted on 28/7/2015).

The land question therefore makes the TJRC process and implementation tricky particularly because it touches on the issues surrounding land and its allocation and distribution across the successive regimes of Kenyatta, Moi and Kibaki. It explains, to a great extent, the reasons for inaction on the part of the political elite by exposing the path dependent nature of the problem. The political elite by first abating the grabbing of public land and so on, and secondly being unable therefore to deal with it concisely put the country on a pre-determined trajectory of land conflict. In other words, *"the TJRC report is what people would call a hot potato because of the historical injustices it touches upon. And there was a story just yesterday[21/02/2016] in The Nation about land and how ministers in the first government were given 100 acres and colonial houses at independence under the leadership and Angaine, Jackson Angaine, the Minister for land then. Land that was then never paid for properly was just given away to the top officials in government. So the hot potato in the TJRC report is land. That is the biggest hot potato. The fact that colonialists took away land from entire communities. And at independence, that land was not properly returned to the original owners but the land was uhm, taken and grabbed by new officials in government who became the neocolonialists"* (LS_30074 – conducted on 22/02/2016), according to a Member of the 11th Parliament of Kenya. Obonyo (2017) agrees with the sentiments of this Member of Parliament and also likens the TJRC report to a *"political hot potato"*. The administration is *"reluctant to address the issues of historical injustices because its leaders may be beneficiaries of the prejudices and most of the injustices were committed by former political bosses and mentors or relatives of those currently in power"*. Implementation therefore amounts to losing influence on the parts of the country where the administration enjoys popular support (Obonyo, July 23, 2017).

In support of the sentiments above the MP went further to indicate that *"it is capital that was taken by access to state resources which was land"* (LS_30074 – conducted on 22/02/2016). The MP contextualized the problem by relating it to the current conflicts experienced in different regions in the country by indicating that the root causes of the violence experienced in these regions from time to time especially during the electioneering period are related to land. *"If you look at the Rift Valley in 1992, Burnt Forest, uhm and other places, Likoni, those were conflicts that were based around squatters and land issues. Subukia, you know, name it…Uhm, if you look at more recently. Mpeketoni, if you look at 2008, Eldoret, and other places, it was land issues that were apart from*

tribal cleavage and tribal conflict. It was land issues at the bottom of it. And so if you look at places like Molo, and their fringes, those are issues, places with issues that are about land going back to the colonial times. The disinheritance of Kenyans, then the mismanagement of the post-colonial government to transfer land to the people but it ended up in the hands of a few colleagues" (LS_30074 – conducted on 22/02/2016).

The difficulty in resolving some of these issues is that such land has appreciated over time and the beholders might not be ready to surrender it at all costs. And, most importantly, *"we are fighting in a generation where the children and the grand children of that first generation of independence leaders who took away land or grabbed land that was public land, or land that had to be reverted to the people"* are the ones in power (LS_30074 – conducted on 22/02/2016.) To be precise, *"In the run up to independence, the big land question was whether to return the land expropriated for white settlers to its original owners. We know that Jomo Kenyatta ascendant Kikuyu elite fought restitution, and adopted "willing buyer, willing seller" policy as it was then known"*. The position taken by Kenyatta was in contradiction to his earlier stand declared in his 1944 pamphlet *"Kenya, the land Conflict"* in which he strongly supported the restitution policy. Such a policy would have encouraged reverse migration of members of *"his Kikuyu community"* from *"the white highlands"* back to reserves in central Kenya *"where Kikuyu notables had appropriated the inheritances of their squatter relatives"* (Ndii, September 23, 2016). Such a move would have been against the plan of the Kikuyu political elite whose decision to appropriate the land was going to be overturned. Such an overturn meant a tilt in the status quo (or the *"lock-in"* which had already set in) which was undesirable to these elite. What was to follow was a concerted effort to maintain this status quo. Attempts at tilting it was met with vicious counter-actions such as detentions and assassinations of those who were vocal about the land question. An example was the detention of Jean Marie Seroney (a former legislator for Tinderet and deputy speaker of the national assembly) who fell out with Kenyatta and Moi in 1969 for publicising *"a document protesting the selling of Nandi settler farms to "outsiders"* (popularly known as the Nandi Declaration). Later, Seroney would die in a Nairobi hospital under what has been considered queer circumstances. Equally the fiery Nandi legislator, Chelagat Mutai, also *"ended up in jail on an incitement charge"* (Ndii, September 23, 2016; see also Cheeseman, November 15, 2015) for raising similar concerns.

Chamwata, Dinka and Slye (2013), who were the external Commissioners augment this in their *"Dissenting Opinion With Respect to Chapter 2 of Volume 2B of the Final Report of the Truth*

Justice and Reconciliation Commission of Kenya", (also refer to Musau, May 24, 2013) where they cite alterations to the original report made after 3rd May, 2013 influenced by the Office of the President after conducting their ``*normal procedure*`` of reading through the report in order to familiarize before the official presentation. According to Musau (2013), *"A senior official in the Office of the President had asked the TJRC to ´sanitise´ the chapter on land before it could be accepted by the president"*. This was so that certain paragraphs which, for example paragraph 203, which indicated that Jomo Kenyatta had dished out large tracts of land to his son-in law, could be expunged (Musau, June 3, 2013). In their statement they indicate that paragraphs 203, 227, 231, 257 and 261 as appearing in the version of 22nd May, 2013, which to date remains the official version of the TJRC report, are not original. For example, paragraph 203 reads:

> *"In addition, there were peculiar cases of land grabbing and land related malpractices during Kenyatta´s administration which serve to illustrate how deeply the problem of land grabbing had cut into Kenya and the wanton manner in which key government officials, including the president grabbed what should have been public or communal land and ``dished`` it to relatives. A case in point involves the president himself. When Kenyatta´s son, Muigai, married Isaiah Mathenge´s daughter in 1976, Kenyatta´s wedding gift was a large tract of governmental land which was, apparently, acquired without official approval without compliance with legal procedures"* (Chamwata, Dinka and Slye, 2013).

The remaining paragraphs 227, 231, 257 and 261, contain testimonies of individuals who complained about the apparent efforts by the President's Office to deny local people at the coast land for resettlement even when the Criticos family, for example, had been willing to initiate such as process based on their 30,000 acre piece they owned at the Coast. Nzau (2013) narrates that a former Member of Parliament who remains unnamed was also accused of forcibly evicting the Criticos family in order to dish out the land. At the same time paragraph 231 was retained in the original format but a rider in favour of former president Mwai Kibaki, who, in the original version, was accused of disrupting the process initiated by Criticos (Musau, June 3, 2013). Paragraph 257 was amended and the part mentioning that Jomo had alienated to himself 250 acres of land, mostly a beach front, as well as taking over Tiwi and Diani trust were had been expunged. Paragraph 261 originally mentioned that the settlement schemes at the Coast benefited only one tribe – the Kikuyu while the report presented indicated that the beneficiaries were upcountry communities. As a result

of this injustice, a resident had claimed that they were better off under colonial rule as opposed to the Kenyatta regime in paragraph 227. This was omitted in the report presented (Musau, June 3, 2013).

In contrast the final version of the report presented to the president paragraph 203 of the same chapter captures a testimony from a participant from the former Northern Frontier District (NFD) who laments about the alienation of the people from that region by successive regimes. This is in total contrast to the content of the original paragraph which had been unanimously approved within the working period of the Commission which ended on May 3rd, 2013. This reveals that there was a deliberate attempt to expunge the names of alleged perpetrators from the report. In fact three cases were reported to have been *"filed in court challenging the findings of the report. Ng'engi Muigai - a nephew of the first president of Kenya Jomo Kenyatta and his sister, Senator Beth Mugo"*, filed cases *"seeking orders to have the reports linking them to illegal land acquisition quashed"*. In another instance a lawyer and a businessman – James Meru - had also challenged the tabling of the report in parliament (Muhindi, August 20, 2013).

Further, this study also found out that *"the dissenting version of the two commissioners was not published alongside the final report"*. Instead, they were *"deliberately not told until two hour before the handover"* and copies of the report had been printed without their knowledge and therefore excluding their dissent (Musau, May 24, 2013). The dissenting Commissioners indicated that their efforts to publish these dissenting opinions were frustrated by their Kenyan colleagues (Musau, June 3, 2013.) Further, to their shock and sadness, the changes were effected despite the protests from the international Commissioners and an explanation given that majority of the Commissioners had voted for this route. This was in disregard to the procedures laid out earlier by the entire team (Musau, June 3, 2013). The Chairman of the Commission remained non-committal to the question of whether the dissent would later be published (Musau, May 24, 2013). In fact, the report was ready by May 3, 2015 but the handing over had not been possible due to a busy diary of the president. But while this was happening, it was claimed that one Commissioner was forcing changes on the land chapter and purported that he had support from another four Commissioners. This was denied by the Commissioners supposedly supporting this (Musau, May 15, 2013). It is important to point out that this coincided with both the delay and final printing of the report that was finally presented without the knowledge of some Commissioners. This indicated a clear

deliberate effort to thwart the effort of the entire process by the political elite. Instead, an insistence on the integrity of the report as presented to the president was maintained.

In conclusion, this study found out that the continued lack of implementation of the recommendations of the report on the illegal/irregular allocation of public land of 2004 and the same lack of implementation of the most recent report of the TJRC, which inter alia touches heavily on the land question in Kenya is a deliberate effort by the political elite. Their action of omission and commission can be interpreted as intent on ensuring that the land grab in Kenya continues as evidenced by the most recent grabs of land belonging to Langata Road primary school (located in Nairobi) for example.

5.5   NAMING THE PERPETRATORS?

The historical institutionalism approach points out institutions (formal or informal) and actor behaviours in history and how they shape and structure political processes and outcomes. The institutions and actors in behaving so have certain motivations and interests. In following this approach this thesis sought to identify the institutions and actors that perpetrated the historical injustices as well as draw inference to their motivations and interests in doing so. This contribution also realized through the interviews and focused group discussion conducted that the public were fully aware of who the perpetrators were. Some of the victims vividly remembered the occasions when certain atrocities were committed. In corruption cases, for example, the public were fully aware who the culprits were. They named the perpetrators and in most cases wondered why little or no action had been taken by the successive regimes.

From the primary and secondary data in this study it emerged that the perpetrators of the historical injustices in Kenya included the following: the colonial administration (which falls outside the mandate of this study[16]), holders of the Office of the President during the successive regimes, holders of various Ministerial Offices in the successive regimes, the state security (the regular police, administration police, members of the General Service Unit (GSU), the political elite and,

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[16] Although this contribution looks at the period after independent Kenya it takes cognizance of the history beyond 1963 when Kenya got independence. The thesis acknowledges that a discussion on the historical injustices in Kenya cannot be void of the colonial period because this period informs greatly the trajectories that the different forms of historical atrocities have taken. Notably, the political elite in independent Kenya took cue from the manipulations earlier orchestrated by the colonial regime and simply perfected the same acts. History matters, according to historical institutionalists. It therefore makes sense to approach the subject of historical injustices from the starting point which can be argued to be the colonial period. By premising this research on the conceptual framework guided by historical institutionalism it is important to take note of this while at the same time limiting the study to the post-colonial period. In doing this the research does not shy away from this history but rather attempts to remain within the context of the mandate the TJRC had which was to investigate injustices committed between 1963 and 2008.

gangs and individuals. The violations were rendered possible because of the positions help by various individuals with decision making capacities and capabilities. Given this, it is possible to assert that certain individuals can be deemed as perpetrators as opposed to others. In the following section this study proceeds to give an analysis of various scenarios and circumstances that identify the perpetrators of historical injustices. It is essential to note here that a comprehensive list may not be possible, as this is not the thrust of this study, but rather it forms a component of the study. It is also important to note that this study is not a judicial process. It follows from the accounts of witnesses, based on their perceptions, as provided by both the primary and secondary data, but serves as a possible starting point leading to further investigation and the implementation of findings from that kind of investigation. In the following section this study conducts a systematic narration of the different perpetrators as well as the injustices they committed.

The interviews conducted in the Counties that formed a part of this study revealed that the state used agencies such as the police to oppress and violate rights. In addition, different people in high positions in government such as officer in the Lands Ministry, also used their positions to, for example grab land. In some other cases, close links to the political elite e.g., prominent politicians or government officials, gave certain individuals the license to commit crimes that violated the human rights of others or whole communities. Such crimes included for example the grabbing of huge chunks of land or the commission economic crimes (LS_30044 – interview conducted on 29/7/2015 in Trans-Nzoia). In fact, the regime "*supported those evicting people from their land and grabbing property so long as they were deemed to one the side of the ruling party KANU*" (LS_30037 – interview conducted on 28/7/2015 in Trans-Nzoia).

In paragraph 27 of *Volume IV* of the TJRC final report, the TJRC "*found that state security agencies, particularly the Kenya Police and the Kenya Army were the main perpetrators of bodily integrity violations of human rights in Kenya including massacres, enforced disappearances, torture and ill-treatment, and sexual violence*". In northern Kenya, for example, the rights of the communities living there have been grossly violated by state security agencies. "*The security operations in the region were accompanied by massacres, systematic and widespread torture, rape and sexual violence of girls and women, looting and burning of property the killing and confiscation of cattle and other Livestock*" (paragraph 28). Further, the Kenya military inflicted violations and atrocities during the Shifta War in northern Kenya and particularly the Kenya Army

committed mass killings during this period (para. 42). They even held women as sexual slaves (para. 43) and confiscated livestock belonging to civilians (para. 44). Among the culprits who bear the greatest responsibility were *"Brigadier Joseph Ndolo and Brigadier Jackson Mulinge"* (para.53). Others that bear responsibility, particularly at the time of the Bull Karatasi Massacre in 1980 were member of the North Eastern Provincial Security Committee which had Benson Kaaria who was the then Provincial Commissioner for North Eastern Province and Garissa District Security Committee as its chair. Others included the Minister for Internal Security at the time of the operation Godrey Gitahi Kariuki (para. 72). At the same time the Commission found out that state security agencies were responsible for Bulla Karatasi Massacre in 1980, Wagalla Massacre in 1984, Lotirir Massacre and Malka Mari Massacre, all which happened in northern Kenya during the Shifta War. This information was corroborated by an interview in Wajir in which the participant reiterated: the massacres in Wajir were perpetrated by people like the former PC [Provincial Commissioner] North Eastern Benson Kaaria, the DC [District Commissioner] and the entire security team (LS_30061 – interview conducted on 2/9/2015 in Wajir).

On the other hand, economic marginalization was directed at was targeted at five key regions; *"Upper Eastern, Coast, Nyanza, Western and North-Rift"*, by the adoption of policies that underdeveloped these regions (para.30). These policies were adopted by the successive regimes of Kenyatta, Moi and Kibaki. Injustices such as assassinations as well as disappearances have also been attributed to the successive regimes and particularly the holders of various offices deemed responsible for security. For example, the TJRC found that *"it was common for the state and particularly the police, to summarily execute individuals who were suspected to be criminals or members of proscribed gangs"* (Volume IV, para.130) such as the Mungiki. Such was the case during Operation Okoa Maisha in March 2008 when the Kenya Police and Kenya Army systematically attacked the civilian population summarily executed members of the Sabaot Land Defence Force (SDLF) (Volume IV, para. 133). In paragraph 154 of the above document the TJRC found out that *"perpetrators of sexual violence included state security agents, ordinary citizens, members of organized militia groups, as well as British soldiers stationed in Kenya for training purposes"*. Further, majority of sexual violence cases committed during conflict, were committed by *"the General Service Unit (GSU), the Kenya Police, the Administration Police, the Anti-Stock Theft Unit and the Kenya military"*. During these state-led interventions, instead of protecting the

civilians, these state agents raped and tortured women and girls in order to *"terrorize, suppress, intimidate and humiliate communities"* (Volume IV, para. 155).

On issues regarding the land conflict in Kenya different revelations were made in support of the earlier observations made in this study and which pointed a finger to the holders of the Office of the President in the successive regimes, key ministers in the successive regimes, power political elite in the successive regimes as well as their allies/cronies. The report on the illegal/irregular acquisition of land published in 2004 pointed out to individuals who allegedly benefited from the illegal/irregular allocations. Additionally, just as has also been mentioned in the report the primary data also revealed knowledge on the part of the interviewees in Uasin Gishu County that *"the Kenya Army, the East African Tanning and Extract Company, the tea farms in Nandi and small land buying companies formed during Jomo Kenyatta´s regime were beneficiaries of land grabbing"* (LS_30022 – interview conducted on 8/7/2015). A similar discontent was expressed in Kericho County where it was expressed that the land buying companies formed after independence by those who were privy to and privileged with the information became the [*wakoloni weusi*] black colonizers (LS_30035 – interview conducted on 20/7/2015). The interviewee went further to lament: *"hmmmm wakoloni weusi, unakuta mtu mmoja yuko na shamba zaidi ya elfu kumi!"* [Hmmm colonizers of black descent. You find one person owning more than 10000 acres of land!] (LS_30035 – interview conducted on 20/7/2015).

In conclusion, Annex I of Volume *IV* of the TJRC report compiled a list of up to 253 *"Adversely Mentioned Persons"* (AMP) in the various injustices that were committed, the alleged violation and the Commission´s findings and recommendation for each of the persons. Further, the Commission sent summons to the accused and documented when these summonses were sent to each of them, their receipt of response and the nature of the response that each of them gave. For example, in the case of Major (Retired) Joseph Nkaiserry (who was Member of Parliament from 2002 to 2014 and is currently serving as a Minister of Interior and Coordination of National Government) and Peter Langat (who was then a District Commissioner), it was alleged that from 22nd February to 22nd May they spearheaded "Operation Nyundo" in northwest Kenya which culminated in the Lotirir Massacre through which many lives were lost and more than 20000 herds of cattle starved to death. At the same time there was rape and beating of locals (Volume IV: 131). The Reverend Simon Alew, who appeared before the TJRC indicated that: *"The operation of 1982/1984 was the major*

one. The disarmament turned into kind of a communal punishment. Everybody, even if you were a peacemaker, a bishop or a professor was treated equally. If it was beating, you were all beaten. There were some people who were beaten and tortured. Over 25,000 heads of cattle were taken to Kacheliba Police Station. Over 10,000 cattle died in the same police station and the remaining 15,000 were just transported to unknown places." (TJRC Final Report, Volume IIA:426). The summonses were issued on 25th March 2013 and they both failed to appear. There was a recommendation to the Director of Public Prosecution for prosecution (Volume IV: 131).

Another example is Mr. Matu Wamae registered as TJRC/L/ITR/037/13 (Volume IV: 131). In another incidence it was alleged that "*some time between1999 and the year 2000 irregularly and illegally benefitted from irregular allocation of Hombe Forest land, within Mathira Constituency. The said allocation is said to have been orchestrated by the then Central Provincial Commissioner, Mr. Peter Kiilu*" (TJRC Report Volume IV: 137). Mr. Wamae received the summon to appear before the Commission but denied the allegation. The Commission recommended further investigation the National Land Commission. Mr. Francis M. Nyenze (registered as TJRC/L/IRT/040/13) on the other hand was alleged to have overseen the illegal excision of 3000 acres of Hombe forest and irregularly allocated himself and others the same while he was Minister in charge of forests. He was sent summonses on 17th January, 2013 and he did not respond. The Commission recommended further investigation by the National Land Commission (TJRC Report Volume IV: 137). Additionally, more than twenty individuals who served in various positions in government were summoned for the alleged illegal acquisition of land meant for Sitatunga Farmers Cooperative Society, Livayo Farmers Cooperative Society in Trans-Nzoia County, Mukaambita Farmers Cooperative Society, Kilivi Self Help Group in Kitui County, Koreni Community, Mtwapa Settlement Scheme, Kijipwa Settlement Scheme in Mombasa County and Kaptich Farm in Uasin Gishu County. All these were recommended for further investigation the National Land Commission.

5.6   THE VICTIMS

This inquiry adopted the TJRC´s definition of victim. In the usage of the term victim the Commission sought to remain consistent with the international human rights instruments, and, in particular, the Basic Principles on the Right to a Remedy and Reparation and Rule 85 of the International Criminal Court´s Rule of Procedure and Evidence. The term, as used in this study,

therefore, *"denotes a natural person who has suffered harm as a result of the commission of any gross violation of human rights"*. These may be persons *"directly affected by the violation"* or the *"relatives of that direct victim"* (Volume IV: 124)

The TJRC, in making its recommendations for reparations identified and categorized the gross violation of human rights during the period 1963 to 2008. The first category was named *"violations of the right to life and"* these included *"victims of massacres, summary or arbitrary executions, political assassinations"* and *"disappearances or killings of political actors and human rights defenders in which the state was complicit"*. In the second category *"torture, inhuman and degrading treatment or punishment of political detainees or human right defenders, rape, sexual and gender-based violence other than rape and mutilation"* and *"grievous bodily harm"* were identified. The third category included those who *"had suffered conflict-induced displacement, development-induced displacement without appropriate consultation/compensation and resettlement plans for communities, deaths or disability directly resulting from conditions of forced displacement and violations of ECOSOC rights within the context of forced displacement"* (Volume IV: 103-4).

Historical injustices and contemporary land injustices formed the fourth category and here the *"illegal acquisition or occupation of communally held land, state seizure of private, community or trust lands without sufficient public purpose or for evident personal gain and, violations of the right to free, prior and informed consent in allocation of rights to, or legal designation of, the ancestral lands of indigenous communities specifically including hunter-gatherer, fisher peoples and pastoralists"* were included. The last category involved the systematic marginalization experienced in the country during the period 1963 to 2008. Under this category they identified the direct discrimination through *"state policy, facially neutral laws that have a discriminatory effect, violations of minority rights to language, culture and religion, violations of the right to nationality, violation of indigenous peoples´ right to identity and recognition and the violation of the group right to participation in decisions that directly affect the minority or indigenous group in question as well as the violation of ECOSOC[17]"* rights in the context of marginalization (Volume IV:103-4).

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[17] Economic, social and cultural rights are recognized by international law as integral parts of the human rights framework. They are also enshrined in the Universal Declaration of Human Rights of 1948, the international Convention on the Elimination of All Forms of Racial Discrimination of 1965, the international Covenant on Economic, Social and Cultural Rights of 1966 and the Convention on the Elimination of All Forms of Discrimination against Women of 1979.

In looking at the atrocities committed, it is true to claim that the array of victims is wide and varies from county to county, depending on the adversities that were experienced during the period under investigation. In some cases certain counties have victims belonging to all the categories and who will need reparations. At the same time it is correct to indicate the ideational influences from international practice also influence the TJRC Commissioners into categorizing of victims. Historical institutionalists point out the role of ideas in shaping outcomes. The outcome of the report in this instance can be argued to be a result of ideas from international experiences and practice as well as international norms as for example enshrined in the ECOSOC framework of rights. The consideration of the *"free, prior and informed consent in allocation of rights"* and the case of minority groups in Kenya – especially the pastoralist communities and issues surrounding their land rights - borrowed heavily from the wider discourse of free, prior and informed consent. This discussion feeds into the general discourse of ideas and norms and the processes involved in norm creation.

The secondary data was in tandem with the primary data collected during this study. From the interviews, participants attested to knowledge about the various victims either within their counties or in the country in general. However, most participants were able to talk confidently about the victims that suffered violations within their respective counties. For example, in Wajir County the victims were identified as survivors of torture and these were men, women and children. A 77 year-old man narrated his experiences both as a victim and witness by saying that:

> *"Sisi wawili ndio nashikwa. Waakati hiyo tunaletwa hapa kiwanja ya Wagalla 1984 tarehe kumi….Kama saa tisa hivi anakuja DC, PPO na mkuu wa jeshi. Nasema hii nakuwa wa serikali ingine sasa nyinyi itamalizwa na wakati itamaliza nyinyi talete wanawake wenyu na watoto wenyu. Mali tutachukua. Wakasema tuko swali sisi. Hakuna swali. Moshi naona Wajir nyingi manyumba nachomwa. Hakuna swali. Hao wanatoa amri maaskari nakuja wengi AP, GSU….Tunakaa. Wakati inafika saa kumi nambili. Wanasema laleni. Hakuna mtu naeka kichwa juu. Mtu mmoja ndio anaanza kukimbia anapigwa risasi anauwawa. Baada ya hiyo analala saa tatu nasemekana toeni nguo zote. Tunabakisha underwear tumetoa ile nguo ingine. Sasa ukiinua kichwa kidogo wanakimbia juu yako. Napiga ile mtu, mpaka nakufa. Kupigwa tu peke yake. Maiti najaa hapa hata ile bado pigwa nakufa na jua…Kama nafika pale nashangaa hata. Watu wawili ile wakati natoroka risasi napigwa mingi hata askari nachoka"*. (LS_30063 – interview conducted on 2/9/2015 in Wajir).

Translated as:

[The two of us were arrested. We were brought to the airstrip in Wagalla in October 1984. At around 3 p.m. the District Commissioner and the Provincial Police Officer and the head

of the army came. They told us they will finish us and once we finish [kill] you we will bring your women and children. We will take your property. They asked us if we have questions. We did not have. At that time I could see plenty of smoke coming from the burning of houses in Wajir. No questions. Then they ordered for more Administration Police and the General Service Unit (GSU). …We continued to stay there. At six in the evening they told us to lie down on the tarmac. Nobody was allowed to raise their head. One person tried to run away and he was shot dead. After that they ordered us to strip and remain with only our underwear. If the hot tarmac burns your head [and you try to adjust] they trample on you. One person was beaten to death. Only through beating. There were lots of corpses here, those beaten to death and those that died due to the scorching sun. If you came there you would be surprised. When two more people tried to run the security agents fired shots at them until the security personnel got tired].

Other victim experiences in Trans-Nzoia included evictions, internal displacements, rape of women and girls as well as the ethnic clashes which also resulted in deaths. In these instances the victims were whole communities, individuals including men, women and children (LS_30037, LS_30039 & LS_30041 interviews conducted on 28 & 29/7/2015). Other views expressed indicated that rural communities suffered the brunt of the historical injustices in a much larger degree as opposed to the urban residents (LS_30019 – interview conducted on 6/7/2015 in Uasin Gishu). This was perhaps due to the lack of exposure occasioned by the remoteness and the levels of development of the regions. At the same time there was also concern that the Muslim community had suffered more than other faiths in the country. The Muslim did not only suffer in the rural areas but were also victims in urban areas like Nairobi, Kisumu and Mombasa. An example was in Kibra, the largest slum dwelling in Kenya, where because of their inability to acquire leases for the land.

They therefore could not be able to build permanent houses. This explains the presence of tin houses in Kibra today. Further, land belonging to Muslim schools has constantly been grabbed by powerful individuals in successive regimes (LS_30035 – interview conducted on 20/7/2015 in Kericho County).

5.7   THE IMPACT AND THE NEED FOR A HEALING PROCESS

Participants in the interviews could well articulate the impact of the injustices committed. Although in some cases they could relate the micro and macro levels of impact, at least they were aware that

there was some kind of impact. Similarly the TJRC recorded testimonies on impact which painted a negative effect on the society. For example, the Lotirir massacre resulted in *"loss of lives, sever injuries and destruction of property as well as displacement"*. This is apart from the financial losses which subsequently made the community members *"unable to send their children to school"* and a massive school drop-out rate which is today experienced in terms of the over 70% illiteracy rates recorded in West Pokot County in general (TJRC Final Report, Volume IIA:428). As a result of this, *"Kanyerus Primary School which was low cost boarding, up to now not re-opened. Schools now re-opened include Kopulio primary school, Nakuyen primary school, Tiyinei primary school, Kosia primary school, Karon primary school, Karamei primay shool, Nauyapong primary school, Kasitot primary school, Kases primary school, Kalapata primary school, Sasak primary school"* (TJRC Final Report, Volume IIA:428). However, in urban areas the participants were able to connect the micro to the macro and project the impact these injustice had on the nation as a whole. In the case of Wajir County the participants related the injustices committed to the people of Wajir County as resulting in underdevelopment in terms of education as well the high levels of school drop-out levels for both boys and girls but affecting especially the girls, high poverty levels, resentment of the community towards communities that did not hail from Wajir County which then became a catalyst conflicts between them and the other communities (LS_30062 – interview conducted on 2/9/2015 in Wajir County).

On the other hand, resident of Trans-Nzoia County related the impact to both immediate and long term effects. The injustices according to them had resulted in high levels of poverty which they associated with the presence of street families, orphaned children, impoverishment, lack of proper housing, the destruction of poverty, child labour as well as the psychological trauma that affected the women and girls that had been raped during the security operations in the area and the raping that took place when there was post-election violence in the successive years, for example. Residents in the area also suffered the loss of farm products particularly when violence started just before the harvest or when they were evicted from the Agricultural Development Corporation (ADC) farms in Trans-Nzoia (LS_30044). At the same time resident of Uasin Gishu County experienced a downward trend in the economy of the region. There were no helping hands in the farms, there was nowhere to sell the farm produce such as maize crop, milk as well as no access to shops from where they could buy cloths and other merchandise which was traditionally provided by persons from other communities such as the Kikuyu, Luo, Luyhia and Kisii (LS_30020 – interview conducted on 7/7/2015 in Uasin Gishu). In other words, the economic vibrancy of the region was

affected tremendously. Generally speaking therefore, the historical injustice had political, social, economic, cultural as well as psychological impact on the country. These, according to the data available require that the government addresses the injustices.

5.7.1 WHICH WAY FORWARD?

The above injustices led to deep divisions in Kenya. The divisions were evident along ethnic but also along lines of class. Economic marginalization, for example, created a wide gap between the rich and poor. A survey conducted by the Commission of Revenue Authority (CRA) in 2012 concluded that poverty should be one of the criterion used to identify the most marginalised areas. The survey further indicated that *"Turkana, Marsabit, Mandera, Lamu, Wajir, Isiolo, Samburu, Tana River, West Pokot and Garissa are the most marginalised counties"* in the country (CRA, 2012:18). CRA further noted that the Constitution of Kenya 2010 recognises that individuals and groups have been disadvantaged by programmes and policies in the past (2012:1). This history qualified the country to be described as a deeply divided society. The public were divided across borders that entailed the landed elite and the landless, ethnicity, economic deprived and those economically privileged etc. John Paul Lederach suggests that such conflicts are deeply rooted and protracted. An enumeration of this will be made in the discussion section where Kenya will be looked at from an historical institutionalism standpoint. It is however important to note that these conflicts necessitated the violence that was experienced after the disputed elections in 2007. They finally led to such process as the truth, justice and reconciliation process envisaged under the aegis of the TJRC.

From both the primary and secondary accessed by this study it was evident that Kenya needed to institute such a truth telling process to help the country deal with the past. In Wajir County for example the perceptions were that, in order to deal with the past, there was need for a process that would make the government and government officials as well as the security machinery accountable. According to them, it was also crucial for some form of compensation to be accorded to the victims of the injustices (LS_30061 – interview conducted on 2/9/2015 in Wajir County). The same perception was registered in Trans-Nzoia where participants indicated that they wanted houses built for them in compensation for their houses that were destroyed during the violence (LS_30039 – interview conducted on 29/7/2015 in Trans-Nzoia County). This meant that their perceptions of the TJRC was one of *"mkombozi"* [savior] (LS_30025 – interview conducted on 10/7/2015 in Uasin Gishu County) who would *"change my life, live in peace, if supported by government, the finally*

our problems would come to an end" (LS_30038 – interview conducted on 28/7/2015 in Kericho County). It is true to say that it was widely expected by majority of the participants in the interviews and the focused group discussions that the TJRC would be able to unearth the historical injustices that had taken place in Kenya since colonialism up to the PEV and subsequently help to resolve them in a manner that will ensure justice and reconciliation between the perpetrators and the victims. And, that is why calls for a truth process emerged in the 1990s.

The peak was in 2002 when the National Rainbow Coalition (NARC) government came into power. The coming of NARC into power was indeed supposed to be a new chapter for Kenya as noted by the Makau Mutua Commission (LS_30028 – interview conducted on 14/7/2015 in Nairobi County). The TJRC was supposed to unlock the historically held grudges among and between communities, between the citizenry and government and so on (LS_30008 – interview conducted on 30/6/2015 in Nairobi County). The same perception was shared by a government official in the Ministry of Interior and Government Coordination who indicated that *"the TJRC was a good move, it was a good initiative that we had a TJRC in place....I think the work was well cut out for the Commission"* (LS_30073 – interview conducted on 22/2/2016 in Nairobi County).The establishment of the TJRC renewed a lot of hope and optimism in several parts of the country especially where incidences of historical injustices were rife. The same feeling was also prevalent within the civil society in Kenya especially those that are engaged with good governance and peace building advocacy. This feeling was very prevalent in all the respondents in this study. In Wajir, victims of the Wagalla massacre were for instance very hopeful that the TJRC would be able to finally resolve the injustice that had befallen them during the security operation in 1984. The same sense of renewed hope in the TJRC was also felt in Uasin Gishu where most respondents were more concerned with land and ethnic clashes that had taken place during the clamor for multi-party democracy in the early 1990s and during the 2007/08 PEV.

5.7.2 ESTABLISHMENT OF THE TJRC

The call for the establishment of a truth commission in Kenya dates back to the 1990s, at a time when there were agitations for a review of the constitution. It became particularly urgent with in advent of the National Rainbow Coalition´s (NARC) regime which came to power via a popular and transformative vote in 2002. Through NARC, the 24 year authoritarian rule of Daniel Moi came to an end with a resounding victory of a seeming united front that promised the enfranchisement of people regardless of ethnic origin. In April 2003, the NARC government established a Task Force

on the Establishment of a Truth, Justice and Reconciliation Commission. The verdict of the plebiscite that followed was a resounding YES to the establishment of a truth process. However the NARC administration did not honor the wish of Kenyans to engage in such a process despite the momentous spirit evident in the country at the time (Volume I, TJRC Report: vi).

It was only after the violence in 2007/8 and through the Kenya National Dialogue and Reconciliation (KNDR) process that the National Assembly enacted the National Accord and Reconciliation Act on March 18, 2008. Subsequently, under the aegis of the Coalition Government, a TJRC Agreement was adopted followed by the TJR Act which was enacted on 23rd October, 2008. The Act received Presidential Assent on 28th November 2008 and finally came into operation on 17th March 2009 (Volume I, TJRC Report: vi).

The Commission had the overall mandate of promoting peace, justice, national unity, healing and reconciliation among the people of Kenya (TJR Act, 2008). Under this broad objective the Commission was *"inquire into human rights violations committed by the State, groups or individuals between December 12, 1963 and February 28, 2008"*. Some of the violations included *"politically motivated violence, assassinations, community displacements"*, settlement and eviction as well as major economic crimes such as grand corruption. Historical injustices related to the illegal and irregular acquisitions of land as well as other injustices were also to be investigated (Volume I, TJRC Report: 18). All in all the Commission was expected to operate guided by eighteen objectives as set out in the Act (TJR Act, 2008) which sought to seek out the antecedents in order to comprehend the nature, root causes and context that led to the violations. These were to be contained in a final report which would state the findings as well as the recommendation of the Commission submitted to the President, fourteen days after which it would be made public and subsequently presented to parliament for discussion and adoption (Volume I, TJRC Report:18-19).

Under Article 47, the TJR Act indicated that the recommendations would be *"legal, political or administrative as may be needed to achieve the objective of the Commission"* (Subsection a). Further the Commission was expected to recommend for prosecution (subsection b), amnesty (c), reparation (d) specific as required or legal/administrative (e). The Minster in charge was expected to table the report in parliament at least twenty one days after its publication followed the establishment of an implementation committee whose work was to begin within six months upon publication. Article 50 dissolved the Commission three months after the publication of the report

(TJR Act, 2008). All in all the TJRC´s mandate was threefold; truth seeking, reconciliation and justice (Naughton 2014:60).

In their summary of the report, Kituo Cha Sheria (2014), indicate that initially the Commission was supposed to be in operation for two years. However due to which ranged from those challenging the suitability of its Chairperson (and which lasted for a total of fifteen (15) months from the time the Commissioners were appointed in August 2009) to legal as well as financial challenges, the operations of the Commission were slowed down. The Commission therefore only began substantive operations in September 2010. It is worth noting that this was one full year after establishment. It is because of this that the life of the Commission was extended three times: the first extension lasted from November 2011 to May 2012, the second extension lasted from May to August 2012, while the last extension lasted from August 2012 to May 2013.

After four years of work, the TJRC handed over it report to President Uhuru Kenyatta on May 21, 2013. However, the report has been facing several serious challenges amongst them the government´s reluctance to widely publish the report a well as several pending court cases disagreeing with the contents and seeking order from the High Court to censor aspects of the report or block the implementation of some of the recommendations (ICTJ publication, 5/9/2014). In other developments there have been attempts by parliament to amend the law by withdrawing a clause that deters MPs from making any changes to the report (Daily Nation, 7/12/2013 & Angote, February 28, 2014) so that Members of Parliament can have powers to amend the findings of the Commission, "*including some touching on President Kenyatta*" (Daily Nation, 6/12/2013 & Beja, March 3, 2016). Another reason was that the TJRC report recommended prosecution of some senior government officials and politicians for their involvement in 2007/8 poll chaos (Daily Nation, 7/12/2013). The public therefore remain doubtful about the implementation of the report. While the report was released on May 21, 2013 "*few people know much about its findings or what is happening with its recommendations. The short answer is that the Commission provided detailed overview of injustices, but that—together with its recommendations—these findings have been largely ignored*" (Daily Nation, 9/5/2014) as has been the case with the reports of previous commissions in Kenya.

5.8   PREVIOUS COMMISSIONS IN KENYA

The lack of implementation of the TJRC report was reminiscent of the outcomes of previous commissions and from a historical institutionalist point of view, a clear indication that the lack of implementation of earlier reports set Kenya on a certain trajectory. This trajectory reflects the authoritarian tendencies of successive regimes, albeit with variations. It also partly explained the unwillingness of the political elite to implement the various reports. The simple reason adduced from this inaction was that implementation meant punishing people related to them for atrocities committed. This can be further explained from the standpoint of CDA to reflect the use of Commissions to deflect the public from the social, political and economic unjustness facing the country. In this way the Commissions become a part of the vocabulary of the political elite whenever faced with pressure from the public on the need to purge the country from these unjust practices by their own.

From the interviews with participants it was evident that there was general worry that the TJRC report was never going to see the light of the day. This was especially given the history of the reports from other Commissions of Inquiry established in the past in Kenya. Stephen Brown and Chandra Lekha Sriram (2012) write that "*Numerous commissions have investigated massive graft by senior government and ruling party officials (the Goldenberg scandal, the Anglo-Leasing scandal), political assassinations (of Foreign Minister Robert Ouko), land grabbing (the Ndung'u Commission) and electoral violence (the Kiliku and Akiwumi commissions*" (2012:250). They conclude that, "*Most commission reports have named numerous high-level officials as allegedly responsible for serious crimes, yet none has ever led to a conviction or even a prosecution*" (*2012:250*).

This claim was also supported in Wajir County, for example, where it was indicated that the historical trends with the work of Commissions and particularly with reference to the assassinations that were executed in the past of prominent individuals such as the late Tom Mboya[18], the late J.M. Kariuki[19], the late Robert Ouko[20] and more recently the late Professor George Saitoti[21] were never

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[18] The late Tom Mboya was a trade unionist as well as a pan-Africanist. He served as a Minister in the Kenyatta administration and is credited with drafting the firs Sessional Paper called Sessional Paper No., 10 on African Socialism and its Application to Planning in Kenya of 1965 which set the economic development path for Kenya and which reflected a mixed economy that was capitalist oriented. Mboya became popular in the Kenyatta regime but was assassinated in 1969.

[19] Josiah Mwangi Kariuki (aka J.M. Kariuki) was a prominent politician in the Kenyatta regime who was assassinated in on March 2, 1975. He was known to challenge the Kenyatta administration over issues on corruption, unfair land distribution as well as the rising poverty among Kenyans. One of the famous quotes from his speeches and which has been used repeatedly was that Kenya had become a country or ten millionaires and ten million beggars.

going to be resolved. Referring to this occurrence as normal the participant said: "*.....but as normal, the recommendation was not made public. It was not implemented by the parliament. Which was supposed to implement it? It has been rubbished out again. The essence of roaming and using the public funds I don't know why. Where is the commission for Ouko? Where? Kawaida tu ya Wakenya kuform tu commission na kutupa nje tena. [It is usual with Kenyans to form commissions and throw them out later] But the commission itself they did a marvelous job*" (LS_30061 – interview conducted on 2/9/2015). The same sentiments were raised in Trans-Nzoia County where a participant complained on the lack of feedback from the TJRC process. He also cited the Ndung´u Report (which dealt with the illegal/irregular acquisition of land in 2004) and concluded that they focused on the issue of land (LS_30044 – interview conducted on 29/7/2015). At the same time the report of the TJRC was likened to the famous *"Waki envelop"[22]* which contained the names of the perpetrators of the 2007/8 post-election violence and which were finally presented to Kofi Annan before being finally released to the International Criminal Court (ICC) for action. According to this participant the names touched on in the TJRC report are some of *"the big fish"*, *"wale ambao sasa wana madaraka ya juu au ushawishi mkubwa katika serikali"* [those in high profile positions in government or who control or have considerable influence in government] (LS_30029 – interview conducted on 17/7/2015 in Kericho) making it unlikely for the recommendations to be pursued genuinely.

The above views resonated with those a Commissioner with the National Cohesion and Integration Commission who indicated "*very many commissions were set up to look into issues, for example for example, before even the creation of the commission, we had commissions looking at post-election violence since 1992........make very good reports with very good recommendations, but they are never picked up*".....posing that...."*one of the challenges, from eh, the Truth and Reconciliation whatever processes, is picking up the recommendations*". In most cases, what we have witnessed as a country is "*the government of the day, most of the time, tends to shy off*" (LS_30071 – interview conducted on 12/2/2016 in Nairobi County). This can partly be explained in part by the fact that whenever there are violations of human rights, "*they are by government departments*" (LS_30071 –

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[20] Robert Ouko served as a Minister in both the Kenyatta and Moi administrations. He was found murdered in 1990 while he was serving as Foreign Minister. His murder was blamed on top officials and close allies in the Moi administration.

[21] He was the Internal Security Minister in the Mwai Kibaki administration who died in a plane crash together with his deputy Mr. Orwa Ojode on June 10, 2012. His death was mysterious.

[22] A colloquial term used to refer to the encasement used by the Justice Phillip Waki Commission that investigated the violence of 2007 to present and preserve the contents of their report.

interview conducted on 12/2/2016 in Nairobi County) or by senior people in the executive as shown by data in the previous sections.

However, the conduct of the TJRC has elicited a heated debate in Kenya with regards to its contribution to the justice and reconciliation process. There is a prevailing feeling among victims and many members of civil society organizations that the conduct of the TJRC was dismal due the way in which it conducted its activities, its operational design and the leadership wrangles that rocked it. The lack of political will[23] in the process further served to complicate its operations. This therefore leads to a critical concern regarding whether the TJRC was able to uncover the truths around the historical injustices, was able to propose mechanisms that will ensure justice and finally, whether the process has led to reconciliation in the country.

5.9 DISCUSSION: ANTECEDENTS, INSTITUTIONS--FORMAL AND INFORMAL, PATH-DEPENDENCE AND CRITICAL JUNCTURES

5.9.1 INTRODUCTION

Peter Kagwanja (2009), while referring to a democracy at risk because *"of negative ethnicity, populism and manipulation of informal violence"* asserts that *"Kenya was on the precipice long before the first ballot was cast or President Mwai Kibaki was declared winner and sworn in for a second presidential term on 30 December"* (2009:365). It was therefore not surprising that the hotly contested 2007 general elections would take on an ethnic dimension, especially when it was alleged that the incumbent had rigged the presidential outcome. The post-election violence demonstrations that resulted were on a scale and magnitude not witnessed in the country since 1963. This stemmed from the massive politicization and proliferation of violence, personalization of power around the presidency, marginalization of and inequalities amongst ethnic communities as well as rising poverty and unemployment especially among the youth (Report of the Commission of Inquiry into Post-Election Violence 2008:22-23). It is from the foregoing background, this study wants to make a contribution to research on truth commissions by utilizing the historical institutional approach in understanding why Kenya established the Truth, Justice and Reconciliation Commission? This approach insists that in understanding the historical circumstances that befell Kenya it is possible to begin to explain the need for, and the process of political transformation in Kenya.

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[23] In section 8.6 this contribution, while referring to a lack of political will, seeks to deepen this discussion further by indicating that the lack of political will may actually be that the political elite in Kenya are well aware of their intentions and may have also planned so that non-implementation happens. They may also have been aware and caused the same non-implementation of recommendations made by previous commissions that investigated issues related to the mandate that the TJRC had. This research took a CDA perspective to infer these conclusions about the idea of lack of political will on the part of the elite in Kenya. For details about this discussion please refer to Section 8.6.

5.9.2 INSTITUTIONS AND INDIVIDUAL BEHAVIOR

Historical institutionalists argue that institutions are shapers of politics, political history, strategies adopted and eventually the political outcomes. In order to proceed with this argument it is necessary to identify what these institutions are in the case of Kenya. In Kenya there are both formal and informal institutions that existed before and during the time of the establishment of the TJRC. Kenya has had some form of constitution since independence. The constitution has guided the political, economic and social behavior of actors within the political arena. In existence are also by-laws governing other interactions. It can however be argued that while there exist formal institutions in the country the presence of informal norms and the role they play in Kenya cannot be ignored. A growing culture of corruption, kinship, nepotism, ethnicity, personal networks and clientelism has been the subject of debate the country since independence in 1963 as the *"rules of the game"* when it comes to governance in Kenya. Corruption in Kenya, for example, has become an informal system embedded in an asymmetrical exchange of those in positions of power and in need of protection. The institutions have therefore influenced the behavior of actors such as the holders of the Office of the President, the appointed Ministers and other holders of public office. The result was that the growing discontent amongst the populace could not be held back in order to prevent the violence that erupted after the disputed elections in the country. It can therefore be argued that these choices and actions formed insurmountable antecedents to the violence that was experienced during the post-election violence of 2007/8.

5.9.3 THE ROLE OF POWER AND ASYMMETRIC RELATIONS IN THE DEVELOPMENT OF INSTITUTIONS

In *When victims become killers: Colonialism, nativism and the genocide in Rwanda* (2001) Mahmood Mamdani alludes to a complex process orchestrated by the colonial and post-colonial power elites in their bid to cling to power. In other words, the creation of a patron-client relationship where the patron, because of the position he/she occupies in society offers favours to the client, who is usually in a weaker position in exchange for support. The patron on the other hand promises to offer protection. This is exemplified by the creation of elite gangs and private militias for purposes of protecting the powerful and unleashing terror and extra violence in anticipation of opposition during and around elections. In their study of political violence in Nairobi, Mwagiru, Sana and Njau (2002) confirm the presence of sponsors and perpetuators of political violence in

Nairobi. They also confirm an emerging trend within the Kenya political culture where use of political violence is becoming popular as a strategy to consolidating power. They attribute this to the frequent use of political violence by the elite to contain individuals and parties opposed to them. This same view is shared by Linda Kirschke (2000) in her study of late third wave transitions who asserts that in Kenya groups strongly represented in the ruling party provided some mechanism of control for the state over opposition. This phenomenon witnessed in the multi-party period was also witnessed in other countries in Sub-Saharan Africa such as Cameroon and Rwanda.

5.9.4   PATH DEPENDENCE AND CRITICAL JUNCTURE(S) IN INSTITUTIONAL DEVELOPMENT

Kenya can also be discussed from the point of view of path dependence which posits that once the choices of corruption, ethnicity, clientelism and patronage were made over choices of good governance practices at independence in 1963 by the Kenyatta regime, Kenya was destined to follow this path for a long time in history. These policy choices were therefore destined to have a long lasting effect on the choices the country and her future leaders would make. This, to a great extent, partly explains the inability of successive regimes, as evidenced in the data previously presented, to break away from these practices. In the data it was evident that under Kenyatta, Moi and Kibaki, the practice of land grabbing could not cease. This probably explains that both Moi and Kibaki were part of the Kenyatta administration and in that way they may have been privy to the goings-on thereby making it difficult for them to cut the umbilical cord. The same case can be seen in the present leadership in Kenya where cases of corruption and land grabbing continue to be reported unabated. Similarly, grand corruption, as an institution is instead growing in the country.

In many ways, it can be argued that the choices made during these early stages in the formation of the state that is Kenya today rendered the system *"locked in"* and have continued to constrain and shaping the behavior of actors in time by their persistence. The holders of office in successive regimes after Kenyatta have been unable to overhaul the informal norms of corruption and ethnicity that took root during his presidency. These choices seem to have an inertial tendency of continuing despite public outcries and rebuke. The intentions of holders of different offices of power, though they may want to turn around and reshape the dynamics that control the public sector, have been unable to do so given the deep embedded nature of these informal institutions. Arguably, by looking at the history of such institutions of corruption in Kenya, one is able to contemplate the reasons for its deep entrenchment in the political system and in the society in general.

While critical juncture offer societies the opportunities for a re-birth and to re-engineer itself, Kenya´s critical junctures were not utilized exhaustively for the realization of a new path(s). The first critical juncture for Kenya, of course, was at independence, a time when the political elite made decisions that have continued to bedevil the country. It is at this point that the country was expected to craft out a trajectory that would lead to unity in diversity for purposes of development. Instead, and with reference to the land question for example, the Kenyatta regime opted to ignore the calls for equity and adopted the skewed policy in the allocation and distribution of land to the natives. This instead ushered the country on a collision path. Another root of conflict witnessed was taken in terms of inclusivity which took the country towards the tribal/ethnic turn. Two more critical junctures can be identified: the Moi and Kibaki regime. As evident from the data presented earlier these two regimes did not alter the decisions earlier taken by the Kenyatta regime. The Kibaki administration, for example, came to power under the National Rainbow Coalition (NARC) which was widely viewed as having a national outlook and representation and the vehicle that was to usher the country to the desired destination. Instead, as seen from the data presented, president Kibaki resorted to the old styles and tricks of the past regimes. In the end, Kenya therefore lost this opportunity. Earlier, Moi, who ruled for twenty four years, had plenty of time to turn around the country, but he did not do it.

The Truth, Justice and Reconciliation process can also be viewed as another critical juncture in the history of Kenya. From the data presented, it was the hope of many in the country that this would serve as an opportunity for the country to make up for the lost chances it had in the past. The reference to the TJRC as ``*mkombozi*`` [savoir], as revealed in the data, is a clear attestation to the expectations of the general population in relation to the purging nature of such a process. However, one crucial question is whether the antecedent conditions affect this critical juncture to the extent that the decisions made are not binding and do not present Kenya with a no-return option in terms of the path taken. This is particularly because once such a decision(s) is made then it becomes progressively difficult to return to the initial point which had plenty of options.

5.9.5   IDEAS AND POLITICAL OUTCOMES

The role of ideas in bringing about change is also critical to historical institutionalists. Indeed, HI scholars believe that institutional change is the product of the ability of powerful actors to embrace new ideas in favour of instituting change. How can creative solutions address collective problems in society? Ideas, in this case become adaptations aimed at solving collective problems in society. In

this way, the ideas yield certain political outcomes in the society. In this way, it is true to argue, the idea of truth processes and its ability to help societies purge their past was first practiced in Latin American countries. More recently, it was then established in several countries in Africa including Sierra Leone, Ghana and most notably South Africa. The acceptance of the idea of truth commissions and the outcome for societies is therefore gaining root in Africa. However, for the idea to be embraced and to yield the expected results it is essential that the powerful actors believe and trust in it. In the case of Kenya, it can be argued that the truth process has, by and large, been a push from civil society actors, the opposition and external actors such as the donors and epistemic communities.

In the data presented it was indicated that calls for a truth process had been expressed earlier but gained momentum in the 1990s with the push for a new constitutional dispensation. The appropriate time however was when the NARC government came into power under president Kibaki. However Kibaki reneged on all that had been promised during the campaigns and the efforts came to naught. The violence that engulfed Kenya after the 2007/8 elections and the resulting KNDR process that followed gave birth to the TJR agreement that culminated in the establishment of the TJRC. In this way, it is true to say that the TJR process was not an idea that the powerful actors in the country believed in but rather it was forced on them by circumstances surrounding the post-election violence. The same can be argued about the International Criminal Court (ICC) process. The powerful actors were not willing to honestly commence with trials either locally or abroad.

In order to remedy this, Stephen Brown and Sriram, L. Chandra (2012) write that, aware of this and previous trends in the country, the Justice Philip Waki Commission, employed mechanisms that compelled the powerful actors to follow the recommendations in the report of the Commission of Inquiry into the Post-Election Violence of 2008. The Commission recommended that the government creates a tribunal whose composition involved a foreign prosecutor. The government failed to do this and subsequently the evidence was passed on to the ICC. Interestingly they conclude that the political elite had converged together to perpetuate the impunity that had characterized Kenya for decades. This saw top government officials publicly advocating for the creation of a Special Tribunal for Kenya but privately opposing it. They argue that it is an unrealistic expectation that *"the big fish will fry themselves"* (2012:257-8).

The above argument is supported by Lord Mark Malloch-Brown who refers to ICC cases relating to Kenya. He indicates that applying international justice procedures while leaders are still in office is

incredibly difficult because it becomes very difficult to protect witnesses and prevent the process from being politicized. In the same vein Kofi Annan on the other hand, augments this by indicating that in the Kenyan case the president and his deputy were on the dock and employed lots of effort and resources to fight the ICC process (Pilling, June 16, 2016). This culture led Judge Chile Eboe-Osuji to make a damning indictment of the levels of impunity in Kenya. In his verdict he indicated that *"one relevant consideration to both issues is the troubling matter of impunity for repeated cycles of post-election violence in Kenya. There was violence in the 1992 and 1997 elections. And, then, there was the 2007-8 episode"*. Yet, despite all this evidence, *"the regimes of the time had done little to stem the streak of political violence"*. According to the Judge, *"the failures of the past"* regimes to make a conscious effort to deal with these crimes *"had convinced the Trial Chamber that the government had no intention of prosecuting perpetrators of the 2007/8 violence"* (cited in, Namunane, April 7, 2016). This same attitude has been witnessed with regard to the TJRC and the outcome of the process, according to the findings of this study. This amounts to, and explains the lack of political will in implementing the recommendations of successive commissions of inquiry and the underlying lack of commitment when establishing such commissions. The decisions made by the elite in the past continue to tie them or their relatives and cronies and dissuade them from breaking away from the past and pursuing a course that will land the country in the path of justice, reconciliation and participatory democracy. It can well be argued that the setting up of such commissions has merely been a public relations exercise aimed at cooling off the temperatures of the public.

5.10   SUMMARY AND CONCLUSION

This chapter sought to answer the research question: ***why did Kenya establish the Truth, Justice and Reconciliation Commission?*** The chapter identified the antecedent conditions, amongst them, the human rights violations, massacres, torture, and detention without trial and sexual violence. The primary and secondary data revealed that historically –from 1963 to 2008 -- different regions in Kenya suffered violations of human rights ranging from assassinations, disappearances, illegal/irregular dispossession and acquisition of land and torture. The injustices were committed by the State, communities and individuals. In the most part however, individuals holding positions of power used their offices to commit the injustices. The bulk of the data also indicated that land injustices formed a bulk of the violations committed against individuals and communities while at the same time land issues were also very closely related to other injustices committed. A discussion of the data utilizing historical institutionalism also indicated that there is resonance in institutions,

actor behavior, path-dependence, critical junctures and ideas and political outcomes in relation to the truth process in Kenya. This resonance also affects, to a great extent the attainment of justice, reconciliation and the end goal of a participatory society. This is because the decisions taken at independence have continued to influence the policy directions taken by successive regimes with regard to later decisions in relation to the desired change in the country. This therefore obscures the delivery of justice and the establishment of a comprehensive reconciliation framework that ultimately leads to the emergence of a participatory society occasioned by the feeling that all belong to the country and feel an urge to contribute to governance. In this way, historical institutionalism offers a succinct approach to the understanding of why Kenya established the truth process. The analysis further suggests that for there to be meaningful change there must be political will. That is, the powerful actors must first embrace the idea that truth process is important for the country and be ready to face the outcome of such a process. Only then can we expect genuine change in the country. A lack of political will therefore continue to serve as an impediment to the implementation of the recommendations made by the TJRC and as such to the desired change in Kenya.

The predicament of Kenya can be related to various routes of modernization that did unfold in different societies, and particularly in the so-called West. In "*The Social Origins of Dictatorship and Democracy: Lord and Peasant in the Making of the Modern World*" (1966), Barrington Moore discusses the revolutionary origins of capitalist democracy by utilizing the historical institutionalism approach. He identifies three paths to modernity; the bourgeois revolution that attains the ´*western form of democracy*´, ´*conservative revolution from above*´ whose resultant political arrangement was fascism and the third pathway culminating in communism and exemplified by Russia and China is initiated by the peasants. The first pathway was followed by England, France and the United States while the second can be attributed to the developments in Germany and Japan (Moore, 1966:413-14). Moore attempts to contrast the political developments in India, which did not experience similar processes; ´*no bourgeois revolution, no conservative revolution from above, no peasant revolution*´ (1966:314), to the capitalist and communist variants. He concludes that although India did not go through these upheavals and seems to be well on the path of development in terms of industry and a working political system the ´*appalling problems facing the Indian government are due to these very facts*´ (1966:314) which were then affecting the developed worlds. He therefore suggests certain conditions for democratic development to happen. These are:

a) the development of a balance to avoid too strong a crown and too independent a landed aristocracy,

b) a turn toward an appropriate form of commercial agriculture,

c) the weakening of the landed aristocracy,

d) the prevention of an aristocratic-bourgeois coalition against the peasants and the workers, and,

e) a revolutionary breakaway with the past (1966:430-31).

Arguably, Moore´s argument is premised on land reforms where he concentrates on the land aristocracy, appropriate use of land in terms of agricultural practice and the empowerment of the peasants, who depend on that very land in order to realize their potential and future. This becomes the basis for either growth into a democracy or a relapse into dictatorship. The data in this study revealed that although there are other forms of human rights violations committed in Kenya historically, the potent of injustices related to land carried more weight and thereby needing more attention. Further, the land injustices were committed mostly by the political elites and their allies. Moore´s assertion is that the above are prerequisites for a society moving towards a functioning democracy which to him is the desired future. Processes of democratization should therefore be characterized by these five conditions in order for a society to attain peace and stability (Femia, 1972:23). The argument here is that the inability of a regime to make serious political reforms, and by extension, to pursue truth commission processes in earnest, that take into consideration historical injustices such as those identified in the Truth, Justice and Reconciliation Report in Kenya; land, economic, marginalization and others, eventually leads to more conflict in a society and further demands and grievances which can precipitate into additional instability. It is therefore possible that societies coming from similar pasts can overcome this and move towards stability if they are able to address the public´s demands for social, political, and human rights acknowledgement and redress.

Moore however cautions that while the historical conditions in a country can generally be attributed to the kind of change that happens in that particular country, a consideration of external factors is also necessary as contributing to change (1966:427). His view of democracy is purely in structural terms (Femia, 1972:22). This is demonstrated when he writes that the long periods of violence that characterized ´the Puritan Revolution, the French Revolution, and the American Civil War´ led to change seen in terms of the ´modern western democracy´ (1966:429). The rudiments of this order of life according to him are:

"…..the right to vote, representation in a legislature that makes laws and hence is more than a rubber stamp for the executive, an objective system of law that at least in theory confers no special privileges on account of birth or inherited status, security for the rights of property and the elimination of barriers inherited from the past on its use, religious toleration, freedom of speech, and the right to peaceful assembly" (1966: 429).

He further emphasizes that societies, after attaining this order, may from time to time falter and renege on these tenets but that does mean however that they are undemocratic because they have mechanisms that bring them back to democratic practice (1966:429). Inherent in democratic political systems therefore is structures and corrective functions that remedy and self-regulate relapses from time to time. This is the function of checks and balances in a system.

CHAPTER 6.THE TJR PROCESS IN KENYA AND THE ATTAINMENT OF JUSTICE

6.1   CHAPTER PREVIEW, AIM AND SCOPE

While maintaining historical institutionalism as the meta-theory, this chapter utilizes the conceptual framework for reconciliation as envisaged by John Paul Lederach to critically analyze whether the TJR process delivered justice in Kenya. Lederach (1997) conceptualizes justice as being one of the four major components in the phrase, "*Truth, Mercy, Justice and Peace*" as enshrined in Psalm 85. He engages in a discussion with the Nicaraguan conciliation team accompanying the Yatama leaders in an exploration of these concepts. He thus arrives at the powerful image of Justice which is, according to the discussions represented by the image of "***making things right, creating equal opportunity, rectifying the wrong, and restitution***" (1997:28). By looking at the present as being a conditioning from the past the chapter seeks to answer the second research question: ***Did the Truth, Justice and Reconciliation process facilitate justice, how and why?*** The chapter also applies the overall conceptual framework used in the study in order to link the historical component of this contribution as well as the effects this may have had on the attainment of justice. In essence therefore, the chapter seeks to provide an understanding to the lack or presence of justice in the TJR process and links it to history and the anticipated future that is a participatory society. Utilizing both primary data from the interviews and focused group discussions, as well as secondary data from various reports by civil society organizations and other literature such as newspaper articles and journal articles, the chapter explores the concept of justice as understood by various actors and presents the perceptions from the interview participants on whether justice was delivered and why. This is then followed by a discussion on the concept of justice and understood by various scholars and the implications of this on truth commission processes.

6.2   INTRODUCTION

In Article 15 of *Volume IV* of the final report of the TJRC the commission recommended "*the establishment of a Committee for the Implementation of the recommendations*" contained in this volume. This would have been in accordance to the critical juncture framework which would mean that the implementation of the recommendations would propel Kenya into a reconciliation path that would then trigger the emergence of a participatory society. It was named the Implementation Committee. According to the recommendations, this committee would be established by legislation

and was expected to be in operation before the dissolution of the TJRC to enable the handing over of critical documents which were in the custody of the commission. The commission further went ahead and drafted a bill titled *"Committee for the Implementation of the Recommendations of the Truth, Justice and Reconciliation Commission Act"* which it hoped would make the work of parliamentarians easy in moving forward with the TJR process in Kenya (2013:75).

In addition, the content of the bill had functions of the committee which were proposed to be, for example, the *"management and administration of the Reparations Fund"*, mapping, registering and processing *"victims´ claims using the commission´s database as the starting point"* and *"facilitating, in consultation with the relevant government body, the process of memorialization in line with the recommendations set out in"* the report, among other functions (TJRC Final Report, Volume IV, 2013: 77). The proposed committee would also have an outreach strategy which would be tasked with the management of victim expectations about the reparation process, provide clarity on eligibility for reparations and pilot-test outreach methods before creating a nationwide program (TJRC Final Report, Volume IV, 2013: 78).

All in all, in their report, the TJRC envisaged the management and administering of reparations. In so doing, the Committee adopted a definition for reparation which states that it is the process of: *"dignifying the victims by measure that will alleviate their suffering, compensate their social, moral and material losses, and restitute their rights"* (2013:97). According to the report, *"the State of Kenya is responsible for reparations because violations were perpetrated by State agents or the State failed to protect its citizens"*. Further, reparations could be obtained *"through state administrative"* programs *"or through recourse to the courts"* and it was the States responsibility to ensure that victims were not overburdened in pursuing this (2013: 98).

6.2.1 TJRC AND TYPES OF REPARATION

The Commission was cognizant of the *Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law* which distinguishes five forms of reparations as the following:

- Restitution: restores the victim to the original situation before the violation occurred. It includes restoration of liberty, enjoyment of identity an citizenship

- Rehabilitation: includes medical and psychological care
- Compensation: provides money for damage suffered
- Satisfaction: includes official declarations restoring dignity and reputation, public apology, commemoration and tributes
- Guarantees of non-repetition: includes structural measures that will prevent reoccurrence of the violations. (Volume IV: 99).

These forms of reparations as envisaged in the basic principles were taken to inform the ideas behind the reparative recommendations made the TJRC. In other words, as argued in historical institutionalism the ideas emanating from the principles would in effect influence the outcomes of the TJRC process. It is therefore following these guidelines that the TJRC received proposals from individuals and communities on their demands for reparations and analyzed and categorized them. The TJRC then came up with the following categories:

1. Violations of the right to life
2. Violations of the right to personal integrity
3. Forcible transfer of populations
4. Historical and contemporary land injustices
5. Systematic marginalization (Volume IV: 103-4).

Against these categories, the TJRC then went ahead to proffer appropriate measures to be taken in terms of reparations to individuals and communities. These were categorized as collective reparation and individual reparation. Some of the victims were identified as most vulnerable and were prioritized under category A while those under priority B we eligible for collective reparations such as land reparations and socio-economic measures. Victims under category C were eligible for standardized reparations (Volume IV: 105-121).

6.2.2 TJRC AND THE CONCEPT OF JUSTICE

Objectives d, e, f, g, h, i and j of the Truth, Justice and Reconciliation Commission Act No. 6 of 2008 gave the Commission the mandate to generally investigate the historical injustices and to recommend for prosecution, *"determine ways and means for redress"*, facilitate the granting of conditional amnesty, *"provide a platform for non-retributive truth telling"*, provided a truth telling

forum that restores dignity, provide a forum for confession in order to facilitate reconciliation and to *"compile a report with recommendations on measures to prevent future occurrence of such violations"* (TJRC Act, 2008:9). In the process of their work the TJRC was influenced by different schools of thought in their conception of justice. These ideas shaped the outcomes of the recommendation that the Commission made, according to the HI theory. This means that apart from retributive aspects of the concept justice, the TJRC adopted a restorative (focused on repairing the harm done to victims and the greater community) and social (linked to equality and respect for human rights) conception of justice which included the reparation and rehabilitation of victims of gross violations of human rights. This approach targeted not only individuals but also regions and whole communities (TJRC report, Volume I: 45-6). In the thinking of the TJRC the establishment of an authoritative record of past abuses through the identification of individuals and institutions found to be responsible for human rights violations and historical injustices even without the prospects of criminal justice was a form of justice in itself. The act of wrongdoers publicly being held to account for the wrongdoings would serve some form of justice (TJRC report, Volume I: 45). The above means therefore that justice is a complex concept and can be conceived variously. The ideational process of the TJRC impacted on the recommendations and helped in constructing the nuances of the complexity of the country´s problems and issues. These ideational processes also shaped the assumptions made by the TJRC. It is from here that we now look at the conception of justice as envisaged by the TJRC. This study finds it important to analyze the perceptions of the sample data on whether the above was attained through the TJR process.

6.2.3 WHO´S JUSTICE AND WHICH ROAD TO JUSTICE?

The conceptions of justice vary according to different sections of society. These conceptions are also dictated by an array of issues ranging from geography, the kind of injustices faced by victims, the current economic position of the victim, whether one is an alleged perpetrator, whether one is an alleged direct perpetrator or a descendant of the alleged perpetrator, and the position of authority of either a victims or alleged perpetrator. This was evident from the data collected during this study. The data revealed indicated that these issues were alive before the establishment of the TJRC, during the life of the TJRC and after the report was submitted. A number of people in Wajir County, for example, developed acute health complications emanating from injuries caused by the police during the Wagalla massacre. To them, addressing the consequences of the atrocity and compensation, in accordance to tradition, was paramount. Another vivid example was one of victim

who presented himself before the Commission in Nakuru County with a bullet still stuck in his head. The exigency was addressing this as an immediate issue (NPI-Africa & GPPAC, 2014:15). This raises an issue on the expectations of the public had on the process and the variety that accompanied these expectations which came in many forms; ethnic, class, regional and religious. Who was lobbying for what form of justice and why? How about the government; what form of justice did the government envisage? Hayner 2001 argues that, *"when dictators and other perpetrators help design the end of their own rule, the usually place limits on any accountability for their own crimes"* (2001:12). This then has serious implications on the entire process of truth seeking. How about the alleged perpetrators; how did they perceive the process of the TJRC vis-à-vis the attainment of justice? How about the landed elite?

According to a participant in Wajir County, for example, the marginalization of the people of Wajir affected the community in a variety of ways - it had a spill-over effect in education standards, affected people economically and socially as well as politically. To him, the attainment of justice must address all these aspects. For example, *"when you see a whole military raping girls in front of their parents....And when a parent has to choose between his children who should proceed and who should not. Then a girl child will always be the one who will be chosen to be the one who is dropped out, the mere fact that you are just a girl...."* (LS_30062 – interview conducted on 2/9/2015 in Wajir County). On another note the same participant has the following view of justice. Additionally, justice is *"I think bringing the government to book for every, should I say violation that they brought to the people... Yeah"* (LS_30062 – interview conducted on 2/9/2015 in Wajir County). This, points to the varied concerns, some which are immediate, and need different kind of attention. To this participant, the conception of justice will vary because of the proximate nature of the impact of the injustices committed.

The different perceptions of justice within the country may have been blurred by the varied concerns. For example, in a situation where *"justice for the many means eeh, punishment. And those who are supposed to be punished are the ones who are supposed to implement that punishment"* (LS_30013 – interview conducted on 1/7/2015 in Nairobi County), it renders the pursuance of this justice difficult. This is because *"I think that is not an easy thing for you to even get to that point"*. It requires a comprehensive framework beginning with the premise that *"people have to know their rights first, they have to be sensitized; they have to know the right channels, where to go in case this happens.…… And eventually maybe they can get justice. Yeah. Accountability from the government*

I think is what is required" (LS_30062 - interview conducted on 2/9/2015 in Wajir County). Evidently, there were silent contestations of the different notions of justice and their applicability. For example, the team of drafters of the report of the task force which sought the opinion of the public on the need to and purpose of a truth commission was headed by a Professor Makau Mutua, a prominent legal scholar and human rights activist. The report did recommended *"the establishment of a Truth, Justice and Reconciliation Commission to investigate the assassinations and killings; massacres and possible genocides; political violence and murder of democracy advocates; torture, exile, disappearances, detention and persecution of opponents; politically instigated ethnic clashes; and violations of economic, social and cultural rights"* (Report of the Task Force on the Establishment of Truth, Justice and Reconciliation Commission, 2003:13).

Two arguments can be pursued in relation to the recommendations made by the Makau Task Force. As put by a former Commissioner in the TJRC, one argument could be that because of the background of members of the team, such as Makau Mutua, *"who were negatively affected [during previous regimes] and who might have wanted to seek justice"* (interview conducted on 23/02/2016) these members pushed for the Justice component in the TJRC. This only agrees with the historical institutionalist approach which seeks to unearth how different actors react to different rules differently and that in certain circumstances certain actors may either circumvent adapt to emerging rules and practices (Lowndes & Roberts, 2013: 10). In Kenya there was a school of thought that leaned towards the human rights approach while there were those that would have preferred the peacebuilding approach. Makau Mutua and others, because of their human rights background fronted the human rights approach as opposed to the peacebuilding approach to justice because of their background. *"The approach of the peace builders is not to antagonize but is more to say there were atrocities that were committed how do we deal with that in a constructive manner that does not divide the nation while not neglecting the question of justice. But how do we do it in such a way that people see the sense and the logic without tackling the issues of justice. On the hand the human rights feel like the peace builders are too soft and they want to be able to call a spade a spade, right"?* (LS_30026 – interview conducted on 14/7/2015 in Nairobi). This largely meant that whoever was charged with the mandate of providing the direction for country would definitely have some bias depending on their history with the injustices in question.

This brings to focus the international/outsider element and whether the Justice component was a push from external actors? This is partly because *"Kenya is the only country with the "J"*

component" (interview conducted on 23/02/2016), as argued by a former Commissioner in the TJRC. This would mean that the promoters of the agenda may have had personal interests in ensuring that compensations were made to people, including them, who had suffered the injustices and that this was prompted by an external push.

This leads to the second argument which claimed that the process of demanding for a truth process was a largely civil society and opposition affair and in many ways had an international agenda as opposed to the national agenda. This then would have blurred the interests in demanding for justice and placed the whole demand in antagonism with the government of the day. Hence because of this, and according to a senior official in the Department of Justice in the Office of the Attorney General & Department of Justice, *"some parts of the report are not implementable and parliament considers these recommendations as explosive"* (interview conducted on 17/2/2016 in Nairobi). Indeed, internal memo dated 19th February, 2015 and referenced as DOJ/CONF/LJM/3/48 VOL. V (97), the Department of Justice gives brief comments on the recommendations of the TJRC and states in part that *"some recommendations pose considerable implementation difficulties in that they are either: coached in mandatory terms so as to order actions by constitutional bodies and commissions (which is contrary to the constitutions) or by simply being difficult to implement"*. The memo further gives examples of the said recommendations such as the further investigation by the Office of the Director of Public Prosecutions (ODPP) of the assassinations of J.M. Kariuki, Robert Ouko, Crispin Odhiambo-Mbai and Father Anthony Kaiser.

The above data reveals the contestations around the concept of justice but which mainly has the position of the political elite (who happen on the most part to be part of the perpetrators) on one end the position(s) taken by the victims and civil society organizations on the other end. Following from the argument fronted by Lowndes and Roberts (2013) it followed that the reactions from both sides would signify those that were pro change and those that wanted status quo maintained. Lowndes and Roberts continue to argue that this further points to the general practice in the political system where such voices that sought change would generally not be welcome.

The above thought lends credence to a comment made by an officer in the Ministry of Interior and Coordination of National Government, in relation to these contestations that Kenya would have been better placed with a TRC process and not TJRC. According to him, the TJRC made room for contestations over the interpretation of what justice is and it *"is going to be our waterloo. Implementing the recommendations of the TJRC is therefore not going to be a walk in the park"*

particularly "*because the demands by different sections of society for compensation are outrageous*". In retrospect, "*whoever loaded the "J" did a very big disservice*" to our country and implementing "*justice is going to be the biggest challenge once we begin to roll-out*" since "*every step we make there will be a challenge awaiting us*" (LS_30075 – interview conducted on 23/2/2016 in Nairobi County). The resultant is an implementation dilemma (discussed in section 6.5).

The conception of justice with regard to the TJRC therefore remains in the report submitted to the president but is not shared. It means that the commission clearly understood its mandate and reflected on the way forward for the country yet this vision is not shared by the political elite. At worst, it would be expected that this vision is not shared by the populace who do not have access to the report given that the same report was handed over to the political elite, through the president, and that they should therefore have read it. Although this is the case, one can still argue that they political elite may have read the report but since it does not resonate with their thinking, that is, they are still not willing to take in ideas and let them influence their behavior, they have thus chosen to conveniently ignore the content altogether.

The Commission submitted its final report of its work to the president on 21st May 2013. Thereafter the Attorney General submitted the report to the National Assembly within 21 days as stipulated by the TJRC Act No. 6 of 2008 (Aide Memoire to the Attorney General dated 21st May, 2014:3). This partly explains parliament´s inaction. The report of the TJRC was tabled before the National Assembly for debate on 24th July 2013 but has however not been prioritized for debate to date (DOJ/CONF/LJM/3/48 VOL. (98)). This is despite the advice by the Office of the Attorney General and Department of Justice to the Chief of Staff of the President and Head of Public Service in a letter dated 19th February, 2015 requesting him to bring the matter to the attention of the president with the a view to obtaining his authority for the prioritization of debate in the National Assembly. The Office of the Attorney General and Department of Justice was of the view that the issue of the TJRC needed to be brought to a close in order to avoid unrest and negative perceptions from the populace (DOJ/CONF/LJM/3/48 VOL. (98)). The Department of Justice had in an earlier internal memo referenced DOJ/CONF/LJM/3/48 VOL. (97) and dated 19th February, 2015 recommended to the Attorney to "*consider giving advice to both the Presidency, and the Leader of Majority in Parliament, to the effect that the TJRC Report debate be prioritized forthwith*". It is important to note here that the end of term of Kenya´s 11th parliament expired June 15, 2017 (Munuhe, June 18,

2017) before the August 8, 2017 polls. The TJRC report never saw the light of the day under the 11th parliament. We are yet to see how the next parliament (the 12th national legislature) which was sworn in on August 31, 2017 (Ngirachu & Owino, August 31, 2017).

An observation made in the process of this research the narratives of government officers and the political elite seem to act in concert. They both presented a picture that the "J" component was monstrous and therefore an impediment to the TJRC process. This was also evident in the internal memos accessed during this study and which emanated from the Office of the Attorney General to various government ministries and departments. The general sentiment which led to the advice given was that some TJRC recommendations were not implementable due to the fact that they were ambiguous and not specific thereby dismissing them. This was perhaps an easy way to let this narrative permeate through the ranks and probably percolate through some trickle-down effect in the domain of the general public. As such, it may well have meant to publicize the discourse of the political elite. In any case, in the absence of a publicly available and presented report, access remained questionable and only those working in environments that needed them to access the report would be able to do so. In so doing, the assumptions made by the political elite about the recommendations made in the report remain as the determinants of the discourse relating to the outcome of the TJRC.

6.3 JUSTICE DELAYED AND DENIED, SELECTIVE JUSTICE AND PARTIAL JUSTICE

Some of the injustices committed in the history of Kenya date as recently back as the post-election violence that occurred in 2007/8. In relation to the violence that occurred in this period alone the data obtained in during this study indicated that there was no form of justice realized by the victims. According to a joint report by the international federation for human rights and the Kenya Human Rights Commission (2017) there has been almost no criminal accountability for the atrocities committed during the post-election violence, or meaningful reparation for the victims. Moreover the atrocities have remained uninvestigated and in continuation with past practices where there was political will, parliament seemingly failed to establish a domestic mechanism that would investigate and prosecute the post-election atrocities.

The above report is of the view that generally the overtures by the Jubilee government (which came into power from 2013 to 2017) have indicated reluctance to support any form of prosecution of the post-election violence of 2007/8 related cases. The report further indicates that *"since 2007/8*

thousands of complaints have been filed and yet very few have been adjudicated. It has been 10 years since the violence and many victims are waiting for justice, while many more will never find it". Notably, *"a multi-agency task force established by the Director of Public Prosecutions"* in March of 2012 reviewed over 6000 case files yet the outcome of this is still unknown and the report given to the president is yet to be made public or acted upon (2017:49).

The findings of the report above can be seen from the standpoints of historical institutionalism where actors and actor behavior can be judged through history the *"creation of the task force is viewed by many as a smokescreen for continued inaction by the government in holding perpetrators of the post-election violence to account, largely meant to create an impression that complimentarity efforts were underway and to justify the government´s willingness to address PEV cases away from the ICC"* (2017: 49-50). The report continues that all in all three petitions have been filed in the High Court challenging the government´s failure to prevent, investigate, prosecute and provide reparations to victims of sexual violence, police shootings and forced displacement and while this remains unsolved they form a critical channel for the achievement of justice by those that suffered the injustices of the post-election violence (2017: 50-51).

The focused group discussions conducted in; Nairobi on July 14th 2015, Trans-Nzoia on July 28th 2015, Wajir on September 9th 2015 and, Garissa on 18th of May 2016 seem to agree with this position. In Trans-Nzoia, for example the participants indicated that they were still waiting for justice to be done. According to them, they had been promised relocation as well as reparation in the form of allocation of land elsewhere in the country. They had now resorted to forming associations such as the Mwatikho Torture Survivors Organization, which has amongst other objectives advocating for the plight of the internally displaced persons from the 2007-2008 violence in Bungoma, Busia and Trans-Nzoia and other regions. The main reason was that their plight was yet to be addressed by the Kenya government. Mwatikho organization was formed in 1992 after the clashes that rocked the country during the first elections under a multi-party system. The feeling of lack of justice was also felt in Garissa and Wajir Counties where participants in the discussions expressed the sentiments that the government did not care about their plight. According to them, they expected *"no action from the central government"* and this seemed quite *"normal"* to them because historically they had been marginalized and continued to be marginalized.

This apathetic mood was in both Garissa and Wajir who had some hope in the formation of the TJRC but which hope died with time. To them, it is only *"a different regime that would take them*

into consideration" and they looked forward to such a time. In Nairobi, participants decried the lack of commitment to deliver justice and associated this with the implications this had on the part of the elite who have been in power from 1963. According to them, individuals as well as their families were liable to returning the ill-gotten wealth and this is why they, for example, would like to stay on in power so as to control governance processes in a way that is convenient to them. Simply, this convenience means non-implementation of reports coming from processes such as the TJRC and most particularly the report of the Commission of Inquiry into the Illegal/Irregular Allocation of Public Land which was presented to the president in June, 2004.

From the above, it was the observation of this research that participants in Nairobi were more aware of the nature of the injustices committed in the country in general and had the advantage of knowing some of the content of the TJRC report by virtue of their proximity to media outlets including the internet. The fact that the TJRC report had not been made public seemed to obscure knowledge of its contents as well as the status of the implementation. They were therefore more articulate about the outcome of the process and were able to take into account the generality of the problem. This was as opposed to the participants in other far flung regions who did not have this advantage. In essence this meant that further injustice was being committed by not providing information to the country in general. And this was, seemingly an orchestration by the politicians and civil servants high up in the rank. This was confirmed by a participant in the focused group discussion in Trans-Nzoia who asked the researcher to kindly present their plight to those in Nairobi since they were only lowly people and did not have the muscle to wrestle with those in the offices in Nairobi.

The sentiments above indicate that with the TJRC process Kenya was at a critical juncture which required certain decisions to be made. However, the actors and their decisions remain *"locked in"* and are therefore unable to make such a move. Historical institutionalism also talks about power asymmetries which is indicative of the relation between in the offices in Nairobi and those suffering in the far flung areas of the country, as well as those in Nairobi that do not have the authority to execute such decisions. This is exemplified in the narratives such as the one obtained from the participant in the focused group discussion in Trans-Nzoia who from a critical discourse analysis point of view is in a compromised and subdued situation where they can only ask proxies to intervene for them. The small *"d"* in discourse analysis is about the nature of the narratives found amongst these people who seem to be suffering and no one is coming to their aid. As much as they

depend on government, the same government is not concerned with their plight. They hence form associations through which they can channel their alternative voices in the hope that they attract the attention of the government.

The association's citizens continue to form become their solace and meeting every month to console one another as well as give one another the confidence that some relief shall come one day. This feeling then keeps them going since it gives them some hope. Hope is all that they need to keep going lest they fall. This analysis also is pointed to the fact that because of the *"lock in"* caused by path dependence the delivery of justice remains obscured and the much anticipated reconciliation also remains elusive. Justice to the participants in Trans-Nzoia is about getting title deeds and being relocated to lands where they can settle and firm and raise their children without uncertainties. To the people of Wagalla it is about families of those that suffered the massacres getting reparation and greater and more funding for purposes of the development of their otherwise marginalized region. Other regions too have certain expectations that remain unmet. These disgruntlement discourses feature in their daily conversations and unless something meaningful is done, their reconciliation remains a myth. Ultimately the goal of a participatory society remains only but a dream. The data that follows further exemplifies this discussion.

On the overall therefore, a majority of the interview and focused group discussions participants were of the opinion that there had been no justice attained through the process. According to them, the process had been botched by the executive and so had the whole concept of attainment of justice through the process. Within the Kenyan context, it can be argued that the process of seeking the truth faced a number of challenges that subsequently undermined the process of seeking justice and reconciliation. Some of the challenges included lack of adequate funding to conduct its activities, lack of adequate staff and lack of political will. In addition, the conduct and the drama that surrounded the chairperson of the commission further served to illegitimatize the TJRC in the eyes of some victims and CSOs[24]. In fact, several respondents and analysts have cited it as one of the internal factors that greatly undermined the operations of TJRC. It not only diverted the attention of TJRC from the real issues but also weakened the internal cohesiveness of the team. In fact, this

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[24] The TJRC was chaired by the late Amb. Bethwel Kiplagat. However, his position was hotly contested by several commissioners and CSOs who were of the opinion that Kiplagat was unsuitable for that office since he was formerly a high ranking government official in the Moi regime and which perpetrated the Wagalla Massacre. There were calls for him to be a witness so that he could shed more light in to the events that unfolded in Wagalla in 1984. This controversy led to the Vice-Chair person of the Commission Ms. Betty Murungi to resign both as Vice-Chair person and as a Commissioner all together. The President also did not fill in the vacant position as a result of this resignation. This rendered the Commission to operate with only eight Commissioners instead of the nine initially envisaged. Kiplagat stepped aside later and this further reduced the number of Commissioners to seven.

scenario pointed to a key challenge of discerning victims from perpetrators since there was a tendency of perpetrators trying to pass themselves as victims. This was for instance very common in Uasin Gishu County where historical injustices have a long historical trajectory and elicit different narratives from segments of the society.

According to an interview participant in Uasin Gishu County the justice part of the TJRC has not been done due to the above factors:

> "In fact according to me TJRC has not done justice. They just did documentation of some of the issues that happened for example the Wagalla massacre, issues to do with land and that were grabbed, that were taken….and issues to do with the post-election violence of 2007-2008. They highlighted those issues. Some of those issues the TJRC highlighted. But when it came to justice, justice goes beyond highlighting those issues. Justice goes to restoration. What are the measures of restoration that have to be taken into consideration? What has happened is a camouflage of justice, the justice they are talking about" (LS_30018 – interview conducted on 6/7/2015 in Uasin Gishu County).

In so long as there was no feedback from the TJRC to the people of Kenya then there was no justice delivered. This is because this occasioned the inaction by the government of the day, which has largely ignored the findings of the TJRC to the extent that although the Commission completed its report, few know much about its findings or what is happening with its recommendations (Daily Nation, 9/5/2014). "*It is all silent since the TJRC presented the report to the president*" (interview conducted on 2/7/2015 in Nairobi County). And this had been the case with successive regimes. The same sentiments were echoed by another participant from the same County who replied that:

> "We are far from attaining justice…..we have already done the highlighting and documenting the atrocities that took place. We've not done the justice part of it. And justice entails people owning up and saying we've done this. If it is property that was taken people return property, if it was things that were looted people return what was looted. If victims were to be compensated, they are compensated. And then the reconciliation part of it, which is key, is where the victim accepts to forgive the perpetrator. That is the final part of it. You know me I don't think we are there and we

are not going to be there any time soon" (LS_30019 - interview conducted on 6/7/2015 in Uasin Gishu County).

Yet others felt that the government had short-changed the people once again (referring to the works of previous commissions). There was a regret that the process had exposed the lives of individuals who had come up to the Commission and presented their grievances and the perpetrators involved. All this was deliberate on the part of the government. Participants were unable to settle at ease with:

> *"the fact that the report is out and nothing substantial has been done to implement that report….. Is already telling you that people who put their lives in danger in saying things about the injustices that they felt, were feeling more shortchanged because they had poured their hearts out, people listened to them, people heard them say things. And then already put their lives in danger because no one is implementing the TJRC report. Here it is known that so and so said this about my name and the untouchables know who said them. So already that bit of reconciliation that was meant to have happened once the report was out, and people who were saying these things to get justice. And non-implementation then means they are not getting anything…..aaah out of that process"* (LS_30015 – interview conducted on 1/7/2015 in Nairobi County).

There also seems to be an element of denial from the government in relation to the atrocities committed. The perceptions from members of the communities visited were that so long as the government and her institutions such as the military and police do not openly accept liability then the road to justice remains inarticulate. According to them, this serves as a first step followed by "*compensation, for the families, then that can also be a form of justice. And also the perpetrators, those who were directly involved in those types of injustices were to be punished and held accountable for………… I think neither, all the three has not happened"*. Instead, in the Wagalla case the government changed the narrative to read that the "*57 people who lost their lives and they said those were highway bandits……… The narrative was that those who died were highway bandits and that they were engaged with the security machinery"* (LS_30059 – interview conducted on 31/8/2015 in Wajir County). This only furthers the interests of none acknowledgement leading to no implementation.

This lack of implementation of the report meant that the government was playing a wait and see tactic with the report and thereby denying certain sections of the population a chance to receive the justice they deserved. This was aptly expressed by one Member of Parliament in response to the question of Justice and the TJR process, "***Justice delayed is justice denied"*** (LS_30074 – interview conducted on 22/2/2016 in Nairobi County). This is because "*there are issues of justice that need to be addressed, you know? What are we doing about it? Yeah. Because victims are there we can't ignore there are people that are hurting and we cannot ignore that…………. Alright, how do we deal with them because we can't wish them away, alright? We can't wish them away, how do we create these platforms of various dialogues saying, those that were assassinated, what happens to them? Those, the Wagalla massacre what response do we have for it? Because these things happened during different periods, right" (*LS_30026 – interview conducted on 14/7/2015 in Nairobi County).

The country cannot move on without facing the issues that happened historically and deal with them. Only then can we say that we are on the peace path. This is because "*peace is a forum where people talk to one another and forgive one another and what not*" (LS_30024 – interview conducted on 9/7/2015 in Uasin Gishu County). And what come first, "*we think that peace can solve the others but it's the other way round. Before you get truth and before justice is done no meaningful peace can be established, that I can assure you"*. This observation is further supported by Owino (2014) who avers that "the TJRC report *"appreciates that justice is a pre-requisite for reconciliation, rather than a substitute for it. This is why even though it was modelled along the South African Truth and Reconciliation Commission (TRC); in Kenya it became a Truth Justice and Reconciliation Commission. In other words, justice was meant to be a cardinal component of this national undertaking"* (Owino, June 21, 2013).

The 2013 general elections in Kenya were conducted in relative peace. This was because leaders from two major communities (the Kikuyu from central Kenya and the Kalenjin from the Rift Valley who have previously been adversaries) came together for their own political expediency. This however did not address the root causes of the violence that erupted after the elections in 2007. This means that, "*We're just telling each other friend lets live together in peace but when I turn the other way round I point my finger at you and say look at this foolish fellow and he thinks that I am with him. The order of things ought to be put in place and before we talk about peace, there is a lot of peace we are talking about especially at this point in time"* (Owino, June 21, 2013). For peace to

happen therefore, "*I think it will take a very serious leader to come and say whatever the case is, let us open this thing because it's all about Kenya and we're not going anywhere. We're here and if the thing is not solved, down the road this somebody will say it was historical injustice not to implement TJRC report*" (LS_30024 – interview conducted on 9/7/2015 in Uasin Gishu County). This information is further corroborated by the Kenya Human Rights Commission´s *State of Human Rights Report* of 2014 which indicated in part:

> "*Many people anticipated violence during the March 2013 General Elections following the violence that marred the one in 2007. Fortunately, the elections were by and large peaceful. Regardless, some of the salient issues which made Kenyans fight one another in 2007, still remain unaddressed. The absence of violence in 2013 does not mean therefore that justice was served. In essence Kenyans sacrificed accountability at the altar of peace, which can therefore be termed as negative peace*" (KHRC, 2014: 22).

The issues raised in the report will "*just blow up*" if left pending. It requires members of parliament to be bold and brave in order to deal with them. These leaders cannot tell people who are aggrieved to accept and move on? Above all, Kenya needs a leader who is brave enough to confront the challenges the country is facing (Daily Nation, 28/11/2013). It implies that a decisive action needed to come from the leadership, that is, the presidency.

Yet, there were others whose perceptions were that there had been **selective justice**. This view maintained that those who had, for example, been compensated were favoured along ethnic lines. This in actual sense became another injustice compounded with the previous injustice. Participants wondered why certain regions received some form of compensation and others did not? "*Certain areas where there were violations committed received compensation, such as in Subukia in Nakuru but not others like Trans-Nzoia. Why? Is it about ethnicity or sectarianism?*" (LS_30037 – interview conducted on 28/7/2015 in Trans-Nzoia County). According to this interviewee, areas that the government deemed as being opposition strong-holds were left out in the compensation scheme that had been implemented. This only bred further conflict and discontent. It only served to propagate the patron-client relationship discussed in the previous chapter. According to a Commissioner with the National Cohesion and Integration Commission, if, "*squatters are going to buy the land from the government because they did not vote for the government…..Then as IDPs (Internally Displaced Persons] from Central [Kenya] and Rift valley, you're given free land and*

400,000 [Kenya Shillings] on top of it. Where is the fairness? Where is the reconciliation agenda? In as much as the first pillar of this government is Umoja" [Unity] (LS_30071 – interview conducted on 12/2/2016 in Nairobi County).

This meant that for some sections of Kenya justice was not treated as a first priority and was hence delayed for reasons such as perceived political affiliations or ethnic backgrounds.

6.3.1 THE ROLE OF TRUTH

Rotberg (2000) posits that for a society to prevent the recurrence of past atrocities a deep understanding of what happened and why it happened is critical. Only then can that society come to terms with the past and begin healing. Hayner (2001) also agrees with this and observes that *"the most straightforward objective of a truth commission is sanctioned fact finding: to establish an accurate record of a country´s past, clarify uncertain events, and lift the lid of silence and denial from a contentious and painful period of history"* (2001:24-5). She continues that truth commissions are expected to detail patterns of violence that have long been hidden with quality and accuracy to the extent of naming perpetrators so as to unsilence topics spoken in hushtones and rarely reported in the press and which are omitted in taught history (Hayner 2001:25). According to Hayner, sometimes the commission may actually bring out what is already well known but not officially acknowledged (2001:26) as was the case in Kenya, according to the findings of this study. This brings to question the role of truth.

Participants in the research also brought to question issues surrounding truth in the TJRC process. As already raised by a participant from Uasin Gishu, *"Before you get truth and before justice is done no meaningful peace can be established, that I can assure you"* (LS_30024 – interview conducted on 9/7/2015 in Uasin Gishu County) the issue of truth before justice was seen as crucial in the process. Participants in the interviews and focused group discussions were of the opinion that the process of establishing the truth was incomplete. This was supported by the argument presented by Wambugu (2014) that the Commission process did not go far enough, first by failing to expose the truth it had unearthed, second by those accused not coming before the commission to verify the accusations and possibly defend themselves and third by not addressing the inherent challenges in its mandate which obscured truth relating to the pre-independence period. The result was therefore circumstantial which required one more step: one that leads to the arrival at the absolute truth. Instead, a distortion of this circumstantial truth in order support certain interests and political

positions and promote certain fears is what Kenya has witnessed (Wambugu, August 4, 2014). This hampered any attempt to realize any form of justice. In this way the conduct of the TJRC was in many ways at fault. It is expected that truth, justice and reconciliation should follow each other in a systematic manner.

The TJRC was expected to first seek to unearth the truth about particular historical injustices in order to clearly identity the perpetrators and the victims. Going by precedencies set in other contexts, it was expected that the commission would seek the views of all parties to a specific injustice and then discern the truth. It is this truth which forms the basis for pursuing restorative justice and reconciliation. It can be argued any interference, either overt or covert, in establishing the truth greatly undermines the process of seeking truth and reconciliation since they are all related. In this case therefore, the process of establishing the truth should be thorough and beyond reproach. In addition, the manner in which the commission conducted its public hearings has also been faulted with concerns being raised as to whether it was able to collect conclusive information about historical injustices that had taken part in several parts of the country.

It is claimed that the TJRC was mainly interested in getting the victims version of events rather than deriving truth from the accounts of both perpetrators and victims. This assertion has the potential of undermining the findings of TJRC especially when it is proven that certain narratives of events were favoured. In addition, the TJRC has also been accused of failing to conduct follow up interviews in areas that they visited. This therefore denied them chance to verify the authenticity information that they had collected. It also denied them a chance to differentiate real victims from perpetrators. For example, "*if the Kenyatta family was to be for example accused of mass acquisition of public land, what is their version of the story? If some people are said to have been murdered by Moi and his people, or Biwott, what is their version of the story? Or any other person who was accused of killing people during the many ethnic clashes of the 1990s. So the perpetrators talked to no one…… And partly they knew that. We are covered by the person in power who is one of us. That eeh, brings more impunity and desperation for the victims*" (LS_30026 – interview conducted on 14/7/2015 in Nairobi County).

To some extent, the inability of TJRC to conduct follow up investigations was beyond the powers of TJRC since this was occasioned by the financial constraints that it faced. According to Naughton (2014) the TJRC "*suffered from a lack of sufficient funds and resources to efficiently and effectively conduct its operations which made the Commission, for example, to operate without a secretary or*

a secretariat during its first fiscal year". In the second year, the Commission was only allocated half of the funds projected in its budget. Interestingly, Commissioners from time to time loaned the Commission money to operate or the government belatedly came to the Commission´s rescue to provide supplementary funds or deployed support staff from other ministries to fill this gap (Naughton 2014:62). This meant that the commission operated on a lean budget due to this insufficiency that subsequently limited its activities. In addition, perpetrators of historical injustices were also averse to the whole process and as a result, some people who would have shed more light on some issues never participated in its deliberations.

The discussion on the role of truth in the attainment of justice in Kenya can perhaps be concluded by a quote from an officer serving in The Commission on Administrative Justice who indicated that:

> *"I also think that uhm, at conception, we, we, really were not interested in the truth. So before we call something any truth, justice and reconciliation, the supposition is that you would be interested in what the truth is first. Then, you would be interested in justice where justice can be achieved. And where justice cannot be achieved, then we will focus on reconciliation. The very design and the manner with which TJRC went with its process, was not geared for any of these things. It turned out to be more of an inquiry. Meeting people in…, and they say their bit here and there. And so there were no truth sessions. There was no reconciliation sessions. And certainly, the justice aspect of it could have been expected that it would arise from the TJRC report. No justice has arisen from it. And that's why I say that perhaps, whatever we had in mind clearly it was not a Truth Justice and Reconciliation process"* (LS_30072 – interview conducted on 22/2/2016 at the Commission offices in Nairobi).

This exposes the ingenuity on the part of, a particularly government, in establishing and subsequently implementing the report. In the previous chapter this study discussed issues related to the ideas and political outcomes as posited by historical institutionalism. The idea of a TJRC in the first place may well not be a welcome one in the face of the crimes committed and the alleged perpetrators. This was captured by a participant in Wajir County who maintained that "*Kuna sehemu ya watu ambao wanasema fisi akifanywa hakimu, mbuzi hatakuwa na haki? These same guys who are now in government are the ones whose parents walikuwa wanafanya hivi vitendo"* [There are people who have a saying that if the hyena is made the jury, will the goat receive

justice? These same guys who are now in government are the ones whose parents were committing these acts]. "*TJRC walifanya kazi lakini ile serikali ambayo ingeimplement hio kitu hakuna. Ni kuweka tu chini ya carpet again*" *[TJRC did their work but the government in power which would have implemented that thing is lacking. They will put it under the carpet]* (LS_30061 – interview conducted on 2/9/2015 in Wajir County).

This information is further corroborated by Lempaa (2017) who writes that *"there is no political elite good will to implement the TJRC report"*. This is because, according to him, *"THE people mentioned in the TJRC Report are high profile personalities, persons from very influential families. These people are both from Jubilee and NASA, save for the independent candidates"*. These same people are the *"who-is-who of Kenyan society who control all the factors of production - land, labour, capital and entrepreneurship, you name it. Therefore, none of them, including those who are now promising to implement it, will ever do it because they are part of it* (Lempaa, May 27, 2017). Among those named in the report are for example, President Uhuru Kenyatta and his Deputy William Ruto in relation to the 2007/8 election violence – although the report did not recommend action because the ICC proceedings were on at the time. The cases later collapsed for lack of evidence, recanted statements by witnesses and the death and disappearance of witnesses. Also named in the report are Stephen Kalonzo Musyoka, an opposition leader and former vice president for funding an illegal group in 1997 that evicted more than 2,000 Tharaka families from Mwingi area. The Laikipia Senator, G.G Kariuki who is also a former Internal Security Minister is named as bearing responsibility for the massacre of the Wagalla people alongside Benson Kaaria. The report also names Elizabeth Ongoro, an opposition nominated Senator for perpetrating violence by inciting other communities against members of the Kikuyu and the Kamba communities in Nairobi in the violence that happened as a result of the 2007/8 botched elections. These are amongst other names mentioned in the report such as the late former *"Kenya Army bosses Major Wilfred Ndolo and General Jackson Mulinge"* as bearing responsibility for the atrocities committed during the Shifta War of 1963-67 which was triggered by Somali secessionists. The war resulted in the execution of innocent Kenyans of Somali origin (Kisika, May 27, 2017). Lempaa on his part continues to argue that a read of the report reveals that the TJRC report borrows heavily from previous commissions that investigated various injustices in the country and whose reports continue to gather dust with no intent in sight to implement the recommendations. It therefore means that "*If successive presidential administrations have not implemented these reports, how can a group of politicians who have been*

part of the system implement a report of a commission that summarises the reports of other commissions?, Lempaa argues (Lempaa, May 27, 2017).

In fact, the idea of submitting the report to parliament was a misconception that parliament would have the interests of the country. This is particularly so when a high percentage those mentioned in the report are politicians (LS_30072 – interview conducted on 22/2/2016 at the Commission offices in Nairobi). Instead the political elite have formed a brigade championing *"the new national motto"* of *"accept and move"* yet the *"problems relating to land"*, for example, are so, *"sensitive that injustices around the resource should be left to fester. Move on! Very important people are involved!* Clearly, the preference for the status quo reveals an indifference to the realities that the country is facing. *"It is this indifference and intentional disregard for the suffering of other citizens that forms the fuel for the "move on" brigade"*, Owino argues. Regrettably, the political elite view the calls for justice as *"a waste of time and reconciliation simply a euphemism for the real statement that losses and gains should lie where they fall; for the sake of peace let the perpetrators keep the fruits of their injustices and the victims accept their lot"* (Owino, June 21, 2013). In principle they argue that implementing the TJRC report by, for example dealing with the land question in the Coast region of Kenya *"will reopen old wounds"*, as argued by the Deputy President William Ruto. Such an approach, he argued, *"will cause more harm than good because reconciled communities might clash again"* because it means that communities will be forced to testify against each other in the open, departing from the spirit of nationhood (Ernest, July 19, 2017). This argument, simply sought to maintain status quo as well as serve the exigencies of the looming elections of 2017 during which questions around the implementation of the report were already emerging.

Ernst (2017) continues that this is the opposite of what the TJRC report recommended. In part the recommendations are that *"the unresolved grievance of land alienation underlies the risk of social and political conflict"* and land formed the main reason why communities in the Rift Valley and the Coast were the epicenters of the 2007/8 violence (Ernest, July 19, 2017). In the accept and move fashion *"title deeds are the answer"* (Ernest, July 19, 2017) regardless of whether this provides a comprehensive solution that delivers justice and assures of non-recurrence of the conflict in the future. The Nation Agenda (2017) argues that *"The answer to Kenya's land problem has to be based on "fairness, equity, and justice" as provided for in the Constitution ad as recommended by the TJRC. Without this, meaningful reform will remain a pipe dream, whatever the political*

construct that ascends to power". The issuance of title deeds is therefore hoodwinking because it does not reform issues around ownership and therefore remains a *"mere ornamental treatment a huge problem, akin to administering a painkiller to a malignant tumour"*. These figures about the number of title deeds issues by the Jubilee administration[25] therefore amount to a lie about numbers that conceals home truths. The approach does not realize that land and economic marginalization are bedmates. The approach further only shuts *"the truth that squatters are a result of an injustice, and they will continue being there as long as the injustice is not corrected"* (Nation Agenda, February 14, 2017). This only reveals the ad-hoc approach that has been adopted in dealing with the recommendations made in the TJRC report. It is a tendency evident in subsequent the maneuvers of subsequent regimes, as found out in this study to avoid confronting injustices committed over time. The TJRC indicated that at the center of Kenya´s stability laid the land reforms and an end to economic marginalization.

It is this ad-hoc manner and lack of comprehensiveness in the approach and mindset of the political elite that has been evidence by the data obtained throughout this study. It further points to the history behind the actions and decisions made earlier by the same political elite in terms of the manner in which the property was acquired, for example, that inhibits their actions today to implement the recommendations of the report. Naughton (2014) comments on the TJR process in Kenya and points out that *"the vagaries of political will and the dangers of political interference are a risk factor in the life of all truth commissions, as they ultimately proved to be during the TJRC´s tenure"*. She continues that this red flag was already raised at the time of establishment of the Commission. She cites the TJRC´s report which opined clearly that some of the reasons for non-cooperation were the reassertion of the vested interests in the choices made by the elite and their regression from reform (Naughton 2014:65). This lack of cooperation was therefore experienced in the earlier stages of the TJRC and was seen to perhaps become fully blown in the non-implementation of the recommendations.

On the contrary the actions and decisions made by the political elite and which led to the historical injustices replayed when it was time to implement the recommendations of the TJRC report. As Naughton (2014) continues to argue, accepting a reform process therefore meant an end to

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[25] The Jubilee administration rose to power in 2013. The Jubilee party brought together Uhuru Kenyatta and William Ruto, who were previously accused of crimes against humanity in The Hague. The crimes were committed during the violence that erupted in Kenya following the botched elections of 2007. Their campaign and victory was attributed to the ICC process and through this they galvanized their communities (the Kikuyu and Kalenjin), which were otherwise initially on opposing sides. The Jubilee strongholds are therefore mainly seen to comprise the central and rift valley parts of Kenya respectively.

corruption, the primitive accumulation of wealth and a clear break from the past which the political elite were not ready to do (Naughton 2014:65). This also has a bearing on the emergence of a participatory society since the lack of a comprehensive approach also obscures the feeling of being a part of the same society. Instead, the people at the Coast of Kenya, for example, will continue to live in pain because of the unresolved land conflict and this then will lead to them to never feel appreciated and therefore a part of the society. Their full participation in governance will continue to be faint-hearted. In a nutshell, the work of the TJRC lacked the required impetus from the political elite to pursue its successful implementation. "***The report was dead on arrival in parliament***" (as earlier indicated by the Ombudsman). This is one of the many ways the pivotal aims of justice were impeded. This however points to the fact that implementation of the TJRC report remains a bitter pill which must be swallowed in order to the country to heal.

6.3.2 SOME FORM OF JUSTICE

While this was the case, it is worth mentioning that there were participants who were of the view that the TJR process, although it did not travel the full journey, achieved some form of justice. This view was shared especially by the Commissioners interviewed in this study. One of the Commissioners indicated that:

> *"….for those who wanted to let go, those ones we could, for example when we were conducting the hearings, and we could ask some people so what? What do you expect? Elderly people said we thought we were going to our graves with this; we needed this for us to be heard. So the fact that they came they shared and Kenyans affirmed they listened to them at that individual level people appreciated some form of justice and the fact that even this commission was set up, there was an acknowledgement that all was not well….And for some people that is their justice at that individual level"* (LS_30027 - interview conducted on 14/7/2015 in Nairobi County).

This view was reinforced by one of the international Commissioners in the TJRC who noted that he thought justice "*was to come through several ways. I think, one, through the telling of the truth and uh, the public exposure and the engagement with that truth. Provided some form of justice, and then there is also some form of investigation and make warranted prosecutions*" (interview conducted via Skype on 27/10/2015 from Aalborg-Denmark). Another contention is the geographical spread and coverage of the TJRC hearings. This is because the rural areas, where we have a majority of

victims, were not covered. In most cases the rural dwellers did not know what was happening (LS_30019 – interview conducted on 6/7/2015 in Uasin Gishu County). Indeed, some sections of the population in Uasin Gishu County, for example expressed that they were, first, not aware of the TJRC´s timetable and, second, not given a chance to express themselves before the Commission. *"When it comes to justice, if such a thing was not done, then people never got justice….When the Commission came to Uasin Gishu, the other communities did not get the right chance or ample time to have one-on-one open forum where somebody could have time to get out his problems, his sufferings, we never got that chance…..that means the Commission even if it had collected some information from Uasin Gishu, it went half-baked because other communities never got a chance"* (LS_30025 – interview conducted on 10/7/2015 in Uasin Gishu County).

Another reason could be attributed to the fact that officers from the International Criminal Court (ICC) were also in the process of collecting evidence from witnesses at the same time when the TJRC was also conducting its activities in the region. Many victims, who may have wanted to participate in the TJRC hearings and statement-taking did not because they feared their actions may be construed as providing evidence for the ICC process. And yet the ICC process was already bedeviled as one which was meant to *"fix"* prominent leaders of the Kalenjin community. This confusion obscured the work of the TJRC since it prevented useful information from getting into the hands of the TJRC officials (LS_30025 – interview conducted on 10/7/2015 in Uasin Gishu County). This meant that the desires of many to appear before the Commission were stifled and hence their perceptions on the outcome of the process remain unrepresented. This may also affect their perceptions of justice.

6.5   THE IMPLEMENTATION DILEMMA

As already mentioned in section 6.2.2.1 in relation to the road to justice the magnitude of the injustices committed and the subsequent reparations recommended by the TJRC presented an uphill task for the government of Kenya. According to the ICTJ, (2015), the *"inaction by the National Assembly had huge repercussions on the lives of hundreds of victims who bear the scars of past human rights abuse"*. This is despite the petitioning of parliament by the National Victims and Survivors Network (NVSN) to table the report in parliament (ICTJ, 2015). Although these efforts were made by civil society and other groups the National Assembly was officially dissolved on 7th August, 2017 (The Star, February 20, 2016) without tabling and discussing the TJRC report. In connection to the foregoing, the primary data collected in this study also pointed to the herculean

task ahead of the country and the government in particular. The challenge lies in not underestimating the pain that people have gone through and the desire for justice. And to "*reconcile that justice with some restorative restoration so that it doesn't create more cleavages in society"?* (LS_30026 – interview conducted on 14/7/2015 in Nairobi). These cleavages only serve to divide the society further and prevent the country from cohering.

Additionally, the challenge is in taking care of the detail while keeping focus of the big picture of peace-hood in Kenya as put aptly by a Member of Parliament in relation to some of the recommendations made by the TJRC, some of which the government has started to pursue albeit in an ad-hoc manner and without proper reference to the report.

> *"There was a request for an apology.... The president took one step. The question is, how much more specific, what follows an apology? How do we do reparations for victims of post elections violence who were shot by police or who were raped by militias. How do you do justice to them? When you say a 10[Kenya Shillings] billion fund [was set by the president] for restorative justice, the question is then, form a National mechanism for restorative justice and reparative justice. We have to pass that law, that is something parliament must do. And it's one of the things that we hear from the victims. They want an authority and a fund that has been budgeted for that they can go to that and address their issues as survivors and victims. We don't have that, so I think both approaches must work. And I think the ministerial committee comes up with a draft bill that makes sense and we move on"* (LS_30074 – interview conducted on 22/2/2016 in Nairobi).

The above further raises the question on the way forward in terms of implementation of the recommendations. As earlier indicated in the Chapter five, the TJRC recommended the establishment of the Committee for the Implementation of the Report of the Truth, Justice and Reconciliation Commission which, it was suggested was to be in place before the dissolution of the Commission. The membership of this Committee was also spelt out. This, among many other things such as the debating of the report in parliament, has not happened. Instead, the National Security Advisory Council in its meeting of 2nd July, 2013 directed the Ministry of Interior and Coordination of National Government to follow up on the recommendation for a mechanism to be put in place under the coordination of the Directorate of National Cohesion and National Values. Subsequently an inter-agency taskforce which drew specific Terms of Reference to implement the NSAC

directive was put in place (DOJ/CONF/LJM/3/48 VOL. V (98), dated 19th February, 2015). Yet the Implementation Task Force cannot work for two reasons: one is that so long as parliament has not discussed and approved the report the process remains stuck where it is at the moment; parliament. This is because this is a parliamentary process and not an executive process, according to a senior officer with the Commission on Administrative Justice (interview conducted on 22/2/2015 in Nairobi).

The other reason is the fact that the Task Force has not been published in the Kenya Gazette[26] as per requirements under Kenyan law, rendering their actions ultra vires. This leads to the conclusion that that the design and thinking around the TJRC was out of place and the legislation was weak (interview conducted on 22/2/2015 in Nairobi) and "*thin*" (interview with an officer in Office of the Attorney General conducted on 17/2/2016) and leaves room for variety in interpretation. At the same time different schools of thought exist about when to start implementation. Some say as soon as parliament has acted while others say it can go on without parliamentary approval (interview with an officer in Office of the Attorney General conducted on 17/2/2016) and this explains the public apology given by the president during the State of the Nation address of March 26, 2015 at parliament buildings, and the establishment of a Fund of 10 billion Kenya shillings over three years beginning 2015 for purposes of restorative justice (The Star, 26/3/2015).

While these may be seen as positive pointers to the future they still fall short of a comprehensive framework "*yet to be put in place on how to, eh, how to roll out that reparation process*" (LS_30075 – interview conducted on 2372/2016 with an officer in Ministry of Interior and Coordination of National Government in Nairobi) in order to address the recommendations made in TJRC report. In a nutshell, and as pointed out earlier by a participant, the government is shy and avoiding to confront the past. It is important to note that since the inter-ministerial agency is not gazette, it therefore is unable to function. Part of its functions would have been to manage and administer the 10 billion Kenya Shillings Fund established by the president. Or rather where this fund is domiciled? Which state organ is managing and administering it? And what framework are they employing in undertaking their mandate? In the absence of this the little but noble effort is rendered naught four years after the completion and presentation of the TJRC report to the president for action. A critical view of the situation reveals the double-speak by the government who on one

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[26] The Kenya Gazette is an official publication of the Republic of Kenya. Notices of new legislation and those required to be published by law or policy, as well as other announcements meant for general public information are published regularly in the gazette. It is registered as a newspaper (The Kenya Gazette, n.d., 2017).

hand have not properly set up the structures for implementation yet at the same time have announced the 10 billion shillings fund.

In their report, the international federation for human rights and the Kenya Human Rights Commission (2017) indicate that the *"operationalization of the fund has however been an unduly protracted process since the President´s pledge"* and *"the government has failed to take substantive action to implement the fund"*. Further, the President´s State of the Nation address in 2016 did not mention the fund or any tangible efforts to implement it, thereby indicating a lack of commitment to follow up on the promises made in the previous year. This is in addition to the numerous petitions by victims urging that parliament adopts the report so as to allow for discussion and implementation. This is besides the fact that the TJRC in its report of 2013 had put in place a robust framework that would guide this process (2017:53). In essence and instead, the implementation of the report therefore remains an ad-hoc affair and one that is conveniently attended to *"in order to avoid public unrest and negative perceptions"* as previously indicated in this chapter. For example, the disbursement of funds has lacked proper oversight and is plagued by political interference as shown in the disbursements made on 6th June, 2017 in Kisii and Nyamira Counties where cheques worth Kenya Shillings 358 million and 400 million were disbursed to 7000 and 9000 internally displaced persons respectively. Yet it was unclear where these funds were being drawn from. This was also supported by an affidavit by Stephen Mbogwa, a representative of the Internally Displaced Persons Support Initiative (IDPSI) in a case where the High Court issued a temporary injunction preventing the government from releasing the funds set aside to Integrated Internally Displaced People (FIDH/KHRC: 55-56). The affidavit challenged the fact that the government had not brought to light the mechanism put in place to ensure the beneficiaries would be compensated. The contestation was in relation to who was genuine in receiving the compensation and whether a proper framework was in place to ensure the smooth running of this initiative from the government. In contravention of the court injunction the President went ahead to disburse the funds in what seemed as using the government assistance to induce voters for votes in the 2017 elections that were fast approaching (FIDH/KHRC: 56).

6.6   DISCUSSION: WHAT THEN WITHOUT JUSTICE?

In a discussion on different forms of justice, Maiese Michelle (2003) asserts that justice is action in response to law requirements. She argues that these rules can either *"be grounded in human consensus or societal norms"* and that the ultimate goal is to ensure that all citizens fairly treated.

According to her justice issues are prevalent in society and play a significant role the conflict cycle. The role of justice is therefore to bring about stability, well-being, and satisfaction, while injustice may lead to dissatisfaction, rebellion, or revolution. The variations in law requirements within society express principles of justice and fairness variously. The result is the different forms of justice as exhibited in literature and practice. Although there are varieties in these notions, four common types/varieties can be identified. These are distributive, procedural, retributive, and restorative. Restorative justice (which aims at restoring relationships within the society and bringing back in offenders to the society) is commonly associated with truth commissions and is therefore the mainstay of this study.

Rotberg (2000) underscores that the notion behind the establishment of truth commissions lies in the rallying call of non-recurrence which is the central intention of societies seeking to recover their sense of belonging. In this sense, he argues that, truth commissions are intended to prevent future violence and restore normalcy. This chapter sought to respond to the research question: did the TJR process facilitate justice, how and why? This is because historically Kenya is a country in conflict where individuals and communities have experiences with trauma that they associate with the alleged perpetrators of historical injustices. These grievances have accumulated over generations, locking communities and individuals into long-standing animosity. The conflict is basically deep rooted and is characterized by intense animosity, fear and severe stereotyping (Lederach 1997:23). In the search for justice these communities and individuals have been seeking rights, social reconstruction and justice.

This search for justice was evident from the narratives of the participants in the interviews and the focused group discussions. The secondary literature consulted also suggested the same. When asked what their hope was when the TJRC was formed all the participants, irrespective of their background and affiliations, indicated that they had hoped for justice to finally be done. They indicated that this justice had eluded them for generations. A sense of desperation however seemed to hover in their minds with hope lost given the outcome of the TJR process. Although there are a few, mostly within government institutions who defend the actions of the government, who still saw hope in resuscitating the TJR process, the majority, particularly in the rural areas did not share this view. Not at least with the current regime given the links that it has with the previous regimes.

The role of government in ensuring peace and stability features prominently when the country faces an election. While commenting about the electoral outcome in Kenya Gaitho (2017), reiterates that

both rival political groups in Kenya seem to know have the diagnosis of the problem. However the opposition side prefers to confront the issues of equity and redistribution while the ruling party is obsessed with market-based trickle-down economics and GDP growth in the hope that this will address all other injustices committed previously (Daily Nation, August 24, 2017). This in itself presents a preference of the status quo of *"accept and move on"*. The same post-election status quo heralded in 2013 ending up in the normalization of silence and the suppression of democratic debate despite the anomalies that were evident in the 2013 general elections. A few years later (in 2017) little has changed. The country has failed to resolve the long standing issues such as land reforms, unemployment, ethnic favouritism (Shah, July 20, 2017). Shah continues to observe that rather than have a meaningful conversation about the flaws in the electoral process, such a discussion is sidelined and vilified as *"anti-peace"*. According to her, *"true peace is more than the mere absence of violence"*. Rather, *"substantive, long term peace is based on an open and honest discussion and policy reforms that attempt to rectify the deep historical injustices that continue to feed suspicion and lead to mistrust of political leaders"*. She continues to assert that "substantive peace creates the foundation for a credible election, because that peace is built on strong, publicly accountable government institutions and on public faith in the legitimacy of the electoral process".

The *"accept and move on"* mantra is propagated by the ruling elite in order to stifle discussion about good governance. In other words it dictates that all public dialogue is devoid of the justice question. It demands that citizens do not look back and demand any form of redress to past violations. Michela Wrong (2009) likens the mantra to what happened around 1962-3 when the formation of the cabinet marginalised the Mau Mau. Quoting Lonsdale and Odhiambo (2003) she indicates that this marginalisation policy buoyed by a call *"forget the past"* and *"remember another past"*. Through this call a *"new political culture of orderly amnesia emerged"* and led to the marginalisation of sections of the society, particularly the Mau Mau (2003:4) (cited in Wrong 2009:110). In the end it seeks to silence any dissent by maintaining status quo and demonizing reference to the past. Godsmith (2017) calls is the *"amani badala ya haki (peace instead of justice) meme"*. This meme is a *"blatant oxymoron coined to minimize another outbreak of 2007-style-post-electoral violence"*. While this was happening, he argues that *"the now familiar mix of skullduggery and double entendre aided by the tendering controversies perpetuated by the guardians of the process"* continued in 2017. According to him it was unfortunate that the media fraternity was calculatedly enrolled into this thinking, thereby affecting their supposed role of the fourth estate (Goldsmith, August 20, 2017). In an unfortunate development, the *"accept and move on brigade"*

has convinced the international community to *"brush aside all manner of irregularities in the interest of preserving peace"* even when it is clear that, for example, a regime is exploiting incumbency *"to perpetuate their rule through patronage, oppression and manipulation of the vote"* in order to remain in power (Editorial, Financial Times, September 3, 2017). By manipulating elections and staying in power, the elite ensure that they continue to perpetuate the injustices against the people as observed in this study. The political elite therefore popularize this mantra and use it to choke demands for justice as a prerequisite for reconciliation and participatory democracy. It is tyrannical and dictatorial from the way the political elite seek to emasculate all manner of dissent, independent voices as well as institutions that seek the emancipation of the polity. It in effect therefore is an antidote to the emergence of a participatory society.

In supporting this argument Macharia Gaitho (2017) in reference to the 2017 elections opines *"that perfect peace does not come out of vacuum"*. He maintains that everyone and particularly the Jubilee government are singing the song of peace but not one of justice and equal rights. He agrees with Godmisth (2017) that the government has been successful in enrolling other institutions such as the churches, media and civil society groups into preaching this peace without justice successfully. To them peace means non-scrutiny and non-engagement on how the elections are organized. Rightly, he continues to argue that if Kenya can get its act right then peace will be an automatic (Interview on Nation Television, July 23, 2017). The idea here is to preach a preference for silence in order to preserve peace by not engaging in scrutiny and critical engagement. This is not to mention that since 1957 electoral management in Kenya has had credibility issues manipulated first by the British and their African successors (Cheeseman, July 14, 2017). In the overall therefore, the underlying message that comes out of this discussion is that while a discussion about maintaining peace is necessary, the discussion of whether that peace is there, the quality of it as well as how peace should be attained in case it is really not there, is not necessary for purposes of maintaining status quo. Intentionally therefore, a discussion about justice and what justice remains a taboo and absent in the radar of the elite who prefer to maintain status quo, a position informed by the decisions and actions made either by them or people close to them.

In the view of this contribution the justice question is one that has been elusive to the country. This is because the political elite in successive regimes created a legacy from the beginning of not dealing with issues to do with justice. This is evidenced in the creation of successive commissions to deal with corruption, land and other injustices that have been experienced in the country. The

intentional shelving of the reports from such commissions is an indication that a *"lock in"* condition is prevalent in the country. This *"lock in"* is a result of the historical legacy from the successive regimes. In this way therefore the treatment of the reports evident in the public utterances of the political elite is pure rhetoric and meant to maintain status quo.

6.7   SUMMARY AND CONCLUSION

This chapter looked at the question of justice. Rotberg (2003) writes that in uncovering the past truth commissions offer the chance to answer questions that have remained unanswered. Who killed? Who gave the orders? Who benefitted from the land grabbing and so on. In this way it becomes possible for both victims and their heirs and alleged perpetrators to confront each other and take the road towards closure. This, at least, is the first form of justice identified by the participants in the interviews and focused group discussions. The TJR process in Kenya managed to record 40,098 statements and 1,529 memoranda. The process also held public as well as private hearings with 696 witnesses with individuals and communities spatially spread across the country. From this view, if we are to measure the success of a commission by the number of deponents submitting statements and memoranda to it, then this would a high score (NPI-Africa & GPPAC, 2014:15). However, in the same vein, majority of the summonses given to the alleged perpetrators were never honored. In other cases, when they were honored, the alleged perpetrators did not face the victims in any kind of dialogue.

Elsewhere, the alleged perpetrators would wait to late challenge the findings in court and attempt to bar the Commission from publishing its report or bar the discussion of the report in parliament. In fact, a number of parliamentarians contemplated amending the law to allow them not only to discuss but to expunge parts of the report that they felt displeased with. This was because members of the Jubilee administration headed by President Uhuru Kenyatta were keen to delete names of their members who are adversely mentioned in the report. Among the members of the Jubilee administration mentioned were the president himself, his deputy William Ruto, Kajiado Central Member of Parliament Joseph Nkaissery and Kapenguria Member of Parliament Samuel Moroto, amongst others (Odunga, December 7, 2013; Daily Nation, November 28, & December 6, 2013). MPs amended the TJR Act and introduced changes that reflected vague implementation timelines which then made *"it easier to amend the report and ignore recommendations"* (Lynch, May 9, 2014). The argument here is that even this minimum form of justice was eventually not delivered.

The next step is the reparations, as recommended by the TJRC. In some of the cases recorded by the Commission there were recommendations for either further investigation by the Director of Public Prosecutions. There has however been no program for reparations instituted. This emanates from the fact that the report has not even been discussed in parliament. Other efforts to contemplate the implementation of the report have been clouded in administrative conundrums which the state machinery is aware of and able to solve but has not attempted to do. In this way therefore the search for rights, social reconstruction and justice has been frustrated by the political elite because of the vested interests in the atrocities committed, as evidenced by the data collected during this study. The role of truth which involves acknowledgement of the wrongs committed as well as the substantiation of the losses as proposed by Lederach (1997), in the attainment of justice also featured in this study. A public apology was given by the president thinly veiled in the presidential state of the nation address. A victims fund was also set up to accompany this. However, while this is the case, all this was done void of a reparations framework embedded within a policy that would guide its implementation. It therefore ended up being construed as ad-hoc and probably unintended. This has further fermented the view that the denial of justice to individuals and communities is a reality. What is evident is the delay of justice. Justice delayed is justice denied as the legal maxim goes.

CHAPTER 7.THE TJR PROCESS IN KENYA AND THE RECONCILIATION DILEMMA

7.1 CHAPTER PREVIEW, AIM AND SCOPE

This chapter takes cue from chapter six which utilizes the conceptual framework for reconciliation as envisaged by John Paul Lederach in his book titled, "*Building Peace: Sustainable Reconciliation in Divided Societies*" (1997). This is done in the context of historical institutionalism and the implications of history on the implementation of a framework for reconciliation. At the same time the comprehensive framework for peace sets in motion processes that lead to the emergence of a participatory society. Lederach seeks to deal with the challenges posed by contemporary conflict by suggesting that the place of reconciliation is the important meeting point between realism and innovation. According to him reconciliation has got to do with the building of relationships. It involves the "***engagement of both sides of a conflict with each other as humans-in-relationship***" (1997:28). It also means and encounter where several streams of activities are interconnected so as to unlock the past and avoid going back to conflict. "***People need opportunity and space to express to and with one another the trauma of loss and their grief at that loss, and the anger that accompanies the pain and the memory of injustice experienced***". He further indicates that acknowledgement is critical for reconciliation to kick off. This is because it is the first phase in the restoration relationships. In this way a society is able to confront the past and shape the future together.

This chapter seeks to answer the third research question: ***Did the Truth, Justice and Reconciliation process facilitate reconciliation, how and why?*** In answering this question the chapter also seeks to postulate that the historical circumstances prevailing in Kenya may hinder or encourage the process of national reconciliation. This is because actors and their choices and preferences in relation to instituting the ***"reconciliation project"*** in Kenya are deeply affected by decisions made earlier. As such therefore, this also then impacts on the realization of a participatory society. The chapter utilizes both primary data from the interviews and focused group discussions, as well as secondary data from various reports by civil society organizations and other literature such as newspaper articles and journal articles. The perceptions from participants in the interviews and focused group discussions are relayed. This is then followed by a discussion on the concept of reconciliation as it has unfolded in the TJRC process and the implications this has had on the future of participatory democracy as influenced by history.

7.2   INTRODUCTION

From the onset, the Commission set to execute its work with an appreciation that reconciliation is a complex concept. An attempt at defining the concept was therefore not in order. Rather, an outline of the essential elements in reconciliation was made. These included; that for reconciliation to happen there must be a process before arriving at the goal; that reconciliation is experienced at intra-personal, community and national levels; and that reconciliation is also redistributive given the material reconstruction involved and the restoration of dignity. The Commission also contemplated on the universality of models and concluded that a one-size-fits-all did not exist (TJRC final report, Volume I: 46). This meant that the experiences of other countries that had established truth commissions in the past such as Sierra Leone and South Africa could only serve to inspire the TJRC process in Kenya but could not serve as templates for it. The history and the nature of conflicts in Kenya are different in each of these cases. For example, while South Africa came from an apartheid system, Kenya had had independence since 1963 and established a truth commission process only in 2008.

The Commission further believed that in order to achieve meaningful reconciliation effective and prompt justice had to be realized. In this way the team implied that justice and reconciliation were closely intertwined and one could not be achieved without the realization of the other. In the thinking of Lederach (1997), amongst other things, reconciliation can only happen if time is given to both justice and peace at which point we redress the wrong past and envision a future that is common. In the same way the Commissioners believed reconciliation could be achieved after individual and communal reparations are provided to victims, acknowledgement of those who suffered is done by individuals and institutions responsible, investigation and where appropriate prosecution for those responsible is done and reform of institutions to prevent future violations in order to provide equal opportunity and support to all is done-without leaving out the marginalized. A restorative focus, without the precluding retribution, was a possible way to reconciliation for the country (TJRC final report, Volume I: 50-51). Lederach (1997) argues that the rebuilding of relationships is critical and this can happen when space for an encounter between the various levels of society seeking to reintegrate and embrace one another after a painful past and visioning a shared future (1997:34-35). This culminates in the restoration and repair of those who suffered as well as the meaningful material enabling of those who were previously excluded and marginalized (TJRC

final report, Volume I: 119-120). This study set out to investigate the extent to which this was done and if so why and how. The following is an analysis of the data obtained during the study.

7.3   UNDERSTANDING RECONCILIATION

Participants in the interviews and focused group discussions, in agreement with the view of the Commission, underscored that the concept reconciliation was a complex one and that it involved a process. Reconciliation to them was not something that can be achieved in an event. Others went as far as invoking the meaning of reconciliation from the traditional sense as well as their religious backgrounds and beliefs, all of which treat reconciliation as a process. "*We don't want to, to, to go half circle, we needed to go full circle, and that's why the bit of reconciliation was very key for some of us. That you want to, to, to uncover, you want to discover, but most importantly, take people through the process of recovery. That was very key for us*" (LS_30011 – interview conducted on 1/7/2015 in Nairobi County). This makes reconciliation an important component of the future of Kenya. "*As a Christian, as somebody who believes that eeh, without reconciliation the future of this country will be difficult especially when it comes to questions of healing, and eeh, forgiveness*" (LS_30013 – interview conducted on 1/7/2015 in Nairobi). A shared future culminating from addressing the wrong from the past in a just way is critical for the country. It is the key to development. "*And as I said before it doesn't matter how much we have done in terms of infrastructure, or increasing the, the wealth of the people if values and relationships are not taken seriously. Coz that's a major pillar of post violence reconstruction...*". In a nutshell, reconciliation is "*a dialogue that is aimed at eeh, restoring relationships*" through which process we seek to "*understand what happened by knowing the truth*". It is from this point that "*forgiveness is offered......*" (LS_30013 – interview conducted on 1/7/2015 in Nairobi). It is a process that the Commission started by receiving over 40,000 statements, the highest number of statements compared to other commissions in the world. The next point was to give the alleged perpetrators an opportunity to say what action they would take, for example, what they were willing to return back given the opportunity to do so (LS_30027 – interview conducted on 14/7/2015 in Nairobi & TJRC Final Report Volume I: iii). The return of land allegedly grabbed over the years, by say the military in Uasin Gishu, would be an example of the things given back by either individuals or institutions. These can be considered as pathways to reconciliation.

According to a conflict resolution expert interviewed, unfortunately the process was botched and undermined and so presently communities still have grievances and the past injustices are still present. "*The latent conflict is still there, the enmities could boil up at any time. Anything might happen because the issue is, we have been able to share these issues with you through this process and you have given your own things which you claim to be true*". Additionally, as a leadership, "*you haven't done anything. In the event that anything was to happen again, I think people, or communities, will not wait to do anything else but to explode*". The tension continues to simmer and the leadership pretends that all is well instead of taking advantage of the opportunity to initiate a process of redeeming the cohesion of the country back. Instead, "*…the platform has more or less been reduced, because it has not been used effectively*" (LS_30015 – interview conducted on 1/7/2015 in Nairobi).

In his publication about the North-South conflict in Sudan, Nasong´o (2015) argues against this oversimplification of conflicts. In his thinking resolving "*grievance-driven conflicts whether they manifest themselves as ethnic, religious, racial, or ethnoregional – lies in squarely addressing the root causes of the grievances that drive such conflicts*" (Nasong´o, 2015:21). He argues that the political elite have two choices. The first choice is to recognize the grievances as legitimate with the intention to ameliorate the situation. This policy path brings about peace and the desired participatory society. On the other hand the second choice is to ignore the claims of those crying out for justice and design policy responses that suppress, expel and further insitutionalise and marginalise ethnic communities. This direction is recipe for conflict and violence (2015:18). Data collected in this research revealed that this is the path the political elite in Kenya have so far preferred. And, this might be because they have oversimplified the conflict arising from the deep-seated historical injustices.

This is because in the view of a Ministry of Interior and the Coordination of National Government officer, as a country Kenya has gone back to the business-as-usual mode and shelved the issues raised by the TJRC. Instead, we are "*basically doing a lot of cosmetic work, around reconciliation. Communities are in conflict somewhere, and we quickly run, and bring them together and ask them to sign a peace agreement, and then we say we must enforce this agreement……fairly cosmetic, if you're to ask me….Is it addressing the real root causes?.........we're basically managing the peace, [laughs] And not yet reconciling communities*" (LS_30073 – interview conducted on 22/2/2016 in Nairobi). The government bears the first responsibility to take the initiative and act on the TJRC

report. The recommendations given by the Commission bestowed the greatest responsibility on the government in terms of implementation. An officer with the National Cohesion and Integration Commission opined that this meant "*the government of the day should tell its citizens what mischief it's playing with the document. If as a state, we put so much resources*" towards the work of the Commission then it implies that we put similar effort in completing such a process. Additionally, in his view the situation also "*speaks to a governance issue, if you're not telling your citizens the truth, right? Which is supposed to lead to healing, so are we going to heal*"? (LS_30071 – interview conducted on 12/2/2016 in Nairobi). The lack of implementation of the recommendations made by the Commission might therefore turn into a missed opportunity for Kenya to take the reconciliation road towards a common and connected future.

7.4   LOST OPPORTUNITY

This study has found out that Kenya has had a series of critical junctures. Among these are the four regimes of Jomo Kenyatta, Daniel Moi, Mwai Kibaki and of course the Uhuru Kenyatta's regime. Other critical junctures exist within the regimes. However, on the main part, the beginning and the end of these regimes were critical junctures because they are moments around which the actors took certain decisions that seem to bind the country. In this study, the decisions highlighted focus on dealing with historical injustices. In path dependence, it is argued that decisions taken at a critical juncture become enduring and are dependent on previous actions and decisions. In other words, the motives that drove the actors in those previous regimes to take certain decisions may in fact be the motives that drive subsequent regimes. And, it is argued that, once a particular path is taken then it becomes very difficult to reverse the course. This also has an effect on the other possibilities that existed at the time. These possibilities that were once seen as plausible became lost. This study found out that this argument is plausible when referring to the opportunity lost in not implementing the recommendations made by the TJRC.

As expressed in the previous chapter, participants in the interviews and the focused group discussions were of the view that the government of the day, because those in different positions of leadership are the same people accused of committing various kinds of injustices in the past, have therefore not been keen on pushing the implementation agenda. "*With this kind of attitude the government, more so those in leadership they are blocking that opportunity*" (LS_30013 - interview conducted on 1/7/2015 in Nairobi). They have therefore denied the society the opportunity to reconcile with the past. As stated in the previous chapter, the apology given by the president was

viewed only as an attempt to cool down the temperatures and appear to have done something. "*Yes….apologized. But what happens to these other recommendations, people whose land was taken from……because as much as the president made an apology, his deputy who had taken land from some poor fellow had to be taken through the court process for him to, give back the land*" The apology was not offered within a comprehensive framework designed to bring reconciliation and national healing in the country. "*It tells you that most of these things are, just to keep the citizens busy, and the worst part is, they're using their monies that should have bought medication for the same people and say anyway, this happened, it happened, but let us make sure instead of wasting this money further we have enough medications in our hospitals*" (LS_30071 – interview conducted on 12/2/2016 in Nairobi with Commissioner – National Cohesion and Integration Commission).

Also, although there was some resettlement program for the internally displaced persons so far, it did not adequately cater for all the displaced people. Indeed its implementation has also been viewed as biased and benefitting only certain communities in the country and further deepening the mistrust amongst communities. The resettlement program has also been criticized for not aiming at building relationships and bringing individuals and community in environments where they can begin to live together once again. In the view of an officer in the Ministry of Interior and Coordination of National government, it can be argued that the resettlement program "*….still remains a grey area, because what we're basically seeing, is eh, I think we all concentrated around resettlement of IDPs and nothing much after resettlement, so what? And I know some people even in parts of Uasin Gishu, they're lots of sores, people are still feeling injured…..You go to Trans Nzoia, and you speak to people there and people will tell you different versions of, of what they're going through*" (LS_30073 – interview conducted on 22/2/2016).

The act of implementing the report piecemeal is an attempt to sideline the issues such as land which touch on the political elite by choosing those items in the report such as an apology which does not have ramifications on, for example, the pieces of land that they allegedly own fraudulently. In the view of a Member of Parliament interviewed, "*…it would still leave the land issues exposed meaning basically that the fire has not been put out. It is still smoldering and if it is fuelled, it lights up again*". The purpose of the TJR process was to "*lead us to a place where the roots of conflict has been addressed, forgiveness has been attained, compensation has been given to people who need*

compensation, and reparations. And in a generation, in the next 10, 15, 20 years, these injustices could be behind us and they would just be subjects of history" (LS_30074—interview conducted on 22/2/2016 in Nairobi).

The idea of reconciliation in the country is therefore distant and one that is far from being achieved. Once a people shy away, for instance, from addressing the issues pertaining to justice then reconciliation is further pushed in the distant future. According to a former Commissioner with the TJRC, this is "*because reconciliation comes when two meet and you talk about the issues. This has not happened. The justice component, this has not happened and I really doubt apart from restorative justice again which needs to be facilitated at that community level I highly doubt that this will happen"*. The restorative justice component is becoming more pronounced in truth processes. And, in the case of Kenya, "*we missed out, it was a one-sided process where the victims came up, many perpetrators did not come up because they feared that justice component"* This could be partly explained with the fact that their understanding of justice was narrowed down only to criminal justice as opposed to other forms including restorative and social justice which were recommended in the TJRC report. Acknowledgement from "*let's say the perpetrators"* (LS_30027 – interview conducted on 14/7/2015 in Nairobi) leads to forgiveness which is one of the foundations for reconciliation. However, because of the complexity of the injustices committed, the process of reconciliation also calls for a comprehensive framework that takes into account all the concerns raised in the TJRC report.

From the data gathered from participants in focused group discussions conducted in Nairobi on July 14th 2015, Trans-Nzoia on July 28th 2015, Wajir on September 9th 2015 and, Garissa on 18th of May 2016, it appeared that to them the opportunity to bring about a national reconciliation had been lost, first by not publishing report and second by not implementing the recommendations made in the report. Although some of the participants in Garissa, Wajir and Trans-Nzoia were unaware of the contents of the report, they were still of the opinion that a lack of implementation meant that no effort had been made at reconciliation. They based their arguments on the fact that they had presented their views to the Commission and it is from here that they expected an implementation process to begin. This was however not forthcoming. On the other hand participants in, say Nairobi, majority of whom were aware of the content, at least through the coverage that had been given by the media and through publications by civil society groups that had followed the process such as the

Kenya Human Rights Commission – who had prepared an abridged version of the report – they were thus able to comment from an informed point of view. All in all, their verdict was still the same as those who had little or no access to the contents of the report: that this meant that an opportunity had been lost on the part of the country to attempt at a process of reconciliation.

From the point of view of historical institutionalism, this situation meant that effort at putting in place a reconciliation framework which meant that the recommendations needed to be implemented were already *"locked in"* and that the political elite was entrapped in this situation. In other words the institutional and historical contexts of the decisions made seem to shape their agency. Their behavior was therefore shaped by previous decisions made either by them or people close to them. As a result informality had settled in and the formal rules were no longer practicable to them. Instead, the informal decisions which favoured their interests took over from the formally agreed principles and rule as found in the TJRC Act No. 6 of 2008. This was particularly because they had been involved in the past crimes and because of the power and authority they had in terms of implementing the recommendations nothing was going to happen. It amounts to such nuances affecting national policy because of the vested interests. The imbalance in power meant that those that felt aggrieved could not do anything and were instead at the mercy of the political elite in as far as implementation of the recommendations was concerned. Again, it is the same class that controlled all the institutions such as parliament or certain ministries and departments within the executive that would have otherwise spearheaded the implementation. The Office of the Attorney General, for example would have been the best place to push for implementation as the chief legal advisor of government. Although the data available indicate that the Office of the Attorney General did advise the executive on the way forward in terms of implementation it was the observation of this study that this advice fell on deaf ears. The executive therefore chose to control this discourse by ensuring that it did not feature in the parliamentary debate and as such would with time fade away in the same manner that the findings of other Commissions did fade over time. This is a situation of power asymmetries which the political uses in order to maintain status quo and stifle discourses such as this one. On the other hand, and as will be discussed later in chapter eight, the political elite would rather promote an *"accept and move"* on discourse in order to steer away from the content and implications of the TJRC report. This they do by discouraging media from propagating discourses other than this one when writing about this topic. In this sense they would

rather caution the media that revisiting the matters advanced in the TJRC report is tantamount to bringing turmoil in the country and that such discourses should be discourage all together.

The lost opportunity at reconciliation was not only from the point of view of the TJRC process. As already indicated earlier the NARC coalition that came into power under President Kibaki was a sure hope that Kenya was on the road to transformation and therefore on the path to reconciliation. In historical institutionalism parlance this was another critical juncture for the country where decisions and actions of actors would have propelled the country into a different dispensation. The critical juncture however only became another antecedent in the history of Kenya and contributed to the compounding of Kenya´s problems. This happened when the president reneged on the contract agreed upon under the NARC coalition thereby dashing the hopes of many.

In addition to this Githongo (2010) opines that *"The perceived arrogance of the political, bureaucratic and commercial elite surrounding Kibaki had engendered an overwhelming sense of alienation – a sense of exclusion and loss of dignity among the majority of Kenyans who were not Kikuyu or from associated communities"*. This only served to entrench the hatred amongst different communities further especially when viewed from a historical institutionalism perspective where actions by previous regimes had marginalized, looted and performed other injustices. It became the view of many that this trend was only but continuing in the hands of Kibaki. The country therefore found itself in a *"lock in"* situation occasioned by the actions of the political elite. Githongo continues to indicate that despite the record development in *"education"*, *"healthcare"*, *"access to water and basic infrastructure"*, the failure to galvanize the country together by keeping the promises made in the contract, intentionally and transparently crafting an all-encompassing administration, and stopping the chiding of other communities – all these served to erode the dignity of other people and communities and became an impediment to reconciliation. Kibaki had therefore only succeeded to *"deliver the hardware of development – schools, roads and growth"*, but had failed in delivering *"the software of nationhood"*. Githongo strongly indicates that fixing Kenya´s problems is beyond the building of roads, hospitals and schools – rather it is about bringing the trust back in the people so that a sense of nationhood prevails (2010:5) and making people begin to believe that their participation is valued and will take them to the next step. These are the building blocks of a participatory society.

The argument around a lost opportunity can therefore be extended to the successive regimes by looking at their actions and decisions at various points in the history of Kenya. This study found out that each of the regimes has had an opportunity to galvanize the country together but instead have continuously chosen paths of exclusion and which divide the country along ethnicity and class. Historically, Kenya has undertaken reforms under the regimes in question. Although the reforms under Kibaki for example may have been well intended, they were however confronted by a *"dubious commitment"* of the political elite (Githongo 2010: 8). Historical institutionalists however explain this by indicating that the subsequent regimes, especially after Jomo Kenyatta find themselves entrapped by historical injustices committed earlier. It is particularly so when they have also been a part of those regimes at least by association. The regime of Uhuru Kenyatta, under which the truth process recommendations were supposed to be implemented, epitomizes the discussion on lost opportunities for Kenya to reconcile.

7.5   NATIONAL RECONCILIATION FRAMEWORK

The *"lock in"* created in the past led the participants in the interviews and focused group discussions to decry the lack of a reconciliation framework in the process of this. This was particularly because of the ad-hoc manner and lack of a clear strategy by the administration to stem the lack of unity and cohesion within the society. In Uasin Gishu County, a concern was raised that the government is not doing things systematically. In fact, the government has shelved the idea of dealing with historical injustices and instead looking for a shortcut to peace. How can people be told to live in peace and yet the fundamental issues cited as affecting their current state of conflict have not been addressed. The same goes with the matters raised through the TJRC report. "*So that when we go to reconciliation the foundation will have been built*". Instead, "*we are building a house that is floating and any wind, any storm that will come can sweep it away*". This is happening while "*we are all aware that the issues of justice have not been done and we know that the fuse that ignites violence in politics every time we have siasa [to mean elections] after five years*". Essentially, "*so long as we don't deal with those fundamental issues and say let´s live na peace na nini na nini [lets live in peace and so on and so forth]. As I said we are putting up a structure that has not solid foundations*" (LS_30024 – interview conducted on 9/7/2015 in Uasin Gishu County).

The same sentiment was vented by an officer in the Ministry of Interior and Coordination of National Government citing the intent of the government by not making public the report of the TJRC. In his view, after making it public the expectation was that "*there was even a national reconciliation framework that was developed*", however with the report not made public, "*nobody knows what the reconciliation report is all about. I think it remains in the circles of government and civil society*". This is happening because "*as I said, the politics around it. I think there is a lot of fear*" on the part of the leadership based on the content of the report which implicates them (LS_30073 – interview conducted on 22/2/2016 in Nairobi). This fear and mistrust has made it difficult for any of the existing government institutions to own the report "*and say this is what the TJRC report looks like*". This partly explains why there is no clear way forward in terms of the next steps after the report was presented to the president and submitted to parliament. None of the institutions is therefore coming out expressly own up and provide a way forward. The information available on what steps are being taken remains somewhat secret and privy to only a section of the government machine. This is buttressed by the fact that even the Ministry of Interior and Coordination of National Government, which is one of the institutions where the report is currently domiciled, has not provided any clear-cut statement on the status of the implementation process. It appears, as indicated in Chapter five of this study, that the government is applying the wait and see attitude towards the report. It is interesting to note that not all institutions whose mandates coincide with the implementation of the report are aware of the status of implementation.

Interestingly, two interviews with former Commissioners also revealed that the TJRC report was either missing or had been corrupted in the website of the commission. This pointed to the fact that there were individuals who were most likely intent on concealing the content of the report. They indicated that the report was previously available but had been pulled down at some point. There was however efforts to keep the report intact and available in digital form by other institutions such as Seattle University School of Law (2013) who have continued to make it available from their website found at http://digitalcommons.law.seattleu.edu/cgi/viewcontent.cgi?article=1009&context=tjrc. This research also found out that other non-state human rights organisations such as the Kenya Human Rights Commission, the Kenya Transitional Justice Network (KJTN) and the International Center for Transitional Justice (ICTJ) had stepped up efforts to publicise the existence of the report and to

demand for implementation. This was in contradiction to the government who had not made any effort to make the report public.

From a critical theory view, this ambiguity and the wait and see mode of operation is deliberate so that the TJR discourse dies a natural death. The inaction can also be compared with the government's reaction to other Commission reports that never saw the light of the day. In this way, the discussions around the reports never took root except for some mention by politicians in opposition during parliamentary sessions. For example, there was no conclusive action taken as a result of the 2007 report on the investigation into the conduct of the Armenian brothers namely; Artur Sargasyan and Artur Margaryan, and their associates. The report by a joint committee in parliament indicated that the Artur brothers were brought into Kenya by individuals in the highest level of government who also funded their stay. They came into the country with the intention of committing atrocities. For example they raided the Standard Media Group offices at midnight on March 2, 2016 because it was believed that the media group was going to publish a damning report about State House. It is because of this reason that they were therefore facilitated and protected by people highly connected with State House such as the former minister of internal security John Michuki, the president´s special advisor Stanely Murage and the director of Criminal Investigations Department, John Kamau (See Adan, November 25, 2010; Oluoch November 24, 2010; Rhodes, April 2, 2009). According to Rhodes (2009) *"Kibaki appointed the former commissioner of Police Shadrak Kiruki to look into the Artur brothers activities"* in June 2006. The findings of this report were however *"never released to the public"* (April 2, 2009). It is in this fashion therefore the political elite have perpetually stifled such discourse touching on the injustices committed from the past. The reasons behind inaction are the need to maintain status as a result of the *"lock-in"* situation created.

Eventually the stifling of the TJR discourse means that, *"not much has been done in terms of reconciliation, not much has been done in terms of healing, not much has been done in terms of building trust and confidence"* (Rhodes , April 2, 2009) by the successive regimes. The argument provided by officials in the Ministry of Interior and Coordination of National Government were that the president gave a public apology and set up a fund for victims *"as a way to reconcile the nation at that level"* (LS_30026 – interview conducted on 14/7/2015 in Nairobi). However, a critical analysis of this posture reveals that this may have been to only cool down the emotions and fears of

victims and the country in general about the lack of attention to the issues raised in the report. In the context of a national reconciliation framework *"something needed to be done to follow it up. That apology, that gesture for reaching out for reconciliation would have been amplified nationwide in a ceremony or symbolic that was meaningful so that we could have closure to past atrocities"* (LS_30026 – interview conducted on 14/7/2015 in Nairobi). This is *"because from the injustices you will find that there were losses that we incurred by members of those communities and they felt that the government needed to do more than just the president coming out to apologize"* (LS_30036 – interview conducted on 20/7/2015 in Kericho County). Further to the manner and circumstances - which *"was small choreographed audience"* - under which the apology was given the importance given that action can also be scrutinized. *"You have never heard it again outside parliament"*. And when you hear it outside parliament it is always in the context of opposition politics where they constantly indicate that those criticizing the government for non-implementation of the TJRC report simply do not *"like the government because they lost elections"*. LS_30013 – interview conducted on 1/7/2015 in Nairobi).

From a critical discourse analysis prism the context in which the public apology was given is questionable. First of all, the President while apologizing did not indicate that he was doing so on recommendations of the TJRC. Rather, he indicated that *"he was doing so as part of his constitutional obligation to report each year to parliament on how his government is upholding national values"*. In the same vein, the creation of the ten billion Kenya shillings restorative justice fund was not credited to the findings and recommendations of the TJRC. This was in contrast with an earlier apology by the Chief Justice Willy Munywoki Mutunga who on March 7, 2015 made a general apology and indicated that it was a recommendation of the TJRC report. This apology was made on the day of commemoration of the political assassination of Pio Gama Pinto[27]. The Chief

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[27] According to Fernandes (2016) Pio Gama Pinto was assassinated on February 24, 1965. He was a Goan born in Kenya in 1927 but completed his education in India and later moved to Goa to join the freedom fight against the Portuguese. He later came back to Kenya and joined the freedom fighters in Kenya becoming a pillar in the Mau Mau (freedom fighters) movement. He worked hard to organize and arm the Mau Mau and a wide range of freedom movements in Africa. Pinto was detained by the British between 1954 and 1959 first in Manda Island and later in Kabarnet in Kenya. He later became a member of the ruling Kenya African Union (KANU). He was a perfect socialist and had links with Malcom X. He was considered one of the *"strategic brains behind any socialist drive towards power in Kenya"*. He was therefore in opposition to Jomo Kenyatta whom he saw as a capitalist conspirator of the British and who facilitated the grabbing of land together with the *"Kiambu Mafia"* (a group of individuals from central Kenya close to Kenyatta and who were close to power and used this closeness to grab land and plunder the country. This group is what historical institutionalists refer to as an informal institution that has the sway in decision making in the country. Their actions and decisions from the past have come to create the "lock in" scenario that the country finds itself in politically, economically and socially.). *"The British government, through the Settlement Transfer Fund Schemes, bankrolled the buying of acres of choice arable and prime coastal land, some of which Kenyatta was then said to have resold to his Central Kenya cohorts at prices below what the government had paid"*. In this way Kenya paid for the *"creation of the ten or so millionaires and ten million beggars"* as put earlier by Josia Mwangi Kariuki who was also later assassinated in 1975. Pinto was therefore *"a serious threat to Kenya´s capitalist*

Justice even followed up with a more directed apology to communities in Bungoma and Nyandarua Counties (Maliti, April 9, 2015). This reflected the little or lack of commitment to implementing the recommendations made in the report. It also reflects the double-speak the successive regimes had maintained in relation to solving the injustices that were committed. In a nutshell, the apology either not meant to be, not serious and above all, not supported by policy. To date it is not clear where the restorative justice fund is domiciled and the particular reconciliation project that it is implementing. The lack of clarity and commitment on the part of the executive has led to fear, frustration and confusion amongst government agencies that are expected to take on different aspects of the implementation. This is coupled with the duplicate mandates amongst government agencies exhibited by the existence of, for example, the National Steering Committee on Peacebuilding and Conflict Management and the National Cohesion and Integration Commission whose difference is blurred (Owiso, forthcoming).

From the standpoint of this thesis a critical exploration of the reconciliation discourse in the country reveals that the political elite have avoided addressing the reconciliation question by not ensuring a comprehensive framework for reconciliation is in place and is adhered to. This legacy seems to be a part of successive regimes in the country. The purposeful shelving of the TJRC report is a clear indication that a *"lock in"* condition is prevalent in the country. It is the result of a historical legacy of not enmeshing the social fabric of Kenya together beginning from independence in 1963 but also evident in the divide-and-rule tactics of the colonial regime. The mentioning of reconciliation by the political elite therefore remains mere rhetoric which they cannot translate into reality. This can be seen from the discussion earlier on bodies created to deal with peace and conflict management but with conflicting or sometimes overlapping mandates which result in their inefficiency. By doing so, the political elite are able to maintain status quo by pretending that public bodies such as the Kenya National Cohesion and Integration Commission (NCIC) exist and are serving the function of uniting the country.

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overlords" and it was clear that he would be decimated in a matter of time (Fernandes, March 1, 2016). Fernandes (2015) writes that Pinto´s friends (Pranlal Sheth and Sarjit Singh Heyer) later burnt all his writings; books, diaries, notes, newspaper clippings, policy strategies, speeches and minutes of meetings" in order to safeguard his wife, children and extended family. Through this action they also hoped to protect other citizens as well as foreigners who would have been targets as a result of their names featuring in the said writings. They did this with the belief that Pinto´s killers very very powerful and would come for others (Fernandes, February 14, 2015).

7.6   POLITICAL IMPERATIVES

The process of implementing the recommendations was obscured by political imperatives and the need to side-step costly reparations (NPI-Africa & GPPAC, 2014:17) thereby obscuring the process of reconciliation. In Chapter five, the lack of political will was cited to be the greatest reason the implementation of the TJRC report has stalled. Argued from a critical discourse analysis standpoint, the implementation of these recommendations would ultimately lead to a tilt in the otherwise imbalanced power structure in Kenya. This very implementation would again tilt the privilege that the political elite enjoy as a result of, for example, illegally/irregularly allocating public land unto themselves in the distant past. In this way they resort to maintaining the status quo by not implementing the recommendations made in the report.

From a historical institutionalism standpoint they are therefore trapped in this web as a result of the decision to rescind commonly agreed rules and principles and use their power to illegally/irregularly allocate public land unto themselves in the historical past. According to an interview conducted in the process of this study, the stifling has been caused by the political elite because it has direct implications to their positions and wealth. "…*the land issue touches the who is who in the establishment in basically the whole country"*. Implementation therefore "*means a very murky affair"*. They, for example "….*don't want to be told to give back the land or whatever they took and be accountable to that process"*. The lack of intent to implement the report, as cited in Chapter five, is because "*One of the key injustices that people feel as injustices is all around land. And, and, and as long as you don't want to address the issue of land, then that basically means that you won't be wanting to implement the TJRC report because basically most of the things revolve around that..."*(LS_30015 – interview conducted on 1/7/2015 in Nairobi). This then has implications on the much needed reconciliation in the country. The outcome of the TJRC report is similar to those of other commissions such as the Report on the Illegal/Irregular Acquisition of Public Land of 2004 which do very good work by identifying the injustices committed in Kenya. Their recommendations entail rigorous mechanisms of how the country is supposed to get on the healing path and finally lead to reconciliation. However given the political exigencies which include non-implementation in order to satisfy the greed of the political elite the end goal of reconciling the country are never achieved.

In the process of covering up, the leadership tailor-makes what was referred to as plastic peace in Chapter five which only serves their interests; ascending to power. This is what the same leadership achieved in the 2013 elections so that there "*is some working reconciliation between the Kikuyu and the Kalenjin because their two leaders are working together*". However a close scrutiny of this relative peace leads one to ponder on the questions: "*Did we really forgive each other? Did we really reconcile these two communities*" (LS_30018 – interview conducted on 6/7/2015 in Uasin Gishu County)? What happens "*if today [William] Ruto[28] is charged at the Hague and he goes in....We don't know....Or if today they fall out and stop being friends*" (LS_30030 – interview conducted on 17/7/2015 in Kericho County). This working reconciliation between the two communities means that we "*have taken reconciliation as a first priority, and it's really putting the horse before the whatever...we turning things upside down*". The best way forward "*should have been truth, justice and reconciliation...But truth and justice we seem to have pushed them aside...*" (LS_30024 – interview conducted on 9/7/2015 in Uasin Gishu County). These sentiments are corroborated by Macharia Gaitho (2016) who refers to the situation as one of "*uneasy peace and fragile reconciliation*" which "*does not adequately mask the deep fissures in society that were exposed by the violent outbreak following the disputed 2007 presidential elections*". According to him, "*the wounds have not healed and many of the issues around the tragic cycles of ethnic-political violence have never been addressed*" (Gaitho, April 6, 2016). Although Gaitho (2016) is referring to the collapse of the ICC cases and the fact that the issues led to the existence of those cases, the same can be attributed to the TJRC which is the subject of this study.

It can be argued that the ICC was only but one of those transitional justice process the country embarked on. The other one was the TJRC process both of which were aimed at arriving at the needed reconciliation. Reconciliation can be long and complex and involve bringing victims to a level where thy feel satisfied that justice has been done. It therefore has to be undertaken within some framework and may therefore go for five, ten and even more than 20 years (LS_30018 – interview conducted on 6/7/2015 in Uasin Gishu County). In a nutshell, the reconciliation process in Kenya was botched as a result of the imperatives it had on the political elite. "*If the government is serious on reconciling, and I wish they were serious, they should reconcile Kenyans before*" the next elections "*....What we are having now is superficial*" (LS_30030 – interview conducted on 17/7/2015 in Kericho County). The government is seen as adopting a wait and see attitude because

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[28] William Ruto is the Deputy President of Kenya. He deputizes Uhuru Kenyatta who is the current president elected on a Jubilee party ticket in 2013 for a period of five years. They were both charged at the ICC and later charges dropped for lack of evidence.

the Ndungú Commission which investigated the illegal/irregular allocation public land for example touched on the political elite. And yet "*huyo mtu mwenye umegonga ndio unampa yeye hiyo kitu aende aangalie. Sasa hata kama ni mimi, nitaenda kujiangalia? Nitajiweka kitanzi? Siwezi jinyonga*" [the person you have mentioned in the report is the one you are asking to implement the recommendation. Even if it were me, can I implicate myself? Can I strangle myself with a rope? I cannot hand myself] (LS_30035 – interview conducted on 20/7/2015 in Kericho County). Subsequently, as seen in previous chapters, implementation of the TJRC report has not been a priority to these elite given the ramifications it may catapult. Subsequently, the process and product did not reassure non-recurrence of the historical atrocities which is one of the expected outcomes of such a truth-telling process.

7.7   THE GOAL OF NON-RECURRENCE

The historical institutional argument is that the outcomes at a critical juncture reproduce similar outcomes in the future. These outcomes can either be positive or negative. The decisions made therefore at a particular juncture have the tendency to influence decisions about that political unit in the future especially in relation to the political process that the unit is going through. This argument is also based on the path dependent line of thinking which emphasizes historical causation (i.e. tracing current events to their root causes) where the dynamics prevalent in a political process within a particular political unit lead to actors making certain decisions. In the event that they are faced with the same processes then they are bound to make similar decisions in the future. In analyzing whether the outcome of the TJRC processes reassured non-recurrence it is therefore necessary to analyse this from this viewpoint.

By and large, the TJR process remains incomplete as already observed. This is despite the hopes of many, as was revealed in Chapter five, that the process would lead to non-recurrence of the violent conflict experienced in subsequent election periods of 1992, 1997, 2002 and 2007. The violence has been recurrent because the deeply seated grievances of land, for example, have never been allayed through a comprehensive framework. It is for this reason that the TJR process in Kenya was viewed with hope. According to a Member of Parliament we still have victims who are living with the same grievances that were previously haboured. "*And victims whose issues are not addressed, then they pass those grievances to the next generation. And there is no forgiveness*" that has taken place from the process (LS_30074 – interview conducted on 22/2/2016 in Nairobi). This is all driven by the

fear of the content in the report and the preference for status quo by the political elite who prefer to "*let things remain the way they are*" and not to "*ruffle the feathers*". This however is a postponing mechanism and does not "*mean that the problem is solved*" (LS_30024 – interview conducted on 9/7/2015 in Uasin Gishu). It is meant to hoodwink the public into forgetting that there was ever a process such as the TJRC. And, should this happen, then status quo will be maintained. Seen from a critical discourse analysis viewpoint it is simply double-speak where the promises and commitments made in public are not sincerely meant by the political elite.

Further, the victims and the perpetrators have not had the opportunity to face one another and chart a future. It however begins with making the report public so that those who have been wronged will know the truth about this wrong and who did it (LS_30030 – interview conducted on 17/7/2015 in Kericho County). As victims of historical injustices, the Talai Community in Kericho County has for example been landless and languishing in poverty from the time of independence. They presented their grievances to the TJRC but to this day the community does not "*know whether the document has been published. We don't know whether it has been acted upon. We don't know if there is political will from those who govern and those who legislate, we don't know*" (LS_30032 – interview conducted on 7/7/2015 in Kericho County). And in this way there has not been a forum that attempts to address historical issues. In such a forum the wrongdoers will also be given the opportunity to apologize. "*Yes, it could be explosive and it could divide Kenyans. But you, that is a pill which we have to swallow for us to forget about eeeh, and you know for other people to bury the past*" (LS_30030 – interview conducted on 17/7/2015 in Kericho County). By acting upon the recommendation of the report assurance of non-recurrence is guaranteed. This is mainly because the issue of historical injustices is a permanent and not a passing one (LS_30024 – interview conducted on 9/7/2015 in Uasin Gishu County).

This study also found out that the highlighting of the issues in the report only served to "*open up wounds and just leave them as they are*" putting people in a situation where they are "*still waiting*" since "*no reconciliation*" process has been initiated (LS_30036 - interview conducted on 20/7/2015 in Kericho County). Reconciliation would mean that in the first place the report is made public and the issues such as a return to our farms from which we were displaced in 1992, which are in the report addressed. The IDPs in Trans-Nzoia have not gone back to their farms and are living in squatters in areas such as Gituamba in Mount Elgon. Further, on returning they need to be provided

with housing as well as livelihoods (LS_30039 – interview conducted on 29/7/2015 in Trans-Nzoia County). The issues need to be given the attention they deserve.

7.8   CONDUCT OF THE TJRC

The process adopted by the TJRC was also criticized as being inconsistent with the principles of human rights such as accountability and criminal responsibility. The process was further viewed as a vehicle of impunity for perpetrators. At the same time perpetrators did not comply with the summonses of the Commission and subsequently stayed away from what they viewed as a victim-friendly process, given the recommendations that finally came out. This made reconciliation efforts difficult and obscured the long-term objectives of the TJRC (NPI-Africa & GPPAC, 2014:17). This can be attributed to the mandate of the Commission which did not have prosecutorial powers. This meant that in the event that there was such an occurrence then the Commission recommended further investigation and/or prosecution by the Office of the Director of Public Prosecutions.

On another note, the TJRC did not put effort in mobilization as well as educating communities on its purpose. This was especially in places such as Kericho County where the activities of the Commission were misconstrued as being part of the ICC process. As a result "*people would go and the information that was given was shrouded and half baked*". This meant that some of the information that was crucial for this process did not come out thereby obscuring the whole process of reconciliation. In the same county the injustices related to land which is occupied by the multinational companies did not come out because of how the process was managed. "*They did not even encourage people*" to come out and speak. "*It was just in the papers that TJRC would be somewhere, I don't know in Bomet, in Kericho*" and so on (LS_30030 & LS_30036 – interviews conducted on 17/7/2015 and 20/7/2015 in Kericho County). The TJRC therefore did not reach some of the remote areas of the country and particularly in Kericho County. And "*most of them [the residents that I speak to] still complain that whatever injustices that were committed in this area were not covered in this report*". Some of their issues such as the boundary problem which has perennially ended up in violent conflict between the Kalenjin and Kisii communities in Sotik area were not covered by the.

The performance of the Commission could also be attributed to the question of commitment on the part of government and thereby affecting the level of coverage on the part of the Commission. This also implied that the Commission did not function as it was meant to be Commission (LS_30036 -

interview conducted on 20/7/2015 in Kericho County) further suggesting that the place of truth in the reconciliation process was not exhaustively explored. It also has implications on the findings and recommendations of the Commission in relation to the injustices committed in this county as well as others where there was not exhaustive coverage. This raises an important question on the role of preparations and public awareness on the existence and purpose of a truth commission. Further it also leads to questions around ownership of the report and hence the entire process particularly when a section of the society feels alienated from the process and their issues unattended to.

7.9   PEACEBUILDING AND COMMUNITY RECONCILIATION EFFORTS BY NON-STATE ACTORS

Kenya´s history is spiked with violence particularly since the introduction of multi-party politics in the early 1990s. The elections in 1992 saw the country experience the emergence of the internally displaced persons. Politicians, in a bid to satisfy they own political exigencies created and used *"informal militias"* and *"death squads within the police force"* to evict, maim, kill and torch the premises of those deemed to oppose them. This was further to the cumulative problems such as the unequal distribution of land and the colonial legacy that the country had inherited (Klopp, Githinji & Karuoya 2010:4).The events ushered in the existence of local non-governmental organizations that engaged in problem solving workshops and other activities to build peace and foster reconciliation amongst the communities. The 2007 election violence particular caused extensive destruction to life and property and created refugees, internally displaced people and besieged populations. Further, the violence brought about psychological and physical harm on women, children, youth and the elderly in particular (GOK, 2011). The streams of violence in the country, coupled with the injustices such as marginalization committed by successive regimes have left the population deep and severe divisions and these adverse effects.

This further occasioned the growth in number and attempts by civil society organizations and other actors involved in peacebuilding and reconciliation efforts across the country. Some of the notable organizations that have mounted similar initiatives include the Peace and Development Network (PeaceNet), NCCK, UNDP, USAID as well as a host of other local non-governmental organizations. As noted by the Institute for Security Studies (2013) in many conflict affected states in Africa local level reconciliation projects proliferate at the community level in the form of peace caravans, dialogue, sports events and a range of peacebuilding through-development initiatives. The

activities of these organizations focus on working with communities in regions deemed at violence *"hot spots"*. The design of these projects is to build into the traditional social hierarchies and structures from where they derive their sustainability by drawing local in order to build social cohesion (ISS 2013:5). However, while these efforts have registered success in Kenya, they have also faced certain challenges which have hampered their effectiveness and efficacy.

It can therefore be concluded from the foregoing discussion, that the TJRC process in Kenya is not any different from the rest of Africa where, as further noted by the ISS, part of the conflict is about the entrenched systems of exclusion which require fundamental transformation of the state itself. It is further affected by the fact that the political elite who control the purse do not have these programming priorities and therefore only pay lip service to these processes (ISS 2013:5). Subsequently the process of reconciliation remains subjected to a lack of commitment on the part of the political elite given the history of the injustices in mind.

7.10   DISCUSSION: THE TJR PROCESS AND THE PROMISE OF CLOSURE

Seils (2017) underscores that reconciliation is complex in the sense that it is supposed to occur at various levels within the society: individual, interpersonal, socio-political as well as institutional levels. At the same time the outcome of such a process may be ´thin´ or ´thick´. That is to say those parties in the conflict may choose to coexist with little or no trust, respect or shared values. A thick reconciliation outcome suggests that there is restoration of dignity, a reversal of the structural causes of marginalization and discrimination and a restoration of victims to their positions as rights bearers and citizens (2017:1). In this sense thick reconciliation means that the citizens finally become members of a participatory society where they feel that they belong and have a duty to participate in the development of that society. They therefore feel duty-bound to participate in processes within that society and feel that they have to be accountable. This happens because they do not feel marginalized or discriminated against by the structures and institutions and the processes therein. In other words, after a transitional justice process such as the TJR process in Kenya, does the public in general feel that was the justice sought in undertaking the process attained?

Another question is on the nature/type of justice. Seils (2017) further argues that individual reconciliation involves people reconciling with their past experiences which may include harm, suffering and damages inflicted on individuals. This invokes the need for psychosocial assistance and other trauma healing programs or better still, traditional healing methods accorded to the

victims. This in essence raises the questions around the right to health (2017:5). Interpersonal reconciliation focuses on the relationships between victims, perpetrators, or beneficiaries of rights violations and comes about through the acknowledgment of past wrongs, reform and forgiveness between individuals (2017:6). On the other hand socio-political reconciliation focuses on the relations between groups. These groups can be said to be social, political, religious, or other forms of cleavages otherwise existing within a society such as rich and poor and which make societies divided. This is usually done through strong and existing structures such as parliaments or other institutions (2017:6). Such can be said to have been the expected case in Kenya where the TJRC made recommendations to parliament with the expectation that the report would be adopted and then the executive would swing into action by forming the implementation committee. The process would then unfold from thence.

Finally, institutional reconciliation has to do with institutions charged with protecting fundamental freedoms such as the police sector, the judiciary, the education sector and the media as well winning back the confidence of the populace. This usually has got to do with the vertical trust between the citizens and the state (Seils, 2017:6). State-society relations are important for the growth of any country and will determine to a great extent the levels of development which are a function of a participatory society. This study sought to determine whether either form of reconciliation resulted from the TJRC process and whether this may have led to the emergence of a participatory society.

The discourse on reconciliation also needs to take into account context. The notion of *"context determines to a large extent what reconciliation means, relationships need to be restored, and how much progress can be made"* (Seils, 2017: 7). This is because different societies experience different kinds of conditions which result in different kinds of conflict. In some cases the conflict is protracted and very complex thereby calling for a more nuanced approach to reconciliation. In Kenya the historical injustices ranged from political assassinations, land grabbing, marginalisation's of all kinds, torture, forceful evictions, murders, and so on, as cited earlier in this study. In this case therefore a template from, say the South African experience (which emphasized both a religious and ethical approach Seils 2017: 7) or the Argentine experience (*"which was about restoring trust in state institutions and the demonstration of their efficacy in protecting human rights"* (Seils, 2017:7), would be inappropriate in answering the reconciliation questions and dilemmas of Kenya. Hence, the recommendations that were made by the TJRC report.

The recommendations by the TJRC were also accompanied by an implementation matrix which stipulated who should do what and by when. A discussion on whether this was done is therefore necessary in order to come to an understanding of whether reconciliation happened.

The above discussion can also be contextualized in relation to the electoral process in Kenya. Elections in any country are about parties that have different agenda contesting with a view to get power and ultimately implement their agenda for the betterment of the country. The 2010 Constitution provides that elections will be held on every second Tuesday of August in cycles comprising five years. These are stated under Article 101 and 102 respectively which define the day of the elections and the expiry of the term of parliament (GOK, 2010). This provision by the Constitution therefore provides the opportunity for the citizens who are dissatisfied with the regime to exercise their power and elect into office representatives who they feel will best articulate as well as implement their needs. This is provided for in the Bill of Rights in the same constitution.

In the context of historical institutionalism, however, one may point out that this is also a time when the political elite, aware of the disgruntlement amongst the populace, may want to hold onto power at all costs. On one hand therefore, we have people who want to exercise their basic rights as provided for in the Constitution while on the other hand we have a political elite that will want to hold onto power in the fear that a change in regime may result in a tilt in the privileged positions they hold. Through these positions they have historically been able to influence the direction of the economy to their advantage and at the expense of the majority. They were and still continue to, for example, grab land, plunder the economy through corruption and so on. An election in Kenya therefore becomes a dueling contest that is cut throat and in the interest of two sides: reformers and status quo advocates. And here comes the question of manipulated election processes not only in Kenya but in Africa in general. This is because it is an election process that triggered the violence in 2007/8 and after which the long discussed need for a truth process in Kenya, but which was postponed, became a reality.

As already discussed in the introduction chapter there is a feeling therefore that the electoral system has always been *"rigged to ensure perpetual rule for an alliance of two major ethnic groups that had monopolized leadership and the economy since independence"*. While there is a generally feeling that contesting the outcome of the 2017 elections in Kenya is following the rule of law, contrary to this there is however another feeling that *"the Supreme Court cannot be expected to deliver justice in a system where the executive holds all the cards and is not shy to use the coercive*

power of the state machinery" (Daily Nation, August 24, 2017). In the 2017 elections two major parties were contesting power; the National Super Alliance (NASA) and the Jubilee Party. The Jubilee candidate who was also the incumbent, Uhuru Kenyatta, was announced as winner with NASA contesting the elections and claiming they were rigged. They have since petitioned the win in the Supreme Court of Kenya.

Campbell (2013) suggests that African leaders have mastered the art of manipulating elections and the electoral game. This is a development emanating from the outlawing of coups by African Union in 2002 hence, leaders found ways of rigging elections, unconstitutionally manipulating political processes and subverting constitutions so as to remain in power. In Kenya, the electoral system has been beset with fraud and the disenfranchisement of the electorate (2013:2). From former president Moi´s time (1978-2002) this manipulation and disenfranchisement grew to disproportionate measures. The more this happened the more there was exploitation and domination which took many forms and intensity. Inequalities and the theft of public funds for purposes of primitive accumulation also sky rocketed (Campbell 2013:3). This led to the formation of a coalition that brought Mwai Kibaki into power in 2002 with the idea of eliminating the political oligarchs that had dominated Kenya over this time. Kibaki reneged on this promise.

In the 2007 election there were two forces. The first one had a reforms agenda and was led by Raila Odinga and the other that sought to maintain status quo was led by Mwai Kibaki. A serious claim on election fraud was described as the cause of the chaos that followed the announcement of Kibaki as president. In 2013 there was again another contest in which Uhuru Kenyatta and Raila Odinga were contesting. At the end of the elections there were claims of election fraud and a case presented to the Supreme Court. (Campbell 2013:4-8). The ruling of the Supreme Court was in favour of Uhuru Kenyatta. In a nutshell, the elections in 2013 were widely believed as flawed and *"voting systems in 2013 were afflicted by widespread malfunctions"* and *"led to renewed accusations of vote rigging"* (de FREYTAS-TAMURA, August 16, 2017). The claims represent disenchantment and a lack of trust in the systems with pointers to the possibilities of manipulation by the incumbent with remaining in power as the driving reason.

This above narration can be said to reflect an ongoing political discourse which presents Kenya as a marriage that is not functioning. David Ndii (2016) argued that Kenya has *"squandered"* four opportunities that might have saved the marriage. These opportunities can be enumerated as follows. The first was the decision by Jomo Kenyatta, the first president *"that wealth was more*

important than the people". He then turned himself into a *"parochial acquisitive tribalist"*. The second was in 1992 when Kenya managed a formidable opposition but which was then swallowed by the disease of tribe first. The third was in 2003 when Kenya overwhelmingly voted Mwai Kibaki expecting that inclusive politics would take centre stage. Kibaki squandered this opportunity by tribalizing the government and going *"back to the doctrine of wealth above all else"*. The fourth opportunity came in between 2010 and 2013 when the country enacted the new Constitution which espoused the values of *"democracy, rule of law, transparency and ethical leadership"*. This period would put in the past issues of corruption and tribalism. The opposite happened. Tribalism triumphed. Ndii further argued that *"Kenya is for the most part an abusive relationship. It is about time we start talking about ending it. This ought not be a difficult conversation"* (Daily Nation, March 26, 2016).

The debate has further seen the advocating of secession on the part of Kenya that particularly feels discontented with electoral outcomes. This only points out to *"the very real schisms in Kenyan society"* (Daily Nation, August 24, 2017). Obuya (2017), defending the secessionist debate argues that the discourse is not entirely evil in the face of the unmet demands for justice, which were partly raised by the victims and witnesses that came before the TJRC. He argues that the secessionist call is occasioned by this feeling. Kenya has experienced *"serious economic marginalization, ethnic cleansing and land injustices"* which the regime *"has blatantly refused"* to address even after receiving the report of the TJRC. Further parts of the country continue to enjoy economic prosperity at the expense of others in a clearly intentioned plan. This then breeds the call for secession in the view that *"part of the population that is chronically economically disenfranchised"* can find relief and a chance to grow economically. In his view, the only alternative is counter this call by an ideology (Obuya, September 5, 2017) that will seek to be inclusive both in policy and practice.

Analytically, the view presented by Obuya above point to the end goal of participatory democracy as championed by scholars such as Carole Pateman whose theory of participatory democracy has been adopted in this study. The idea behind a participatory society is one where individual members are included in the daily governance of society. At the heart of a participatory society therefore is the value of inclusivity as opposed to exclusion as practiced in Kenya where only parts of the society have continued to prosper economically, while others remained marginalized and their lands grabbed.

In connection to the above, this study was also able to observe that WhatsApp, a social media application which can be used to create chat groups amongst friends, colleagues and other social groupings were replete with such sentiments in the election period of 2017. Although they were not directly engaged in the secession debate, they were however expressing sentiments that indicated that there was a sharp division amongst public along ethnic and other lines. This study observed the same sentiments within other social media applications such as Twitter and Facebook. A look into the discourses on Twitter and Facebook revealed this sharp division along these lines. An analysis of the divisions further revealed that people on one side of the divide felt that the opposite side had benefited from past regimes at the expense of the rest of the country. At the same time the opposite side felt it was time to dispense off this trend. The only way to do this was through the elections BUT if elections failed then sentiments that echoed the secession debate were then fronted.

The political elite seem to however be aware of what is afflicting the country. As argued by Macharia Gaitho (2016) the manifestos of both parties (Jubilee and NASA) make pledges towards realization of cohesion, reconciliation, national unity and peace; a fair share for all regions and population groups; fair distribution of development resources; special attention for marginalized groups and regions; equal access to employment, education and health services; and fair representation of all groups in leadership and government". He continues that while this is said in the manifestos, *"at simplistic level Jubilee offers a forward looking model that prefers not to reopen old wounds, as put by the Deputy President William Ruto in rejecting implementation of the TJRC report"*. This is against the wishes of NASA who see *"the old wounds as still open and in need of stitching and dressing lest they continue festering"* (Daily Nation, August 24, 2017).

An example of a reconciliation process that was comprehensively undertaken is the case where the Mau Mau[29] veterans presented their case in relation to events that took place between 1952 and 1963. This issue was raised with the British Parliament on the 6th of June 2013. Subsequently the British government made an acknowledgement that the victims suffered torture and ill treatment during this period as well expressed the sincere regret of the government. Some 5,228 claimants had presented their case. After this statement of regret each of these claimants received a settlement

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[29] According the BBC News, The Mau Mau were freedom fighters in Kenya who were fighting for political rights and land reforms. They had a redistributive mission. The British declared a state of emergency in 1952 because the Mau Mau were attacking political opponents and raiding white settler farms and destroying livestock. This resulted in the killing of 11,000, including the hanging of 1,090 by the British administration – although the official numbers could be higher. This also resulted in detentions without trials amongst other injustices. The Mau Mau Veterans Association took legal action against the British government to secure compensations for four Kenyans allegedly tortured during this period (April 7, 2011).

payment. Further, the British government pledged to construct a memorial in Nairobi in commemoration to the victims in order to promote reconciliation between the two countries. This memorial will be a symbol of acknowledgement and apology by the British government to the Mau Mau and other communities that suffered the atrocities. It also acknowledges the difficult past. This had been made possible by the establishment of a Steering Committee which comprised the British High Commission, the Mau Mau War Veterans Association, the Kenya Human Rights Commission, the Nairobi Governor´s Office, the National Museums of Kenya and the Memorial Design Team. This is done because lasting peace cannot be achieved in the absence of justice, and reconciliation (excerpt from speech by Dr. Christian Turner, September 15, 2015).

The above case presents a clear effort at reconciliation. The British government established a committee to spearhead the reconciliation process. The committee in turn drew out a plan and the actions that were to be taken in order to achieve the said plan. Finally the British committed themselves to actualizing the plan as laid down. Very importantly, the British took a three-step process to lay foundations for reconciliation. These steps included acknowledgement, reparations and memorialization. It was also evident that the acknowledgement was deep from their heart since it was followed by commitments which were honoured. At the same time the idea of forming a committee implied the seriousness with which the British government took the issue.

It is against this background that this study sought to address the question of reconciliation and whether a conscious effort was made to follow-up on the recommendations of the TJRC. From the data obtained during this study there seemed to be an indication that underlying this separatist debate is a feeling amongst the public that although there is a constitution guiding the country certain sections feel robbed and their choices no longer respected, according to two debates aired on a nation television (Nation Television). There is also a feeling that the issues that led the country into abyss in 2007/8 have been swept under the carpet and instead the elite prefer to adapt the *"accept and move on"* (seen from a CDA view it serves the function of stifling the debate and therefore helping in maintaining status quo) mode despite the general feeling of disaffection. They further point out to the general feeling of exclusion and lack of inclusivity. This exclusion is not only along ethnic lines. It traverses ethnicity and takes other forms such as gender and youth (Nation Television, August 23 & 24, 2017).

Kenny and Ahere (2017) complement this by stating that elections form one part of the narrative about Kenya´s history of poll violence. In their submission they argue that *"the focus has been on*

elections as triggers of violence. But elections are only part of the story". An examination of the structural causes this violence is missing in the interpretation of many including foreign and local media. Although Kenya has had post-poll violence in 1992, 1997 and 2007, dismissing these as the expected reactions after every election in the country is to miss out on the reality of Kenya´s politics. Kenya has a history of *"marginalization"*, *"impunity[30]"*, *"inequitable distribution of land and other key resources"* all of which represent structural injustices which are at the same time pegged on history (Kenny & Ahere, August 20, 2017). This history is the driver behind the entrenchment of these injustices as the elite, in seeking to maintain status quo, end up committing further injustices. Owino (2013) corroborates this by pointing out that the TJRC report *"revealed that Kenya is indeed a divided country"*. According to him the divisions show that "chasms between the citizens who have been perpetual victims of injustice" against "unrelenting perpetrators of injustices of different kinds" exist. He argues that a read of the TJRC report reveals *"a thread that connects persons whose obsession with political power and wealth and its attendant prestige have cause harm endlessly to poor citizens, whether it is by grabbing their properties, stealing from the public coffers or even physically brutalizing their compatriots and, if need be, assassinating their supposed political competitors"* (Owino, June 21, 2013). The result is a society that is in deep pain requiring intervention. All in all, the undercurrents in Kenya, depicted by for example, the separatist debate, point to these deep-seated divisions that need to be using some formula.

From a critical discourse analysis perspective the *"accept and move on brigade"* in Kenya is championed by the political elite who seem to enjoy the benefits of, for example, the illegal/irregular allocation of public land. They enjoy this because of the actions and decisions made earlier in history and which favour them, according to the historical institutionalism view. Critically speaking, it is therefore in their interest that the narrative promoted by the reformists who opine that the recommendations of the TJRC report should be implemented. Instead, they are championing this mantra and have managed to popularize it through the media and other channels for purposes of controlling the TJRC discourse in Kenya. They therefore are using their positions of privilege to manage and control this discourse in order to serve their interests. Their interests here being that

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[30] Characterized for example by the excessive use of force and the killings meted out by the security forces on peaceful protesters after the 2017 elections in selected parts of the country. According to Kenny & Ahere (2017) *"The Kenya National Commission for Human Rights reported that by 12 August at least 24 people had been killed by police. Medecins Sans Frontieres East Africa reported treating 64 people, 11 of who had gunshot wounds. The Kenya Red Cross treated another 108 people with serious injuries"* (August 20, 2017).

implementation of these recommendations will by and large involve the revocation of titles, for example, as recommended by the Commission.

This study observed that in some instances the Commission recommended investigation and prosecution of the alleged perpetrators. Yet, this is something that does not go down well with them. Hence the championing of the narrative of disorder in case the TJRC route is consciously followed. Instead therefore the country is persuaded to *"accept and move on"*. To them, they would rather pursue a constricted path to reconciliation which does not comprehensively answer the questions that victims have had for a long time. In other words, this path for example is one where victims of say land injustices are offered title deeds for the lands they currently occupy and nothing is mentioned about the lands that they lost previously not forgetting that the pains they suffer are about the lands lost. They may therefore have title deeds in the interim but the hard questions they needed answered remain unattended. The result is a bitter society that waits to revenge in some future to come. And, this is not the avenue to nurture a participatory society.

From the data obtained during this study, in the overall, a conscious attempt at reconciliation on the part of the state had not been made. This was clear from the focused group discussions conducted in; Nairobi on July 14th 2015, Trans-Nzoia on July 28th 2015, Wajir on September 9th 2015 and, Garissa on 18th of May 2016. The data emerging from these discussions were full of disappointment on the part of the participants at the rather lax approach the government had taken in addressing the issue of reconciliation in the country. The participants in Nairobi went ahead to fault the creation of institutions such as the National Integration and Cohesion Commission alongside the National Peacebuilding and Conflict Management Directorate which seemed to be a contradiction and presented room for counter-productivity. This lack of effort was also echoed by the interviews conducted in the six counties as well as the secondary data collected. The study found out that instead of this comprehensive effort to bring about reconciliation, there were only spotted efforts by civil society in different parts of the country to reconcile communities that have conflicted in the past.

This was clear due to the absence of a clear reconciliation framework adopted as a result of the findings and recommendations of the TJRC report. Instead there have only been scattered attempts at bringing together selected communities in the country for purposes of political expediency. This only serves to fuel the latent conflict that is waiting to manifest itself in the form of violence. Previously, such violence only needed a trigger such as the mishandled elections on 2007. While

these attempts have gone on, the root causes of the conflict, that take into account the complexities involved therein, as suggested by Lederach (1997) in his praxis of reconciliation, have not been addressed at all. In fact, an open discussion leading to designing a common and connected future of the country has not been a priority of the political elite. In total, there has been a lack of commitment on the part of the executive to pursue the reconciliation agenda.

Kenny and Ahere (2017) while commenting on the calls for peace during and after the elections of 2017 point out that *"Rather than pursuing the root causes of election related violence, local media and the non-profit sector have focused on "peace" messaging in a bid to unite Kenyans_ against tribalism, and _for democracy. This has been most visible through the #MyTribeisKenya, and #MyTribeNiPeace ('Peace is my Tribe') social media campaigns. These campaigns often equate 'peace' with 'stability' "* (August 20, 2017). This approach contradicts a genuine call for peace. As pointed out earlier in this study it leads to *plastic peace* which is not sustainable. Indeed Dolan (2017) prefers to call it *"plastic peace"*, *"which is a strange type of calm where we dare not disrupt the state narrative that all is well as we march, hand in hand"* (Dolan, July 21, 2017). And this narrative has the underlying assumptions that all is well and encourages the society to keep the peace.

Yet, when critically analysed, the underlying interests of the political elite, in pursuing this narrative, is to maintain status quo. Actually the peace they do not want disturbed is their peace and not the peace of the nation at large. The situation also points out to the presence of stability and calm yet the country may not be enjoying the peace that is intended. Dolan continues that the kind of leadership championing this kind of narrative, dismisses *"the right of victims to access truth, justice and public acknowledgement"* and therefore *"displays sheer contempt and poor leadership"* (Dolan, July 21, 2017). Further, it brings to question the real intent of the promoters of the peace message and their perceptions about at participatory society and the process that leads to the emergence of this kind of society as argued in this study.

As mentioned in the research design section, government officers were also interviewed in the process of this study. It was however not surprising to observe that they were on the most part uncomfortable with discussing the topic of the TJRC, at least in the initial stages of the interview. From a critical perspective this discomfort can well be related to the ´accept and move´ on mantra that has been propagated by the political elite and particular the occupiers of the highest office. That could explain why they initially were uncomfortable with such a discussion but would later open up

and reveal their inner sentiments about the topic. It also explains the reasons why it was initially difficult to reach and the researcher had to use people close to them in order to explain the objectives of the research and persuade them to allow for interviews. In short, the ´accept and move on´ discourse, as propagated by the Jubilee administration meant that by extension government officers were impliedly expected to propagate the same. This was although their conscience contradicted the dictates of the highest office whose interests were entrapped by the past and their decisions and actions were intended at maintaining status quo.

Data obtained during this study also indicated a lack of follow-up on the recommendations of the TJRC. This lack of follow up on the recommendations of the TJRC thus dealt a big blow to the victims of historical injustices who expected restorative justice and possibly reconciliation with perpetrators. Victims in Wajir and Uasin Gishu Counties, for example, revealed that they had high hopes that the TJRC would finally bring to a closure the injustices and suffering that they had gone through in the successive regimes since independence. In Wajir County, victims of the Wagalla massacre hoped that the government would admit culpability to the massacre and offer compensation to victims of the massacre. Neither has the government taken into account some of the alternative dispute mechanisms that would speak, say, to the clans in the county and which offer rich and substantive measures to be taken in the event that conflicts such as the ones experienced in Wajir County happen.

Examples of alternative dispute resolution mechanisms among the Somali living in this County include, for example, the compensation of 100 or 50 camels respectively in the event that either a man or a woman was killed during conflict. This act defines the compensation phase of the reconciliation process but which is preceded by acknowledgement of the transgression and request for forgiveness and readmission into the social system of the society. It is only then that the victims are able to embrace the perpetrators of the conflict and together they chart the future. These efforts have however never taken place, according to participants in the interviews carried in the Counties covered by this study. In fact the closest that was ever happened was in 2013 when President Kenyatta offered a blanket apology to the victims who had suffered under the arms of the government. Within the truth-justice-reconciliation processes, this doesn't help much because ideally, a perpetrator should admit culpability to specific transgressions and express genuine remorse in order to foster a feeling of justice and lay the ground for reconciliation.

The inability therefore of the government to act on the recommendations of the TJRC has undermined the prospects of victims achieving justice and the possibility of reconciliation between victims and perpetrators. This therefore means that feelings of suspicion, lack of trust, fear and animosity between victims and perpetrator are still prevalent and deep rooted. Although some people argue that reconciliation between the Kalenjins and the Kikuyus has been achieved, this position can be contested since the purported reconciliation is largely a political process which was achieved without a resolution to the long term historical injustices that surround issues of land and ethnic clashes in 1992, 1997 and 2007/8. In addition, the purported reconciliation is a two community affair whereas the nature of injustices that exist in Kenya extend beyond the two communities and encompass a wide variety of issues that go beyond land and ethnic clashes. It can therefore be argued that political elites have emerged as the key impediments to the reconciliation process since they are some of the biggest perpetrators who would have to admit liability for their mistakes in order for reconciliation to take place.

This therefore raises the question of whether there was a genuine commitment to resolve historical injustices and achieving reconciliation amongst. Or rather, one might even be tempted to question the justifications of why the TJRC was established in the first place. Was it due to pressure from CSOs and donors? And might the political elite have yielded to such kind of pressure in order to keep the international community happy? Or, was is another classic text-book case of political solutions that come with conflict resolution packages especially in post-conflict contexts with a history of historical injustices? Of course, these questions elicit different answers depending on you to talk to.

However, the conduct of TJRC and the reactions that it got from CSOs, members of the public and the political elite clearly show that there was lack of a general agreement on the need for reconciliation. This is especially true with the political elites who frustrated the process since its inception. Although the political elite were very vocal on the need for reconciliation, their actions with regards to frustrating the TJRC clearly illustrated their hostility to the whole process.

7.11   SUMMARY AND CONCLUSION

This chapter discussed the TJR process in relation to reconciliation. Did the process usher reconciliation as suggested by advocates of truth commissions? This is against the assumption that truth processes lead victims and perpetrators to embrace one another through the process of truth

telling and attainment of justice. The TJRC found that various forms of atrocities had been committed by individuals and institutions of government since independence. However the previous chapters also indicated the contestation of the findings of the Commission and further led to contested truths, the obstruction of justice particularly by public officials/political elites and the executive. The study, having concluded on the previous chapters, preceded with this logical framework that reconciliation results after truth and justice happens. In answer to the research question, the study found out that Kenya is still a deeply divided society because, first and foremost, the recommendations of the Commission have been abandoned by government. Instead, ad-hoc attempts have been made to bring communities together selectively further exacerbating the existing conflict because of the suspicion and hatred that this action creates within the communities that feel left out.

In conclusion, this study observes that the actions of the political elite have led Kenya to lose an opportunity for the much needed reconciliation. This is because the political elite are implicated in the atrocities committed in the past and are therefore not willing to undertake a process that would lead to their prosecutions or the return of land previously acquired illegally/irregularly. This historical fact therefore undermines and inhibits their agency. As a result of this the process of reconciliation will remain an elusive one for the country unless there is a drastic change of heart on the part of the political elite or unless Kenya undergoes a clear shift in terms of regime change. However, in the event that the alternative regime also shared in the committing of the said injustices then the dilemma will continue to persist. This brings to question the non-recurrence of the conflict in the Kenya.

CHAPTER 8.THE TJR PROCESS AND THE INSTITUTIONALIZATION OF PARTICIPATORY DEMOCRACY IN KENYA

8.1 CHAPTER PREVIEW, AIM AND SCOPE

This chapter analyses the outcome the TJR process in Kenya. In so doing, the chapter answers the fourth research question of this study: ***Did the TJR process play a role in the institutionalization of participatory democracy in Kenya and if so How and Why?*** The analysis relies on interviews and focused group discussions conducted during the study period as well as documents such as journal articles, reports from various organizations, newspaper articles as well as policy documents which discuss, analyse and present the prevailing situation in Kenya, particularly after the presentation of the TJRC report. In order to do this, the chapter utilizes the participatory democratic theory as postulated by Carole Pateman in 1970. This is done in consideration of the arguments contained in the meta-theory of the study – historical institutionalism. The chapter proceeds by analysing the extent to which the TJR process has facilitated the realization of the salient elements of participatory democracy as presented by Carole Pateman in 2012. However in doing this the chapter also links this end goal to the other concepts used in the conceptual framework. That is, the influence that history has on the realization of both justice and reconciliation and the impact this has on the realization of a participatory society.

The TJRC report found that *"subsequent repressive laws and policies"*, *"intimidation and control of the media"*, *"little public scrutiny and accountability by public officials"*, the *"lack of separation of powers in the three arms of government"* and *"lack of genuine commitment to investigate and punish public officials"*, were some of the factors that contributed to encouraged and facilitated the gross violation of human rights (Volume IV: 10). The institutionalization of participatory democracy would mean that these factors addressed to the extent that they do not exist. Addressing these would mean that some form of justice is realized by the victims of the historical injustices and the society at large. This then would usher in a process of reconciliation initiated at the national level by the elite. In this way the conditions necessary for a participatory society at then sown and begin to germinate within the society.

This study found that some of these factors are still prevalent and that this therefore continues to prevent the emergence of a participatory society. The prevalent conditions are a result of history

which seems to have conditioned the actors and their preferences. The study therefore engages in a critical analysis of why the TJRC process has not delivered the desired outcome(s) as discussed in the conclusion part of the chapter.

8.2 INTRODUCTION

"Before we started the session, the National Anthem was sung. I want to tell you that we have never been part of the National Anthem. The National Anthem talks of justice, fellowship, awareness, good life, abundance, among other things. These things have never been experienced in this region [Northern Kenya]. In totality, I can say that we have never been part of this country" (TJRC Report, (Abridged Version), May 26, 2013).

The statement above is characteristic of the feelings of many particularly because of the marginalisation suffered in the hands of successive regimes in the country. The TJR process was therefore considered a watershed by the inhabitants of regions such as Northern, Eastern, Western and Nyanza. However, as discussed in the previous chapters, the data available point out that the TJRC process did not facilitate the realization of justice and reconciliation. Wambugu (2014) argues that before the violence in 2007 weird narratives that saw Kenya´s history written *"on the streets"*, *"in homes"*, *"in the media"*, *"on the internet"*, *"in public rallies"* and so on existed. He calls these circumstantial truths that in many ways only promoted certain *"public positions"*, *"interests"*, *"politics"* and promoted particular fears about the social fabric of Kenya and especially around different ethnic communities. The TJRC process was therefore a chance to once for all correct this (Wambugu, August 4, 2014.) This is in line with historical institutionalism which posits that societies go through certain critical junctures. The TJRC process in other words presented a critical juncture for Kenya at which decisions made would determine the emergence of a participatory society as envisioned in the participatory democracy theory. A lack of completion of this process would therefore be seen as a great setback for the entire society.

From the data gathered in this study, this however has not happened and, if and when it is seen to happen, then it is only merely an ad-hoc adventure meant to hoodwink the public and popularize the narrative that the regime is concerned about the development of the country. Looked at from a critical theory angle, it is the political elite using their relative positions of power and authority in

order to foster a discourse that favours them in fear of what the realities of implementing the TJRC report entail. Regretting the lack of implementation of the TJRC report and the tendency to shift blame for the historical injustice on the colonial experience Kenya experienced. Owino (2013) rightly argues that the TJRC report *"behooves Kenyans to take responsibility for the lost half century, and strive to ensure that justice and the rule of law become the foundation on which Kenya shall be built going forward"*. He continues that *"only then will there be a real chance at reconciliation"* (Owino, June 21, 2013). Kenya´s colonial past may have weighed in on the outcomes that the country experiences. This notwithstanding the rot that the country finds itself in is at the same time the making of contemporary internal factors relating to governance. It is these issues that the country has to deal with first.

The shifting of blame for the historical injustices on the colonial past by the political elite may additionally be viewed as a mere scapegoat and further cements the idea that the elite are not interested in dealing with the past. From a CDA perspective it can be argued that the discussion about the past and the subsequent blame on the colonialists is mere rhetoric. The real intention here is to publicly play the blame game while the real issues remain untackled. It results in a public relations exercise and temporarily quells the simmering tensions that lay beneath the surface. Their real intention therefore is not about turning this rhetoric about historical injustices into reality. Blaming the west purely illustrates the hypocritical stance of the political elite in Kenya. This is especially so because, for example the recommendations of TJRC report have not been implemented particularly because the document is sitting somewhere in parliament and gathering dust. Yet there is no likelihood that anyone wants to discuss it. Instead the only reference made to it has instead been an act of negating its contents and popularising the idea that its contents will breed further instability in the country by the same political elite.

Christine Alai in support of this terms such statement as *"an open insult to thousands of victims of gross human rights violations"*. She further argues that the same political elite have frustrated efforts by victims and survivors in ensuring that implementation happens. The National Victims and Survivors Network, for example, presented a petition to parliament in December 2015 calling for urgent adoption of the report but the petition was passed on to a departmental committee – and subsequently by the time the life of the eleventh parliament lapsed no discussion of the document had been tabled (Alai, July 25, 2017). Importantly, it is worthwhile noting here that the same report

mentions the political elite from the opposition and the ruling party (Jubilee). Although the opposition in their campaigns of 2017 indicated that implementing the recommendations in the report formed a critical part of their agenda (see Onyango, June 20, 2017; Alai, July 25, 2017 & Gitari, July 27, 2017), it remains to be seen (should the opposition win the repeat elections) if this is really so.

Branch (2014) reinforces this point by pointing out that societies such as Kenya, coming from a dark past are usually having a moment of their own choice when they are forced to confront their past in order to move on. This juncture came after the violence in 2008 after the political settlement that brought about substantive processes such as the Waki Commission, the TJRC, and the new Constitution, all of which sought a historical understanding and subsequent confronting of the past. He argues that all this did not yield the expected: the ICC cases collapsed in The Hague, the local prosecutions also collapsed, the TJRC report has been buried and the new Constitution is embroiled in petty disputes. According to him, *"remembering has been jettisoned for forgetting and promises made by politicians and foreign diplomats remain unmet"*. At the same time *"institutions such as parliament, the local courts and the ICC, have not been up to the job given to them in 2008 due to a lack of political will"*. This preference for amnesia however only gives temporary relief and the price is recurrent violence experienced during election times (Branch, October 24, 2014). The prevailing narrative that prefers amnesia is however the making of the political elite in their bid to maintain status quo.

From a critical theory standpoint, the amnesia however serves the interests of the political elite who prefer that this narrative is kept in the archives and not revisited. They even work hard to ensure that the discourse disappears in the general public parlance by insisting that all the country needs is the building of infrastructure such as roads and railways. They forget that those roads and railways will need people who can use them and this can only be guaranteed if there is non-recurrence of violence. In so doing, and according to historical institutionalism, they seek to produce history by suppressing the dominant narrative and supporting their own. Actors are produced by history and at the same time actors are also producers of history. In reference to the TJRC process in Kenya, at this juncture the actors seek to produce history by suppressing the dominant narrative and promoting one of amnesia which focuses on the infrastructure development at the expense of the

much needed justice and reconciliation which results in the emergence of a cohesive and participatory society.

Chiliswa (2013) writes that the above has rendered the optimism that once characterized Kenya to be no more. He argues that because of this the country is incapable of *"creating a shared future, a dignified citizenry"* and above all *"a nation that values integrity and social justice"*. This is particularly so because those in leadership *"are determined to scuttle such ideals with their stoking of intolerance and ethnic bigotry"*. The result has been exclusion of some sections of the society and the emergence of unfair social structures (Chiliswa, December 16, 2013). Subsequent to this sabotage of the delivery of justice which would then lead to reconciliation, the elements associated with a participatory democracy have not been the outcome of the process, as evidenced by the data obtained in this study. Instead, Chiliswa argues that, we see the lack of brevity on the part of successive political regimes to confront and correct the past. This is exemplified by the Jubilee administration´s reluctance to implement the recommendations in the TJRC report which provide a clear pathway to re-establishing *"the dignity of those who were brutalized by past regimes"* (Chiliswa, December 16, 2013).

This is partly because from the beginning the lack of publication and distribution of the report and subsequently the lack of implementation of the recommendations proffered by the Commission have been seen as a setback to the whole process. This view is supported by a participant in an interview in Kericho who opined that the *"lack of implementation of the TJRC report hampers the attainment of Vision 2030"* (LS_30029 – interview conducted on 17/7/2015 in Kericho County). Vision 2030 is Kenya´s development blueprint covering the period 2008 to 2030. Drawn in context of the Millennium Development Goals (MDGs), Vision 2030 is anchored on *"economic, social and political pillars"* (GOK. 2001:2) which encompass *"macroeconomic stability, continuity in governance reforms, enhanced equity and wealth creation opportunities for the poor, infrastructure, energy, science, technology and innovation (STI), land reform, human resource development"* and *"security"* as well as *"public sector reforms"* (GOK, 2007: 6-9). Importantly, Vision 2030 also has land reforms as part of the actions viewed critical in moving Kenya to becoming a middle income economy. The document identifies land as a critical resource for socioeconomic and political development. Yet, the lack of attention to this particular matter is not being addressed currently as recommended by the TJRC. Through the TJR process *"we seriously*

discussed issues that were affecting us in particular the land question". The country had the opportunity to openly discuss the matter yet *"when it came to the way forward it stopped at that. And we continue reminding the authority we want the TJRC because it holds a lot. It has a key for a better tomorrow"* (LS_30024 – interview conducted on 9/7/2015 in Uasin Gishu County). Other injustices such as economic and political marginalization have also been assumed.

Another issue that came up in Chapter Five was whether the Commission managed to arrive at truth. A section of the participants opined that this affected the extent to which the report was representative. This further explains the reason why the Kipsigis Community in Kericho County, feeling that their grievances were not well captured and catered for commenced an alternative process of *"collecting data about displacements"* which took place *"during the early times when most of the natives were displaced from the highlands where we now have the multinationals"* (LS_30036 – interview conducted on 2077/2015 in Kericho County) during this study. Members of the Kipsigis Community had planned to petition the British government over the occupation of such lands by multinational companies such as James Finlay Limited and Unilever which are domiciled in the United Kingdom. They were taking a cue from a case where Kenyans tortured by the British colonial forces during the Mau Mau uprising were compensated with an amount of twenty one million British pounds in June of 2013 (see BBC News, June 6, 2013). The suit was filed by the Mau Mau Veterans Association. The action was a sign that injustices committed in the past must be acknowledged and some form of justice delivered to those who suffered. The TJRC had found out that Kenya had a legacy of injustices committed during the colonial period and had also indicated that the picture of country´s historical past remains incomplete by omitting the colonial era. The TJRC also recommended that the British government make a public apology to the victims as well as begin formal negotiations for compensation within a time period of twelve months. In deciding to apologise and compensate the victims however, the British government did not indicate whether they were doing so in adherence to the report of the TJRC or whether it was purely as a result of the court process.

The data collected and analysed in this research therefore suggests that there lies a potential for Kenya to move towards a participatory democracy if a conscious effort is made to address the recommendations made in the TJRC report. Further, the recommendations are in tandem with Vision 2030. But the data also suggested that this might not be feasible without a purge from the

past; a transition from the authoritarian tendencies exhibited by previous regimes and which engaged in violations of human rights in order to benefit from such acts.

8.3   DID KENYA TRANSIT FROM THE PAST?

Gifford (2009) writes that project Kenya has benefitted the elite who control it. These include the politicians, the civil servants, the parastatal bosses as well as associates close to these groups who continue to benefit from land grabbing, ethnic cleansing, economic scandals such as the Goldenberg and more recently the NYS and Ministry of Health Scandals, amongst others. To this end they continue to benefit enormously (2009:29). He continues that commissions of inquiry, though formed are simply created to cater for the preservation of the elite. The range of commissions in Kenya is replete with narratives of either reports that are never published (2009:29-30) or when published the recommendations are never pursued by the state. In summation, the commissions are simply avenues through which status quo may be maintained and the wrath of the public caressed to reduce the sharpness of the blade. The TJRC process is one such public enterprise that the political elite in Kenya took the country through.

Data obtained during this study indicated that Kenya had not transitioned from the past. Indeed, while various structural changes had taken place, the attitudes and perceptions of office holders remained the same. The focused group discussions conducted in; Nairobi on July 14th 2015, Trans-Nzoia on July 28th 2015, Wajir on September 9th 2015 and, Garissa on 18th of May 2016 revealed that there was a feeling that a continuation of the same injustice committed in the past. For example, in Nairobi, participants expressed the disappointment in the levels of corruption experienced in the country even after the promulgation of the new Constitution in 2010 and the presentation of the TJRC report which had recommended further investigation and prosecution of persons that committed economic crimes. The participants cited, for the example that scandals such as the National Youth Service scandal[31], the Chicken Gate Scandal[32] and the Ministry of Health Scandal[33].

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[31] The National Youth Service Scandal happened under the Jubilee administration where it is estimated that more than 1.8 billion Kenya shillings was lost. A parallel system in the ministry was set up which single-sourced expatriates and consultants. These then acted as conduits for money syphoned from the Ministry of Devolution. The Cabinet Secretary in charge of the ministry was Ms. Anne Waiguru. An investigation by the Public Accounts Committee of parliament found her culpable and investigation and prosecution recommended (Mbaka, March 16, 2017.)
[32] According to Murimi (2016) the directors of Smith and Ouzman, a UK firm were found to be guilty of bribing elections officials as well as officials from the ministry of education in Kenya in order to win printing tenders. The bribes were nicknamed "chicken". Kenya however recovered 52 million shillings. Kenyan officials at the electoral body alone had pocketed bribes amounting to Kenya Shillings in order to award printing contracts to Smith and Ouzman. This was done by mainly inflating prices.
[33] In this allegation the country lost billions of shillings through irregular payments where cash was paid to companies associated with influential personalities in the political and business class (Mwere, January 3, 2017). Other activities included diversion of

Many more corruption scandals were committed in 2017 alone by the political elite and government officials as well as people highly connected to this class as discussed in the next paragraphs.

The above information is further corroborated by the findings of the Otieno (2017) who sought to identify eleven major economic scandals that had rocked the Jubilee administration under Uhuru Kenyatta and which came to power in 2013. The scandals included the laptops tender which had been meant for standard one pupils and which had been awarded to Olive Telecommunications Pvt Limited (the tender involved Kenya Shillings 24.6 Billion. It was later cancelled), the Weston Hotel saga where land belonging to Langata Road Primary School in Nairobi and measuring up to 0.77 hectares had been grabbed and the Weston Hotel built in it (the Deputy President William Ruto admitted to owning a stake in the said hotel, the passenger terminal at the Jomo Kenyatta International Airport amounting to Kenya Shillings 56 Billion but which was later cancelled by the Transport Cabinet Secretary James Macharia, and, the National Youth Service Scandal which according to the Auditor General´s report led to the loss of Kenya Shillings 1.9 Billion by taxpayers, amongst others (Otieno, February 6, 2017).

These corruption scandals and more, clearly indicate that the country had not broken with the past. Instead it led this country to ask the question whether Kenya *"was entering the age of full-fledged criminal business enterprise – network or cartel – and a new era of state capture"*. These networks and cartels can *"easily predict"*, *"influence"* and *"align with the state´s public policy cycle and government´s public management policy cycle"*. The networks reflect to a great extent a part of the political economy (Nation Agenda, February 7, 2017). Painstakingly, Kenya has therefore moved levels higher and become a bandit economy (Nation Agenda, February 7, 2017) a sign that the findings of the TJRC did not deter the grand corruption. Kaara (2008) stresses the point that Kenya has grown into a bandit economy by indicating that the country´s political process is bankrupt of ideas and only *"revolves around access to power, its consolidation, and its use to accumulate wealth"*. The political elite are therefore only interested in *"self-preservation"* that ultimately leads to failure and a total divorce from the *"aspirations of the citizenry"* (February 9, 2008). The post-election violence of 2007/8 can therefore be seen partly as a response to this primitive accumulation by political elite.

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funds, double payment for goods and manipulation of the Integrated Financial Management System (IFMIS). These corruption and integrity issues at the ministry of health led to the American government´s discontinuation of a Shillings 2.1 Billion annual funding of key medical support projects in Kenya (Michira, May 10, 2017).

From a historical institutionalism view the above is indicative to the lack of intention on the part of the political elite to end corruption. This is because of the fact that once having been involved in corruption then it becomes difficult to end it. The outcomes from the other critical junctures, i.e. the previous regimes in relation to fighting corruption, were bound to mechanisms that reinforce certain patterns in the future of the country. In other words, corruption only begets corruption, and the corruption of yesteryears was bound to lead to further corruption in and by the subsequent regimes. According to Nation Agenda (2017) interfere with the judiciary, bribe members of parliament to enact laws that favour them or generally defeat legislation of laws that will aid in curbing corruption and thereby make corruption part of usual business in Kenya. In turn, the country has then become a bandit economy (February 7, 2017). This is explained by the fact that decisions made earlier by the political elite that led to corruption scandals simply served to entrench it and make it difficult for it to be uprooted.

In the same vein, those decisions continue to haunt the political elite and compromise their ability to fight corruption in the country. In other words, corruption begets corruption and this can only be explained by situation of state capture the country finds itself in. In any case, once they were bribed in the past, it makes it therefore to refuse the same bribes from the networks and cartels. This leads to the situation of state capture. This issue looked at from a critical theory view reveals that probably the political elite in engaged in mere rhetoric in their pronouncements against the vice. Their commitment to the fight against corruption is therefore questionable. And this can be explained by President Uhuru Kenyatta´s open and frustrated address to an audience attending an anti-corruption summit at State House on the 23rd of November 2015. According to Mutambo (2016) the president indicated that he had *"taken the actions that I can take, within the Constitution. When we sit down, and I challenge all the agencies here, they say we don't have the resources; we don't have this and that. I challenge them here to stand up and say we have been denied the resources we need"* (October 18, 2016) (see also, Kenyatta, November 23, 2015). The situation further leads to the economic deprivation of the citizens who then feel disenfranchised and unable to decide on their future and that of their country. Instead, it therefore breeds a sense of lack of pride for country and this has an effect on laying grounds for an emergent participatory society.

The above argument is well captured by Murua (2017) who aptly writes that there apparently is no difference between retired president Daniel Moi and President Uhuru Kenyatta despite the fact that Daniel Moi left power in 2002 while Uhuru Kenyatta ascended into presidency in 2013. He opines

that *"promised a new era of leadership but what we got instead was mega corruption cases"*. During Daniel Moi´s time scandals like the Goldenberg (explained earlier) hit Kenya and the coffers of government agencies and parastatals were emptied. On the other hand, Uhuru Kenyatta´s was magic. Under his regime heavy borrowing in billions of dollars took place but this instead went into the pockets of those closely connected to him as well as some of his cabinet ministers. At the same time his family members happened to be at the center of his administration´s economic scandals. "*The worst part was that the amounts involved were gargantuan compared to his political godfather*" who had been in power longer than him (2017, n.d.). Murua continues to argue that at the same time Uhuru has perfected the use of violence to stifle dissent as evidenced in the governments´ actions in fewer than five years. It is therefore erroneous to equate Uhuru to Moi. Instead, Murua insists that he is worse (2017, n.d.).

This contribution takes cue from the path dependent arguments in the tradition of the Barrington Moore approach by emphasizing a political economy approach in its analysis. In the Marxian sense, the institutional design in Kenya is structured in such a way that the political elite has the upper hand and controls access to property and its use and in this way is able to maintain their power. This cosmic design facilitated by the existence of patrons, clients and informal networks ensures corruption is not only entrenched but at the same time becomes the way of life in Kenya. In historical institutionalist terms corruption then reproduces itself because of the *"lock in"* created by the path dependence decisions made by the political elite. At the same time, through corruption, the political elite are able to use the proceeds from the vice to further control the governance system and perpetuate the practice. In fact, the rampant corruption is a perpetual way of life through which status quo is maintained. In turn, this leads to the political struggles experienced throughout the history of independent Kenya. Although corruption may be seen as a deviant behavior, in Kenya it has become institutionalized and can therefore be referred to as an informal institution. Patronage and loyalty tendencies experienced in the bureaucratic government in Kenya buoys the existence of a kleptocratic state – a monopoly by the political elite which has distaste for alternative public opinion. From this view, it can therefore be argued that the corrupt practices of the political elite are shaping history in Kenya by widening the gap between the rich and poor and thereby intensifying the dialectics between and amongst these classes, seen in the form of the constant calls for change. Corruption also limits the agency of the poor masses and as such prevents the emergence of a participatory society as envisaged by Carole Pateman.

Data for this study was gathered at a time when Kenya was moving towards an election year (that is 2017) and where possibilities of violence related to elections were already predicted. This was especially because the risks associated with dysfunctional electoral systems and practices remained at large within the discourse of many stake holders' especially civil society and international donors. The Kura Yangu Sauti Yangu (KYSY) movement[34], hosted by the Kenya Human Rights Commission, in the briefing paper on the road towards credible elections in 2017 indicated clearly that Kenya had indeed not transitioned. They cited the need to build public confidence in the elections of 2017 in order to build credibility and legitimacy so as to maintain stability in the country. Some of the issues they cited as eroding this public confidence and legitimacy included: administrative and political obstacles to voter registration and related doubts regarding the reliability of the voters register, delays in and irregularities with the procurement of electoral technology, the lack of clear backup mechanisms to address potential problems with the functionality of electronic results transmission, and, the independent electoral Commissions´ failure to effectively communicate updates and changes to the public. The above simply point out to the tendencies of the political elite to control such processes with the view to maintain status quo. In their thinking such a process would lead to change in this status quo by electing alternative leadership.

Against the background KYSY pointed to the issues that the Commission needed to address immediately which included lack of clear communication to the electorate, lack of clarity on how potential problems would be solved during the electoral process, lack of access to the voters´ data, lack of credibility in the procurement process as well as the shrinking civic space epitomized by the restrictive environment experienced by civil society groups championing for more democratic space. These indications implied that the transition to a participatory society had not happened in Kenya. Indeed the presence of such an environment clear depicted that the individual remained more and more restricted by the state and the capacities stifled by the same state. It therefore also indicated that the actions by the office holders in government were informed by the past and that they were not willing to cede the positions earlier held which suffocated the populace. The presence of a participatory society was therefore restricted and not allowed to grow in the country.

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[34] Kura Yangu Sauti Yangu (KYSY) is a citizen movement spearheaded by a number of like-minded civil society organizations (Kenya Human Rights Commission (KHRC), Independent Medical-Legal Unit (IMLU), Constitution and Reforms Education Consortium (CRECO), the African Center for Open Governance (AFRICOG), InformAction (IFA), the Civil Society Organization Reference Group (CSO-RG), Inuka Kenya Ni Sisi, Katiba Institute, Development through Media (DTM), the Kenyan Section of the International Commission of Jurists (ICJ-Kenya), Awaaz Magazine, Mazingira Institute, Muslims for Human Rights (MUHURI), National Women Steering Committee and Kenyans for Peace with Truth and Justice (KPTJ).

Similarly, according to a former international Commissioner with the TJRC, indicates that like all transition processes there is usually context in every transition. On this note he argues that Kenya´s process was "*not immune from such things*" (interview conducted on 27/10/2015 in Aalborg Denmark via Skype). Such contexts include the entrenchment of corruption and impunity within a political system which subsequently inhibit attempts at reforming. In *Reform and Political Impunity in Kenya: Transparency Without Accountability* (2012), wa Gĩthĩnji and Holmquist bolster this point by indicating that the reforms in Kenya, including the repeal of Section 2A of the Constitution, which had made Kenya a dejure one party state, was "*intended to enhance horizontal accountability by creating institutions and offices that were legally empowered to hold the political elite accountable*``. He argues that the elite ``*were not factually willing and able to do so*" (2012:56). In their view, corruption and impunity continued as evidenced by the reports of the auditor general and the frustration of the Kenya Anti-Corruption Authority in the process of their work.

The same argument can be furthered in relation to the truth process in Kenya and other transitional justice measures. An important key to the success of transitional justice depends on who is in power or who has taken over from whom? "*The reason important members of the Kenyan political class have had both the will and the capacity to perpetuate impunity is that Kenya has adopted transitional justice mechanisms without a meaningful political transition having taken place*" (Brown & Sriram, 2012:246). A key obstacle therefore lies in the fact that, as evidenced in data collected during this study, those identified as perpetrators of the historical injustices are currently holding public office. In this way Kenya, it can be argued, has not turned a new leaf and continues with the authoritarian tendencies of the past. This lack of transition therefore partly explains why transitional justice mechanisms such as the ICC, the TJRC as well as the local courts cannot function effectively in order to achieve accountability (Brown & Sriram, 2012: 258).

The same view was shared by a participant in this study who pointed to "*the complexity of having sitting governments go through a process of trying to deal with historical injustices where some of them could even, the implications could point to them. So how do you transit as a nation especially in Africa when already some of those that are supposed to be in the case are part of government?*" (LS_30026 – interview conducted on 14/7/2015 in Nairobi County). In furtherance to this argument, a parallel can be drawn from Professor Yash Ghai´s argument in relation to constitutionalism in Kenya that although the presence of a new Constitution should signify a shift in

governance to the better, the dictates of *"constitutionalism are unacceptable to those who gain access to state power, for they interfere with their primary objective of accumulation"*. In the case of Kenya, and as argued earlier, self-aggrandizement for those in power is the sole purpose for which they seek leadership. This process of accumulation cannot be achieved within the precincts of a new constitution (Ghai, August 10, 2009).

In agreement with the above Yash Ghai argues that in Kenya the economy has become *"intertwined with state patronage and ethnic politics, leading business people to become architects of violence and collude in other violations of the law"*. In essence therefore the reform processes put in place in Kenya are then sabotaged by the vested interests of politicians, business people and the bureaucrats. Figuratively, Professor Ghai poses this in form of a dilemma; it is difficult to answer the question of why the sponsors of a reform process such as the constitution making process in Kenya become the saboteurs of the same process. In other words, there is change in structures but this change is not supported by breathing life into it to let it grow, *"making it a living, vibrant document, which affects and hopefully improves the reality of people´s lives"* (Ghai, August 10, 2009). In a similar way it can therefore be argued that by stalling the TJRC process in parliament, the political elite in Kenya has declined to breathe life into the TJRC report and make it a vibrant document that can improve the reality of people and transform Kenya into a participatory democracy.

Similarly, the transition to a participatory democracy is therefore hampered by this lack of transformation of the political dynamics. Barrington Moore (1966) puts its aptly that the development of a democracy is a long and certainly incomplete struggle where three things that are closely related must take place; a) check arbitrary rulers, b) replace the arbitrary rulers with just and rational ones, and c) obtain a share for the underlying population in the making of rule (1966:414). Such a development is embodied in the hopes and dreams of a majority of the population as seen in the data obtained in this study. Unfortunately, in this case the change in structure (for example change in the constitution) remained on paper. It did not capture the change of attitude and the actions, at least on the part of the leadership. A statement by a particular participant that the public pushed for change and only managed to change the structure and the leaders captures the mood:

> *"Unfortunately, we did a lot of work; we pushed the wall so to speak, the political wall, we actually got the structure...we have not been able as the civil society to push further to ensure that the structure is being managed by people with the same spirit... so personally I think my hopes have not been realized. I don't know if they will be*

realized in the current situation. You do not expect the same people who were in the know of those atrocities being committed against others to be judge, you know, the jury and the prosecutor of themselves. You know it's difficult...Unfortunately as we were doing that, putting the structures in place, we forgot to safeguard, you know, the people.....Soooo, when we were busy....eeeeh, we forgot to address the question of the people who will occupy this space that we have created out of our activism and sooo, what has ended happening is that the same structures that are progressive are being run by the same people who we were pushing against. You know, and so the structures are there but the spirit is not there...for me...the aspirations that pushed us to fight for TJRC have not been realized and we don't see them being realized because uuhmm, in the current dispensation"(LS_30009 – interview conducted on 1/7/2015 in Nairobi County).

As discussed in the previous chapters the above partly explains the lack of will on the part of the political elite. This is despite the fact that president Kenyatta´s party (Jubilee Party of Kenya) enjoyed a majority of seats in the 11th Parliament yet it *"failed to invoke the same leverage"* as it had done on other occasions (including the amendment of the Kenya Information and Communications Act in 2013 which gives the government leeway to punish journalists and media houses for their reporting) *"in pursuing the adoption and full implementation of the TJRC report that contains a roadmap to a more cohesive and stable nation that respects the rights of all"* as expressed by the victims of post-election violence. The Restorative Justice Fund is also non-operational (Daily Nation, 1st March, 2017). As a result, the plight of the victims of the violence of 2007 remains unresolved. And, because of this *"it will be difficult to expect them to have faith in their government and society. Their conclusion is likely to be that justice is selective, only favouring the financially well-endowed and powerful to the detriment of the underprivileged"* (Daily Nation, April 6, 2016).

According to the Ombudsman the law supposed to regulate the TJR process is defective. This is because it was not a good idea to make it a parliamentary process from the beginning. This was *"a misconception"*. The assumption made was *"that parliament would have the interest of the country in doing what need to be done. Especially, because any historical injustices, or improprieties, for every ten people mentioned, mostly likely half of them will be politicians. Either past or serving..."* (LS_30072 – interview conducted on 22/2/2016). This explains why the political elite, fully aware

of the procedure to be followed and the defectiveness of this law decided to remain passive and take advantage of the impasse. As a result *"Parliament has not discussed the report, to approve it as required by the TJRC Act, and provide direction on implementation"*. And at the same time, *"The executive cannot act without the legislature, because the Act requires that parliament makes a move for the executive to implement the recommendations, that have been put forward by parliament"*, according to a public official in the Ministry of Interior and Coordination of National Government (LS_30075 – interview conducted on 23/2/2016 in Nairobi County).

The government has instead formed an inter-agency task force to deal with the implementation without any *"scope within legislation to create anything like that"*. The existing law required parliament to adapt the report before implementation. This means that this inter-agency task force is operating *"outside the framework"* of the TJRC Act No. 6 of 2008 and *"that becomes part of the problem rather than part of the solution...because even the appointment is supposed to pass through parliament just like the first one"*. The contradiction here is that this is a parliamentary process and not an executive process. Further, *"you cannot take a parliamentary process and then in the middle of it whether or not it was implemented, hope that you can make it an executive process. How will they marry? And how does that work"* (LS_30072 – interview conducted on 22/2/2016 in Nairobi County)? Additionally, the report, although legal because it was passed by an Act of Parliament has not been made legitimate through the adaptation by parliament.

In compounding the matter the TJRC report has also not been made public thereby making public officials in the respective ministries to avoid discussing or making reference to it. The lack of discussion around it also means that implementing the recommendations is altogether illegal. In other words the political elite, in implementing piecemeal and selectively (such as constructing some monuments in some places), as discussed in the previous chapters, are circumventing the process in the hope that the public will forget it with time. This is because they believe the public is too preoccupied with too many other things (LS_30013; LS_30071; LS_30072 & LS_30075 – interviews conducted on 1/7/2015, 12, 22&23/2/2016 in Nairobi County). To this end it is therefore logical to explain why the injustices continue to persist despite having had a TJR process in the country. According to historical institutionalism decisions made at previous critical junctures – of not implementing the recommendations made by previous commissions such as the one on the illegal/irregular allocation of public land – have negative dynamics in the country and continue to reinforce this same pattern of non-implementation not only on the TJRC process but also on other

processes that will seek to address the historical injustices. Some of these injustices that have persisted include economic, social and political marginalization, corruption and impunity and land grabbing as we see in the following sections.

8.3.1   THE PREVALENCE OF INEQUALITY AND MARGINALIZATION AND THE WIDENING GAP BETWEEN THE RICH AND POOR

The TJRC report found that sentiments about economic marginalization were ubiquitous in the *"North Eastern and Upper Eastern, Coast, Nyanza, Western and North Rift"*. This was as a result of the policies adopted by successive regimes (Volume IV: 48). Further, there were also instances where marginalization was intra-regional as opposed to national. Each of the leaders favoured their regions when in power. For example, communities from Rift Valley were not appointed to public office during Mwai Kibaki´s regime (2002 to 2013) (Volume IV: 48-49). In this way Kibaki broke the social contract agreed upon by the NARC coalition and the sections of the population of Kenya that did not hail from his tribe, the Kikuyu were simply alienated in addition to the broken promises (Githongo 2010:4). The lack of inclusivity in the management of the country was generally cited as prevailing in the country during the period in question. On the other hand, there was also the economic marginalization of many parts of the country facilitated by practices such as the prioritization of certain development projects within particular regions and the neglect of others in this respect (TJRC Report Volume IV:50). The report further recommended the formulation, adoption and implementation of policy directed at equality by deliberately targeting the marginalized regions. The Commission further noted that these were reparative measures and they beyond the equalization provisions in the Constitution of Kenya 2010 (TJRC Report Volume IV: 53).

This study noted that political, economic and social marginalization is still prevalent in Kenya. For example, in a 2016 report that investigated the recruitment constables in the police force, the Kenya National Commission on Human Rights (KNCHR) noted that the Kenya National Police Service Commission (NPSC) failed to adhere to the two-tier recruitment regulations which require advertisement and shortlisting as a first step and appearance for the aptitude test as the second step. This ensures that *"While shortlisting, the NPSC is required to take note of ethnic, gender and regional balances so that complaints of marginalization are sorted out at this stage"*. The process entails public participation since the NPSC *"is required to make public the names of those that have been shortlisted and ask the members of the public to share any information regarding the would-be*

recruits". The process further ensures that the patronage associated with previous recruitments is avoided (KNCHR 2016 (a):7-8). The report further observes that this exercise therefore perpetuated the disparities in gender, region and ethnic that exist in the country and became an affront to the citizen´s civil and political rights.

Similarly, in another study conducted by the KNCHR in 2016 on how the government was implementing the national values and principles of governance as enshrined under Article 132 of the Constitution of Kenya 2010, the Commission found that the government had put in place structures necessary for the implementation of national values and principles of good governance such as legislation and policy frameworks. The report however identified the lack of a public participation framework, insecurity, corruption and inadequate funding to institutions that have oversight mandates as some of the inadequacies in the country. In the same vein, the devolution process in Kenya is highly promising on delivering some of the deficiencies identified in the TJRC report. However this has not been possible because of high levels of corruption and inadequate funding of county governments, the inefficiency of the Integrated Financial Management System (IFMIS), the poorly coordinated transfer of functions between the national and county government and the skills deficit in the counties (KNCHR 2016 (b):11). These therefore greatly hampered the emergence and practice of participatory democracy.

8.3.2 THE PREVALENCE OF HIGH LEVELS OF CORRUPTION

> *"Corruption is bleeding away the people of Kenya, day in, day out. Despite the change in government, national awareness campaigns, and judicial reforms, Kenyan society suffers from pervasive corruption, dominating the provision of public services, the formation of contracts and, of course, political life. The generalised and all-encompassing rhetorical opposition to corruption is the anti-corruption movement´s own worst enemy. The narrative of rampant corruption in Kenya, though true, is systematising the practice as a necessary way of life, and remove the ability of citizens to distinguish acts of corruption from other political incapacities"* (Burbidge, 2015 :3).

A critical read of the above narration reveals that the fight against corruption in Kenya is mere rhetoric and perhaps intended at glossing over the rampant vice and providing a sleeping pill to the nation while the practice continue to be perpetuated. As Kiai (2017) argues, this pill blindfolds the

public to the extent that despite knowledge of *"corruption – Eurobond, NYS, Mafya House"*. Also despite knowledge that *"this regime is perhaps the most disdaining of the Constitution and the rule of law that has ever been"*, citizens still make decisions (during elections for example) that further cement this status quo (September 15, 2017). In this way, therefore, the citizens are prevented from participating in governance and therefore preventing the emergence of a participatory society as anticipated by Carole Pateman. *"Because a democracy relies on citizen articulations of good governance, accounts of corruption as inevitable strangle political agency and the democratisation process"* (Burbidge 2015: 4). The government effort to fight corruption is gauged from the success of the anti-corruption body[35] which has been described by others as a toothless bulldog. From a historical institutionalism view, the agencies created to deal with corruption exist formally by the informal rules perpetuating corruption seem to prevail. The political elite stick to this informality since it serves their interests – to perpetuate corruption. It is for this reason that Dominic Burbidge (2015) writes that corruption remains rife and it takes different forms like petty corruption, illicit tendering and kickbacks, in institutions and thereby permeating law and order implementation and grand corruption (2015:144). In other words, the anti-corruption rhetoric aims at maintaining the status quo while those in power continue to accumulate and plunder state resources primitively. It is like changing only the hardware but leaving the software in a system. At the same time, the government ensures that they rob the citizens the right and possibility to make decisions.

In an interview Michela Wrong (2009) explains that the phrase *"it is our turn to eat"* refers to the idea that once your tribesperson becomes President or Minister or holds a public office, then your community or tribe will benefit. It amounts to selective employment based on patronage, selective allocation of funding for development purposes to a particular community or local constituency as well as selective award of contracts to companies affiliated with the individual (Wrong, n.d., 2009). She further explains that the disregard for merit is the reality in Kenya and it started with the white settlers and was passed on to the Jommo Kenyatta, Daniel Moi and the Kibaki regimes with the Kikuyu, Kalenjin and Kikuyu again communities gorging from the country in a zero-sum game.

In the Anglo Leasing Scandal, exposed by John Gothongo in 2002, the then Anti-Corruption Tsar in Kenya, contracts worth between 750 million Dollars and 1 billion Dollars "had been signed with

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[35] The Ethics and Anti-Corruption Commission (EACC) was created in 2011 through the Ethics and Anti-Corruption Act 2011. It was preceded by the Kenya Anti-Corruption Commission (KACC) which existed from 2003 to 2011. KACC was previously called the Kenya Anti-Corruption Authority which was created in 1987 until 2000 when it was disbanded after a court ruling that it acted in contravention to the constitution (Amukowa, 2013:489). This reflects the nuanced nature of the anti-corruption rhetoric in Kenya.

ghost companies, ghost military companies, and ghost security companies". In their study on road building that combined historic data from districts and the ethnic backgrounds as well as districts of birth of presidents in Kenya, Burgess, Jedwab, Miguel & Morjaria in, *In Our turn to eat: The political economy of roads in Kenya* (2010), bolster this point by showing that presidents disproportionately invested in their districts of birth or generally in the regions they originated from. The Anglo Leasing scandal is one of many exposed in the country and was a subject of the TJRC report. The Commission found *"that corruption is endemic in Kenya"*. The link *"between corruption and gross violation of human rights is that individuals have been killed, tortured and subjected to other human rights abuses because of their efforts to fight corruption"*. Further, the vice had affected the livelihoods of the entire population and in particularly vulnerable groups by diverting resources meant for infrastructure and undermining the provision of public services (TJRC Report, Volume IV:56).

Despite, an effort to combat corruption more recent revelations, even after the release of the TJRC report has been made. These include the alleged Eurobond scandal[36], *"a high-level heist of public funds"*, exposed in 2015 where 2 billion dollars remain unaccounted for (Kegoro, January 24, 2016, & Wafula, September 8, 2016) and the National Youth Service scandal exposed in 2015 where Kenya Shillings 791 million was fraudulently paid out to three suppliers who site details were irregularly defined (Otieno, June 24, 2017; Wafula, June 13, 2016; Njagih, November 27, 2016 & Ngirachu, May 17, 2017). Since 2013 pursuit of top government officials and their conviction by the government has been slow and this has further entrenched impunity. More Ministries have been reported as engaging in corrupt activities and, according to a former chairman of the anti-graft Commission Kenya loses around six billion Kenya Shillings a year, which is one-third of the annual state budget, each year (Miriri, March 10, 2016). This argument is buttressed by the comments of the former Chief Justice, Willy Mutunga who, according to Lindijer (2016) stated that *"corruption stretches from the very bottom to the very top of society"*. An example can be cited in the Police Service where *"a Kenya policeman who extorts a bribe from a motorist must share the booty with*

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[36] The government of Kenya Government floated a bond worth 2.75 billion dollars in the Irish Stock Exchange in order cushion the government from borrowing from domestic markets so as to drive interest rates downwards and in turn boost investment and spur economic growth in in 2014. However, in 2015 bank interest rates had hit the highest in a decade, the inflation rate was more than high and the government was broke. The explanation given was that this would also help invest in infrastructure, energy transport and agriculture. This did not happen and in 2015 the government had resorted to local borrowing. By October 2015, the government was contemplating borrowing 750 million dollars syndicated loans from local banks to plug a 600 billion Kenya shilling hole in the budget in order to meet its obligations. However the Auditor General indicated that the proceeds from this venture were not deposited in the Consolidated Fund account as should be the practice thereby raising queries. Instead the monies were deposited in offshore accounts whose holders were unknown and the expenditures on these accounts were never authorized by parliament as should be the practice. It was also not clear which projects the funds supported, if at all there were any (Daily Nation, October 10, 2015).

the head of the local station, who in turn share the money with superiors possibly all the way up to police chiefs in Nairobi". At the same time, there are larger cartels which make their illicit gains through *"trafficking illegal migrants, counterfeit money, weapons, drugs and consumer goods"*. The cartel influence is immense, and they do business with politicians. Their counterfeit economy is worth $1.2 billion annually and *"it supports politicians in a big way"* (Lindijer, January 11, 2016). This explains why getting rid of it is a gigantic exercise given the extent of entrenchment leading to the lack of political will to expunge it.

Sir Edward Clay, a former British High Commissioner to Kenya, echoed this unwillingness by the political elite to crack down on corruption during Mwai Kibaki´s regime. He cited *"repeated attempts to undermine the effectiveness"* of the anti-corruption body. He faulted the removal of the Office of Governance and Ethics from the President´s office to the Ministry of Justice and Constitutional Affairs around June 30, 2004 thereby denying this office direct access to the President contrary to an earlier arrangement. This intent to undermine was despite the fact that at the time corruption in Kenya accounted for eight percent of the GDP (Clay, BBC, July 14, 2004). While these undermining acts by the political elite may be said to have happened earlier in the history of the country, a close look at the contemporary situation also reveals the same attitude amongst them. Chagema (2015) equates them to *"busybodies without the interests of the country at heart"*. His sentiment was informed by the ineffectiveness occasioned by the Members of Parliament when they sent the EACC Commissioners packing while some of them had been led to resign due to interference by the same politicians (December, 17, 2015). Critically examined, all this was happening while accusations and counter accusations by the political elite from the opposition and the ruling Jubilee party continued. An analysis of this scenario revealed that the political elite were unwilling to have in place a robust anti-corruption body able to effectively deliver on its mandate. It was also evident that they also engaged in side shows aimed at deflecting the debate and watering it down.

Further, the institutions charged with fighting corruption (the Office of the Attorney General, The Office of the Director of Public Prosecutions, the Director of Criminal Investigations, the Ethics and Anti-Corruption Commission, the Asset Recovery Agency and the Judiciary) have been involved in a blame game. The Judiciary, for example, accuses the Office of the Director of Prosecutions of not doing proper investigations and thereby rendering evidence brought to the Judiciary as weak. On the other hand, the judiciary is accused of frustrating the efforts made to arrest and investigate cases

by letting suspects walk to freedom (Mutambo, October 18th, 2016). Similarly, the President office indicates that *"If there is one issue that has frustrated me is corruption because the pressure is on me to do something about it"* (Nguta, October 18th, 2016), apparently blaming the lacklustre performance of the above institutions. The president´s frustration reveals that despite having institutions that are charged with dealing with the vice, there is still inadequacy on the part of the institutions. The recommendations of the TJRC included the amendment of Article 79 of the Constitution to give more power to the anti-corruption commission, amongst others (TJRC Report, Volume IV: 56). To this end, no meaningful gains have been made. Instead, various institutions, including the Office of the President, continue with the blame game.

8.3.3 LAND GRABBING

As already discussed in chapter five, the land question remains one of the major issues that Kenya needs to deal with. The land question in Kenya has cultural, ethnic, economic, social as well as political constraints. The pressure on land also continues to grow as the population increases. It is estimated the 85 percent of the population relies on agriculture as their primary source of livelihood. Contrastingly, 88.4 percent of the same population has access to less than three hectares of land. The problem is further compounded in the case of minority groups, coming from say the Coast of Kenya, who have been systematically excluded from land ownership (O´Brien & KLA, 2011: 9). The problem affects the entire country with communities at the Coast including Taita, Miji Kenda[37] and the Pokomo suffering the most and longest (TJRC Report, Volume IV: 54). In a similar vein Commission for Revenue Allocation (2012), ascertains that the land problem is at the centre of the political restlessness experienced in the Coast of Kenya. *"Indiscriminate land grabbing, alienation and lack of access to all land related resources"* have produced an effect on the political economy of the Coast people. This situation has further led to Coast people to doubt and ask the question whether they are Kenyans (CRA 2012: 14): hence the emergence of Mombasa Republican Council (MRC) – a movement with the popular slogan at the Coast of *pwani to Kenya*? [Implying that the Coast is not part of Kenya] and their call for secession.

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[37] The Miji Kenda (translated as nine villages in Kiswahili) is a group of nine sub-ethnic groups inhabiting the Coastal parts of Kenya. They include the Giriama, Digo, Duruma, Chonyi, Ribe, Rabai, Kambe, Kauma and Jibana peoples. According to Willis & Gona (2013) the term Miji Kenda was coined around 1944 when representatives of the nine sub-groups, noting that they had been marginalised and seeking to create a voice for the Coastal people in the development agenda of Kenya, wrote to the colonial provincial commissioner and brought this to his attention. The term has since had its ups and downs, exemplified by the order for dissolution of such unions by the Moi administration in 1980. Despite this, the term Miji Kenda became *"naturalized in to the language of Kenya´s ethnic politics and was widely accepted as denoting a group whose members had shared a sense of identity and interests"* (2013:452-453)

Similar cases, events and dynamics in the country further reveal the land history of Kenya as characterised by narratives of land maladministration, disparities in land ownership, tenure insecurity and conflict (KHRC 2016:4). The story of Twiga Farm[38] in Kiambu County is another example of this *"the cycle of disowning a people of their history, systems and culture of land to the modern collision of local, national and international interest leading to legal and illegal land grabs"* (van Rinsum, October 8, 2014). This categorisation led the Kenya National Dialogue and Reconciliation process to single out land as a long-standing issue that needed to be addressed to resolve the protracted conflict in the country (van Rinsum, October 8, 2014). Land constitutes a critical structural factor that anchors the grievances that lead to political violence in Kenya. The colonialist alienated the country´s best land to the small population of settlers. Unfortunately, post-independent Kenya did not remedy this. The reallocation of land from the Jomo Kenyatta period continued to cement these injustices. The injustices produced a new Kenya that is depicted by a *"highly skewed and unequal patterns of access to land and ownership"* which had an ethnic tag. According to them, this situation has turned out to shake the very foundation of the society (Kagwanja & Southall, 2009: 268) and the conflict subsequently also assumes an ethnic dimension to a great extent.

Indeed the Sessional Paper No. 3 of August 2009 on National Land Policy while providing the framework for which land reforms would be undertaken in the country noted that the policy would not bring about the desired land reforms on it own. Instead, it pointed out that there was a need for goodwill and commitment from all stakeholders to ensure smooth implementation. The paper further envisaged the need to continuously seek the participation of all stakeholders by encouraging regular consultation and dialogue. The paper further promised government commitment through the establishment of vital institutions and facilitation of financial support (GOK, August 2009: viii). The sessional paper was thus a vehicle for formulating and providing a comprehensive framework and to *"defining key measures necessary to address issues of land maladministration, access to land, land use planning, restitution of historical injustices, environmental degradation, conflicts, unplanned proliferation of informal urban settlements, outdated legal framework, institutional framework and information management"*. In the spirit of creating a participatory society, the paper

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[38] According to van Rinsum (2014) *"The 1200 acres of Twiga Farm lie in the heart of Kenya in Kiambu County, northeast of Nairobi. The area, with its green hills and fertile fields, first attracted land grabbers in the form of white settlers during the colonial regime. The Kikuyu, who had lived and cultivated these lands for centuries were forcibly reduced to being workers on the white farms"*. After independence in 1963 the British settlers, the first grabbers, left the land in the hands of the workers, who may not have been the original owners. Subsequently manipulation by the political elite ensued and wrangles over the land have been witnessed (October 8, 2014).

sought to *"encourage a multi-sectoral approach to land use, provide social, economic and other incentives and put in place and enabling an environment for investment, agriculture, livestock development and exploitation of natural resources"* (GOK, August 2009:ix).

The sessional paper went ahead to indicate that *"national, regional, urban, peri-urban, spontaneous settlements planning principles and guidelines will be formulated and implemented in a transparent, accountable, sustainable, comprehensive and participatory manner"*. Further, the paper stated that to guarantee *"access to justice in land-related matters"*, the streamlining of institutions and mechanisms would be done by establishing independent, accountable and democratic systems and mechanisms. The preceding was envisaged to happen because wrongs such as historical injustices and minority land rights - of communities such as pastoralists and hunter-gatherer communities - as well as vulnerable groups had been abused in the past. A framework would, therefore, establish to ensure that such groups access to land as well as participate in critical decision-making over land and land-based resources (GOK, August 2009:x). This meant therefore that there was the recognition that land occupied a central place in the conflict in Kenya and that movement towards a participatory society meant dealing with the past injustices through the TJR process. In the mind of the drafters, the Sessional Paper was designed to embrace consultation, participation, interaction, inclusion, consensus building, time bounded-ness and professionalism, transparency, gender sensitivity, innovation and cost-effectiveness (GOK, August 2009: 2) all to achieving a participatory society.

In the spirit above, it is important to note that to this end the TJRC also found that there was a close connection between land injustices and ethnic violence in Kenya. The injustices related to land took many forms which included *"illegal alienation and acquisition of individual and community land by public and private entities, illegal alienation of public land and trust lands"*. The injustices also include *"forceful settlement of members of a community outside of their homelands"* as well grabbing of land by government officials. The Commission further found that the existing laws related to land reforms were adequate to address land-related injustices including the historical ones fully. The report, however, indicated that this could only happen if there were the political will to address the issues (Volume IV:54).

The above discussion brings us back to the activities, which led to the drafting and releasing of dissent about the land chapter, by three Commissioners of the TJRC as discussed in chapter five. According to a former international Commissioner with the TJRC, the interference had come:

"from the president´s office and was specifically on I think, four, five paragraphs in the land chapter. And, what the paragraphs had were uhm, the recounted testimony that we received in the public hearing from individuals who claimed that the first president, Jommo Kenyatta had uhm, either stolen some land or engaged in some land transactions and uh, wronged a particular person or group of people uhm, by using his power to force people to sell land or just grabbing the land" (interview conducted on 27/10/2015 in Aalborg, Denmark via Skype).

This to a large degree explains the deliberate refusal by the political elite to engage with the report and thereby act on the recommendations. The land grabbers are highly entrenched in the political system and the highest tiers of Kenya´s socioeconomic classes. They include those in high public offices, the politically correct individuals, companies, parastatal entities, state-owned corporations as well as wealthy Kenyans in cohorts with international developers (O'Brien 2011:31). It is as a result of this that the government cannot act given the implications. Actually, *"you know, the government made it very clear from the beginning that they did not want to engage with this report. Moreover, so once that decision was made then I think that no sort of contribution to justice and reconciliation moving forward was gonna be extremely difficult"*, in the view of the international Commissioner. It also explains why parliament has not been able to discuss and adopt the report and instead the same parliamentarians have made efforts at amending the TJRC Act while other political elites have gone to court to have their names expunged from the report.

In the same vein, it can be concluded that external influence may have succeeded in pushing the leadership to adopt a new constitution successfully because the new constitution was deemed by the elite *"as less threatening than something like a truth commission as opposed to the TJRC process"*. Interestingly, the work of the Commission was not smooth and faced many hurdles including accessing the necessary finances from the Ministry of Justice. Given this situation, therefore, *"it was not surprising given that there were powerful interests there that would uh, forestall us doing our best job as we could have done"* (interview conducted on 27/10/2015 in Aalborg, Denmark via Skype). An assessment of the commitment of the government and public officials about resolving the land injustices, including the historical ones is therefore unpromising.

This study also found out that from a path dependent point of view the lack of commitment from the political elite can be explained about the informal secret pacts made around the land in Kenya´s history. According to Kamau (2009) the speculation that Kenyatta had made a secret agreement

with the British on not interfering with the lopsided land distribution to be made president is confirmable. Daniel Moi, in turn, made the same pact with Jomo Kenyatta, his predecessor. This information was extracted from the secret papers of the late Sir Michael Blundell who acted as the liaison between Kenyatta and the British government. The decision, in turn, explains the persistent land question that has bedevilled the country long after Kenyatta´s death (September 20, 2008). He continues to explain that this secret deal led to the about-turn from Kenyatta´s original position that land is redistributed to the poor Africans soon after independence in 1963. This development constrained Kenyatta so that he *"had no political will to direct the Settler Transfer Fund[39] (STF) to benefit millions of landless Africans as had been anticipated in the KANU manifesto at independence"*. This fund instead was exposed to the vagaries of a *"few African elites who were loaning themselves money meant for the landless and acquiring huge tracts of land at the expense of the majority poor"* (Kamau, September 20, 2009).

Mwangi was Gĩthĩnji & Frank Holmquist (2008) support view by indicating that Kenyatta facilitated the transfer of this land mostly to members of the Kikuyu community while Moi, upon assuming power, after the demise of Kenyatta, converted different parcels, deemed as remaining mostly to members of his community. Moreover, in both cases, this also brought about an ethnic dimension to the land question (2008:347). This information is further corroborated by a US Central Intelligence Agency report of September 1, 1978. In the report it is indicated that at that time the extended family of the president boasted of *"extended holdings of farms, plantations, hotels, casinos, and insurance, and real estate companies"*. This extended family and close associates also controlled *"a large part of the land in the White highlands"* which was initially earmarked for redistribution among *"African farmers"* through an established fund by the British. This redistribution was to take place immediately after independence. Allegedy, some of these funds only benefited Kenyatta´s family members and close Ministers in the government (September 1, 1978:9-10). This path taken was exclusionist and further cemented marginalisation, as discussed in section 8.3.1 earlier. All in all, path dependence had set into the dynamics of the country and was bound to influence the future calculations around the political economy of Kenya. This was facilitated by informal institutions through which decisions made were influenced by patronage, according to the historical institutionalist interpretation. It also explains therefore why land justice

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[39] This fund was set aside by the British government and given to the Kenyatta government to buy back land from the settlers and redistribute it to those who had been earlier dispossessed by the British. However, in a turn-around, the land was only given to family, public officials and those close to them.

remains elusive to the country and the reason why the political elite evade it given the ramifications it portends.

Similar land transactions further explain why, in the view of a participant in Uasin Gishu County, *"the injustice of land grabbing is still rife in the country"* (LS_ 30019 – interview conducted on 6/7/2015 in Uasin Gishu County) even after the release of the TJRC report which recommended action. This position was corroborated by the Kenya Human Rights Commission who indicated in their report of 2014 that *"poor Kenyans continue to suffer perennial inhuman and un-procedural evictions"*. This is in addition to the ad-hoc implementation of Kenya´s land policy. The report also indicates that *"no proactive efforts have been made after the approval of the land policy and the Constitution to bring stakeholders together to develop clear implementation strategies and plans, and supporting budgets"* (2014:38-39). This situation prohibits a participatory society because, *"it makes it difficult for stakeholders and the public to understand, monitor, review, or audit the progress of implementation"*. Further, it also *"makes it difficult for stakeholders to identify their roles in the implementation process"*. In this way determining and sourcing for budgetary support is also obscured (2014: 39). The inability of the political elite to deal with the land issue, therefore, remains one the unexplainable occurrence.

From the standpoint of historical institutionalism, the above is so because these injustices around land in Kenya led to elite capture and the inability to conclusively resolve the land problem given the consequent *"lock in"*. According to the Institution of Surveyors in Kenya (ISK), the level of impunity currently in Kenya demonstrates the existence of powerful cartels working with corrupt officials in the Lands Ministry with successive regimes have failed to address it (The Standard, 9th December 2016). Additionally, the ISK noted that current land grab was about original pieces whose with leases that were about to expire where owners had not initiated renewal processes. Other cases of land grabbing that have been prominent have the involved the grabbing of land belonging to public schools such as Mwandundu Primary School in Taita Taveta (Daily Nation, August 10, 2016) and Langata Road Primary School in Nairobi (Daily Nation, January 10, 2015) which triggered protests by the school pupils. A survey conducted by Society for International Development (SID) completed in 2016 indicated that 24,405 schools in Kenya risked losing their land to private developers as a result of land grabbing (Daily Nation, January 25, 2016). While investigating the acquisition of Langata Road primary school the Commission of Administrative

Justice found out that in Nairobi City County alone there were thirteen other public schools found themselves in a similar dilemma (July, 2015).

Although laws and policy frameworks including the Act on internal displacement of 2012, the Land Act of 2012, the Land Registration Act and National Land Commission Act, as well as the National Land Policy of 2009 that address the issues of land displacement exist, the government has been unable to implement some of the land issues identified. There is inadequate stakeholder awareness about these instruments, deferrals in the establishment of some of the bodies mandated to oversee their implementation, unavailability of funding and fragile systems both at the national and county governments (International Displacement Monitoring Centre (IDMC) 2014:5). These inadequacies point to the continued conflict related to land in Kenya.

Historical institutionalism points to the role of both formal and informal constraints on processes of change. The informal constraints may at times limit the formal (which are the agreed principles of governance) and endure over time. This is particularly the case when they are supported by tribal and patronage networks such as the ones created in Kenya since independence. The emergence of patron-client relationships as well as the big man syndrome in Kenya is informal but has been of convenience to the political elite who has used it to access power and use it for primitive accumulation. In this way, they are then able to maintain the status quo in a bid to protect such wealth. Examples of this can be drawn from the scourge that is land in Kenya. To support this argument Kamau (2009) writes that *"Seven years after independence President Kenyatta issued a quiet decree on the acquisition of beach plots and what came to be known as send-row plots"*. He continues to note that *"Only Coast Provincial Commissioner, Eliud Mahihu could identify and recommend those qualified for these plots"*. However, in reading this one has to take caution that *"The reality was that those who earned Mahihu´s favour were highly placed political and civil service elites and their business associates"*. This positioned PC Mahihu to become one of the richest people in Kenya, owning a big multi-million business empire with expansive land in Coast province that also hosted prime beach businesses including hotels along the Coastline. Kamau further indicates that since the Coastal communities did not have one of their own highly placed in government, ended up missing on the list of who is who at the Coast. Kamau asserts that Kenyatta only served to deepen the plight of the Coastal people (Kamau, November 12, 2009). The country was turned into a dystopia where the president and a few people allied to him grabbed the land resource otherwise meant to be enjoyed by the population at large.

O´Brien & Kenya Land Alliance (2011) corroborate the above information by asserting that categories of land held under the trust of the government earmarked for development bore the brunt of land grabbing. Some of these lands are unoccupied or occupied by marginalised communities thereby making them easy to target. This recurring characteristic of land grabbing by public officials in Kenya is done through manipulative acts on legal provisions in order to acquire public land for personal gain or political patronage. The beneficiaries include *"national and international private interests, foreign and diplomatic missions, religious institutions, foreign governments"*. They further argue that a complete quantification of this land grabbing enterprise not available yet. There are also long-term effects. These include *"degradation of natural resources"*, *"speculation of land prices"*, *"increased rents"*, and *"landlessness"* and *"missed development opportunities"* (2011: vi). In summation, the land grabbing phenomenon has been orchestrated by Kenya´s elite holding public offices. These elite have facilitated the irregular as well as the illegal allocation of public land mainly for purposes of their own gain.

This primitive accumulation was normalized through the informal rules that were supported by social networks, cronyism, corruption, cultural and ethnic affiliations as well as what one may call mafia-type operations which were clandestine and precluded from the glare of the public. The action signifies the persistent informality, particularly in the political setup of Kenya. Additionally, Kenyatta´s actions in the historical institutionalists school of thought can be interpreted that Kenyatta, in this instance, was producing history while his decisions and action to give land to his cronies and proxies produced rich who own the Coastal land that we have today in Kenya. In other words, these rich enterprises are a product of this decision in history made by Kenyatta. They represent the structural causes of conflict in Kenya and are at the root of the violence in regions such as the Coast. It is, therefore, a story of path dependence and explains the persistent inability to cure the land malady in Kenya. Further, the actions also present the dilemmas Kenya continues to face at critical junctures relating to the land question. Land grabbing remains a part of the practice of the political elite despite making such steps as putting in place the National Land Policy.

All in all, they represent the negative legacy of the past which the TJRC process sought to prevail upon but remains obscured by the political elite. Instead, and as exhibited in this study, the practice of land grabbing seems to continue to date and is perpetrated by the political elite or those in civil service positions with the help of the political elite. This is indicative that it is likely to reproduce itself in both the near and distant future. As such, therefore, the persistent land grabbing, embedded

in the political economy of the country, continues to produce disenfranchised citizens who in turn are discontented. This is so because possession of land means those individuals, institutions, private companies or other interest groups in Kenya can buy and sell the land, use it as collateral to acquire different kinds of wealth and become rich, use it as collateral to borrow money for other development purposes and so on. It is this right that marginalised communities and individuals in Kenya continue to be denied with the ongoing land grabbing. Viewed critically, the denial of this right subjugates these communities and individuals to vulnerability and open to the manipulation of them by the political elite. This therefore explains the excessive grabbing of land by the political elite – it is intended at disempowering the more than eighty percent who do not have access to land. This is a recipe for protracted conflict and does not lay the ground for the emergence of a participatory society.

8.3.4 VIOLENCE AND THE VIOLATION OF HUMAN RIGHTS BY THE STATE

This study also found out that state-sponsored violence, in particular by the security agents against civilians existed was a practice associated with past regimes as well as the current system. In other words, the TJRC process did not bring an end to this violence. For example, after the assassination of the late Argwings Kodhek and Tom Mboya, who were prominent politicians from the Luo[40] community in 1969 there was disagreement between Jaramogi Odinga[41] and Jomo Kenyatta when he was on a visit to Kisumu[42]. This disagreement witnessed the indiscriminate opening of fire on the crowds that were gathered to listen to the president´s speech by Kenyatta´s security detail and the elite presidential guard. Kenyatta was in Kisumu to open the (Russian-built) New Nyanza General Hospital in Kisumu (Ombuor, September 10, 2017). The incident left eleven people dead and scores of other injured (Omari, August 12, 2013). The dead also included school children (Ombuor, September 10, 2017). This study further found out that this kind of police brutality did not end with the TJRC process but seems to continue. For example, after the August 8, 2017 general elections in Kenya the state deployed security officers in Kisumu who meted violence on innocent residents after there was a spontaneous demonstration against the unfair results of the presidential race. During this period the national death was estimated to as high as sixty seven by September 12 2017. *"There was a wide range of human rights violations, including unlawful killings, excessive*

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[40] The Luo community inhabits the region around Lake Victoria in the western part of Kenya.
[41] Jaramogi Odinga was Kenya´s first vice president. They ideologically disagreed with Jomo Kenyatta. Jaramogi was seen as leaning to the east while leaned to the west.
[42] Kisumu is the third largest city in Kenya and is also on the shores of Lake Victoria.

force and beatings". In Nairobi the death toll amounted to thirty three (Amnesty International & HRW, 2017:1).

Christine Alai maintains that patterns characteristic of the history of impunity in Kenya where gross violations of human rights were witnessed continue to re-emerge in the current dispensation. She observes that the country is *"witnessing renewed spates of violence in various parts of the country and abuses of power, including rampant judicial killings and other violations under the guise of security operations"* (July 25, 2017). This clearly denotes the lack of shift from the dark past that was characterized by the violation of human rights through assassinations, detention without trial as well as security operations in regions such as Mount Elgon through various security operations mounted by the security forces in the country. It also points to the targeting of individuals and whole communities by such security operations.

In the same vein, the KNHCR (2017) in a press statement noted that there were ongoing security operations since the announcement of the presidential results in various parts of the country including Nyalenda, Manyatta, Nyamasaria, Mambo Leo, Migosi and Kondele in Kisumu. Other operations were also ongoing in Migori and Bondo (also in the western part of the country) as well as in informal settlements in Nairobi including Mathare, Dandora, Kibera, Lucky Sammer and Huruma. According to them, there was a loss of up to 24 lives as a result of this and that the police were using firearms (August 12, 2017) (See also IMLU, August 13, 2017). Fick and Houreld (2017) indicated that police were not waiting for protesters in the streets but rather went to their homes and pulled them out then beat them. They also stole phones and money belonging to the innocent citizens (August 14, 2017). The same kind of police brutality was experienced on May 16, 2016, when there were protests by opposition parties and the civil society demanding the resignation of top officials of the Independent Electoral and Boundaries Commission (IEBC). These are, but images of the regime trying to suppress calls for reforms (Namwaya, May 18, 2016) and are a continuation of the practices of past regimes.

These images are an indication that the change of name from the Kenya Police Force to the Kenya Police Service, occasioned by the change of constitution and the security sector reform program, did not either bring about any change and that the police are not learning. It could also mean that although they may want to learn there may still be forced, especially the political elite who continue to use the police to commit violence on the population to force them to acquiesce. The idea behind this suppression is to stifle any narrative of dissent or reform with the aim of maintaining status

quo. It also points out to the fact that the political elite used violence historically to suppress the masses. It is within this framework that they continue to operate. This, therefore, means that police brutality, may not have ended with the recommendations made in the TJRC report and which aimed at bringing an end to such brutality. This, therefore, has tremendous repercussions on the intended road towards a participatory society since those individuals and communities targeted by police brutality remain in pain and this inhibits them from feeling they are a part of the community.

8.3.4.1   SEXUAL VIOLENCE AGAINST WOMEN

Despite the findings of the TJRC report on sexual violence against women and the recommendation for the setting up of gender violence recovery centers in each county and the establishment of the Office of the Special Rapporteur on Sexual Violence, this study found out that the vice is still present and the efforts to curb it are feeble. Mutiga (2016) for example, argues that the country did not learn from the experiences of the 2007/8 violence. He argues that the ten billion restorative justice fund has benefitted only the displaced persons and not victims of sexual violence. Instead, survivors of sexual violence remain sick, live in poverty and are *"stigmatised, ignored and often rejected instead of helped by the government"* (Mutiga, February 15, 2016). Data on the prevalence of sexual violence against women also indicates that lifetime physical and sexual by intimate partners' stands at thirty nine percent in Kenya while female genital mutilation stands at twenty one percent in 2016 (UNIFEM, n.d., 2016). The figures as well as the lack of attention to the survivors of sexual violence are indicative of the prevalence and partly to the reasons behind prevalence in the country. The situation also points out to a mismatch in policy and implementation of programmes for eliminating such violence.

8.4   TJRC TIMING & A CROWDED ENVIRONMENT: NATIONAL COHESION AND INTEGRATION COMMISSION, CONSTITUTION OF KENYA 2010, SECURITY SECTOR REFORMS, NATIONAL LANDS COMMISSION AND THE COMMISSION OF INQUIRY INTO POST-ELECTION VIOLENCE

According to historical institutionalism, the chronology of events matter but they are also dependent on exogenous factors. In other words, although such events may probably lead to a certain outcome, this may, on the other hand, be either accelerated or impacted negatively by exogenous factors. This research found out that certain events such as the historical injustices, the failure of the Kibaki regime to deliver Kenya into the anticipated future as well as the violence of 2007/8 sequenced and culminated into the creation of the TJRC. However, while this was the case, other exogenous forces such as the ICC process impacted greatly on the TJRC moment in Kenya. A discussion around the

time of the TJRC is therefore necessary for this study in the attempt to understand whether the process led to the emergence of a participatory society.

The discussion around the timing of the TJRC also featured as a possible impediment to the realisation of the outcomes expected at the end of the process. In some instances, and as discussed in previous chapters, the Mwai Kibaki regime wasted the TJR moment. The argument is that President Kibaki came to power under the National Rainbow Coalition to which was voted for overwhelmingly under the joint call for reforms. The Kibaki regime defeated the incumbent Daniel Moi who had exercised authoritarian rule for 24 years. One of the Commissioners, opines that the timing may have been wrong and compares the Kenya process to the South African and the Sierra Leonean processes. He indicates that in the South African case there had been a "*complete political shift from an actual party, government of apartheid to the ANC government of liberation*". The Sierra Leonean case reveals that "*there had been war and the war was now over*". Moreover, in Kenya, "*at best, Kenya was at a time maybe in the middle of a potential transition. You had uhm, the Kibaki government in 2002. Which I think came in with a promise of reform and that sort of fell apart*". The TJR process in his opinion provided hope for "*more genuine reform*" (interview conducted on 27/10/2015 in Aalborg, Denmark via Skype). This raises a discussion on the presence or lack of complete regime change in such processes.

The above thinking was also shared by yet another Commissioner with the TJRC who in retrospect argued that "*I could be wrong but I think as much as Kenyans decided to look into the past, to look themselves into the mirror, I do not think it was the right time. We were not in complete transition, and my thinking may be why the report is still stuck in parliament is that many powerful people are not comfortable with this report*" (LS_30027—interview conducted on 14/7/2015 in Nairobi County). Apart from reflecting on issues of regime change, this opinion also raises issues around the readiness of the entire population about the revelations that were made in the process of conducting the exercise. On the main part, the victims were eager to have the issues raised and addressed while the alleged perpetrators remained uncomfortable to this date.

Another view indicates that the TJRC came at a time when the country had already initiated other reform processes as well as institutions and frameworks aimed at addressing some of the issues the Commissions´ mandate was supposed to address. According to this view, this may have contributed to the lack of seriousness in implementing the recommendation made by the Commission. This is also raised in an internal memo in the Office of the Attorney General and Department of Justice of

19th February 2015 which provides a briefing on the status of the Truth, Justice and Reconciliation Commission Report. The memo which decries the mandatory manner in which the recommendations are phrased also indicates that where the recommendations are implementable, action plans for implementation are already in place (DOJ/CONF/LJM/3/48/ VOL. V (97)). The memo further indicates that the "*implementable recommendations are capable of being placed under existing Constitutional Commissions, Ministries, Department or Agencies for implementation*". The same view was shared by a former Commissioner with the TJRC that "*unlike other countries in Transition, this report at a time when Kenya had already set up, was already in the reform process and had set up some institutions for reform*". This statement is support for the view that "*We have commissions like the National Cohesion and Integration Commission; we have the Kenya National Commission on Human Rights which is there also looking at reforms, looking at the issues that we tackled*". In their view, however, they some of these Commissions were busy with their mandates, and there was no congruence as well as a blurry line in their terms of office, as already observed earlier. The existence of other reform and reconstruction processes taking place at the same time blurred its niche. The National Accord has set in motion a process to look into the underlying causes of violence. At the same time processes that sought to promote peace and reconciliation also blurred the mission for the TJRC (NPI-Africa & GPPAC, 2014:10-11). A former Commissioner expressed the following:

> "*We have various ministries, so our thinking was that some of the implementations would be done by some of these institutions. Like they when we talk about reconciliation we have the National Cohesion and Integration Commission, and we have the National Steering Committee…… When we talk about human rights issues, we have the Kenya National Commission on Human Rights. When you speak of land we have the Kenya National Land Commission who's even Chief Executive Officer was the Executive Officer of the TJRC. The Kenya National Commission on Human Rights, the Chief Executive, was also the Chief Executive Officer of TJRC, so we knew that various chapters would fall in some of these institutions, but you see we also recognize that some of these establishments are busy with their mandate. So in the report, the commissioners put in place or recommended an implementation mechanism. An implementation committee who were to be set up and the setting up going by the experience we had by an Act of Parliament…..So these commissions, these institutions would take some components to implement but we wanted a body, an*

independent body that would ensure this happens to work closely with these other commissions to ensure that the work or the recommendations of the commission do not just fall through the cracks so in terms of implementation....” (LS_30027 – interview conducted on 14/7/2015 in Nairobi County).

This meant that TJRC thought through the idea that an implementation committee be set up was prudent. This was because, as already described, the existing agencies, commissions, and ministries had overlapping mandates. The government put in place an inter-agency implementation committee that was tasked with conducting an analysis of the report. This committee was also mandated to provide guidance in the design of an implementation framework for immediate action and long-term engagement. This committee is chaired by the Directorate of National Cohesion and National Values (LS_30075 - interview conducted on 23/2/2016 in Nairobi County). This committee has however not been gazetted by the Ministry in charge todate (interview carried out on 17/2/2016) and, as seen earlier, according to the Office of the Ombudsman, the TJR process at the moment remains a parliamentary rather than executive process until the debate and adoption of the report is done in parliament (LS_30072 – interview conducted on 22/2/2016 in Nairobi County). In summary, so long as *“parliament considers the recommendations as explosive”* (interview carried out on 17/2/2016 in Nairobi) and avoids moving the country forward regarding implementation then the country will remain stuck in this dilemma. The implications on the outcome, therefore, remain unchanged.

8.5   THE DESIGN AND MANDATE OF THE TJRC

The lack of achievement of the desired outcome by the TJRC was also associated with the Commissions´ design and mandate. The TJRC Act has been faulted as presenting enormous challenges to an investigative body. This is because the Commission was expected to cover 45 years as well as *“a diverse catalogue of violations, crimes against humanity, genocide, enforced disappearances, and gross human rights abuses”*. The TJR Act, therefore, included an extensive mandate. The Commission was therefore forced to be selective of the events to cover regarding research and investigation. The findings are therefore uneven and varying in detail (Naughton 2014:60-61). As seen earlier in this study, certain regions, therefore, felt left out (Naughton 2014: 60-61; LS_30030 & LS_30036 interviews conducted on 17/7/2015 and 20/7/2015 in Kericho County). The idea to have a wide mandate may have also happened because to have meaningful reconciliation we needed to go as far back as necessary. The injustices committed in Kenya are so

intertwined historically that if you lock out some period, you will never get the basis of it. This rendered the design *"incomplete, unworkable and unwise... And in the end I think ours is a perfect example of a TJRC that was created out of fashion than out of focus of what was necessary"*. This further made the Commission unable to meet its deadlines. *"In the fullness of time as you know the TJRC took a lot longer than a year"* as opposed to other reform and reconstruction processes started at around the same time. It is therefore easy to conclude that *"the first mistake was made was regarding conception"* (LS_30072 – interview conducted on 22/2/2016).

Another built-in weakness of the TJRC Act was the lack of clarity in relation to the link with the prosecution mechanism. Asaala (2010) argues that given the lack of a clear prosecutorial outfit and the confidential nature of the evidence, confessions, as well as admissions made before the Commission, the recommendation for prosecution, can be easily faulted. The provision, of course, is that the Commission forwards its findings to other authorities for further investigation. However, this remains purely in the hands of the Office of Director of Public Prosecutions and the Criminal Investigations Department to take up these inquiries and conduct them conclusively (2010:397). Further, the selection process for the six commissioners was not broad-based and this might have also led to criticisms against the Chairperson, the late Bethuel Kiplagat, whom it was alleged was part of the Wagalla massacre. Although Mr Kiplagat stepped aside and was not part of the deliberations of the commission, his reappearance towards the end of the life of the commission and subsequent presentation of the report to the president may in future raise credibility question and form a basis contesting the findings of the commission (2010:398).

Another fault in the design of the TJRC Act was the requirement *"to give the report to the executive basically and then hope that the executive would implement the report"*. It was a bad mistake to leave it to only one individual to decide whether we are implementing this or not. Moreover, who would be the custodian of that report regarding facilitating the process? This resulted in a flawed process emanating from the inherent weaknesses which made it easy for the executive to decide that since they have the report, they will decide on what to do (LS_30015 – interview conducted on 177/2015 in Nairobi County). The executive was not cooperative because of the vested interests as seen earlier in this study. These interests made parliament to produce an intricate and unrealistic mandate which was malleable to legal contradictions (Naughton 2014:65) and which rendered the realisation of the desired outcome of the process unreachable.

8.6   DISCUSSION: TRANSITION TO PARTICIPATORY DEMOCRACY

The reform agenda in Kenya is addressed by amongst other processes the implementation of the Constitution of Kenya 2010 which promulgated while the TJRC process was going. According to the Kenya National Human Rights Commission, it can be said that Constitution to a great extent addressed the normative questions that are at the foundation of the country. Through this contract, the country was ushered into the democratic path. With a progressive Bill of Rights, the 2010 Constitution has been lauded as one of the best in the world. "*But a normative document must be inculcated in the zeitgeist of the people to be realised. Kenya´s challenge is to move from norms to reality*" (KHRC, 2016:7). While referring to the prospects of the success of the transition process, Asaala (2010) opines that despite the legal obligation (ushered in by the 2010 Constitution) to catapult the country to the next level, it remains unclear whether this can be achieved. This is because there exists a desire to revenge within the ethnic cleavages created and sustained by the ethnicized politics. There is also the need to secure political positions that in turn help in safeguarding political survival and the need to protect and dish out favours to sycophants and loyalists at the expense of dispensing justice (Asaala 2010:377-8). These reasons partly explain why the implementation of the 2010 Constitution has been met with a lack of political will which has undermined the spirit with which it was promulgated. The lack of goodwill is undermined by the calculations made by the elite in the attempt to maintain status quo and continue with practices of corruption and impunity bred by the past decisions and acts. Further, this lack of political will then become a major impediment in implementing processes that have far-reaching effects in Kenya. Asaala (2015) further indicates that an example of this lack of political will was evident about the prosecution of crimes related to the post-election violence. The handling of the cases by the political elite and the bureaucracy was wanting. The *"government´s commitment to the entire process of transitional justice, including prosecution, is fundamental to the success of any transitional justice process"*. She argues that on the contrary the prosecution of the crimes committee during the post-election violence witnessed the *"lack of political will"* epitomized by a *"half-hearted"* attitude towards accountability on the part of the government (Asaala 2015:357-8).

In summation, Asaala and Dicker (2013) posit that to date Kenya´s approach to transitional justice has been superficial and largely ineffectual suggesting the lack of political will from amongst the elite for the full and efficient application of transitional justice (Asaala & Dicker 2013:335). In Kenya, *"there has been no real transition to speak of"* as evidenced by the shortcomings of the transitional justice project (2010: 337). Moreover, this lack of political will emanates from the fact

that the political elite fears truth and fairness because they *"have something to hide or"* *"are protecting the perpetrators of heinous crimes"*. Obviously, it can be ascertained that they are *"not on the side of victims"* (Dolan, July 21, 2017). Their interests are shaped by the past and entrapped into a discourse aimed at maintaining status quo.

Further, arguing from a CDA viewpoint one may also push the discussion of lack of political will further by indicating that the action of the political elite is not just about lacking political will but also about the elite being conscious about what they are doing. This is exemplified by the utterances of the Deputy President in 2017 to the fact that the government would not implement the TJRC report because it will only serve to open up wounds and lead to instability in the country (see Alai, July 25, 2017; Gitari, July 27, 2017 for the comments). The Deputy President made these remarks while in the Coast region and in response to the oppositions remarks and promise to implement the recommendations of the report. Inference can also be drawn that perhaps the non-implementation of the report is a move contemplated from the beginning and that the political elite yielded to pressure to form the Commission during the KNDR process. As a result of this it appears they may have planned shun the outcome of the process anyway. The idea that the reparation fund for victims does not actually exist or if it exists it remains unclear where it is domiciled may have also actually been a part of a careful orchestrated move by the political elite. In fact, discussions about the fund, what it is for, who is in control of it and how many people have benefited from it and its future is absent in the public domain. This therefore explains the nuances depicted by the various announcements and counter announcements by the same political elite. The announcement that there will be a fund dedicated to reparations is a clear indication that the political elite acknowledges that there were historical injustices. Yet at the same time the same political elite are audacious to indicate that the report will not be implemented. In analysing this kaleidoscope of announcements and counter announcements, this contribution can only conclude that all these are intended at hoodwinking the public for purposes of maintaining status quo.

This discussion can also be stretched further to include the fight against graft in Kenya. James Macharia opines that the *"removal of Kenya´s anti-corruption tsar and weakening of the country´s graft watchdog´s role by parliament shows a lack of political will at the top level to fight a vice that has dogged the nation for decades"*. Macharia was referring to the removal of Patrick Lumumba as well as his top deputies from office in 2011 because the same parliamentarians happened to be in the *"watchdog´s crosshairs"*. He continues that Lumumba and his team had come so close to

"hauling cabinet ministers to court to face corruption charges". According to his opinion piece *"there has never been political will to fight corruption"* since the "major players hold the levers of power". He concludes by writing that the fight against graft *is mere posturing, a game, and a pretense by the political class"*. It is *"all talk and no action"* (September 9, 2011). This brings us back to discussing the phrase of lack of political will as found in various discussions in the country. In the Kenyan case, what is actually meant by a lack of political will might actually mean a conscious effort by the political elite to obstruct justice, for example by replacing the anti-corruption commission at will whenever the commission´s actions seem to touch on them. His analysis of the whole gesture being one of pretense and posturing fittingly capture this idea. In a nutshell, it amounts to sabotage by the political elite.

Asaala and Dicker (2013), while citing Hansen (2013), indicate that the Kenya National Dialogue and Reconciliation (KNDR) process forged a framework under which meaningful reconciliation which addressed the dark past of the country would be achieved. Unfortunately, the process seems *"detached from a fundamental transformation"*, *"captured"* and *"manipulated by elites"*. In their opinion, the transitional justice project (which also includes the TJRC, the ICC process and others) has failed to deliver truth, justice and reparation, and failed to guarantee non-recurrence. According to them this *"failure to fully and effectively implement each of these elements has meant that goals of recognition, trust, reconciliation and strengthening of the rule of law in Kenya remain unfulfilled"* (2013: 354).The series of attacks that began on June 15 and 16 2014 in Mpeketoni and Maporomoko in Lamu County, killing at least 65 people are a pointer to the resurfacing of old grievances. In these attacks, the victims were largely members of president Kenyatta´s ethnic group, the Kikuyu, who were settled in these coastal lands by the first president, Jomo Kenyatta, to the chagrin of the indigenous coastal communities. The first president took advantage of his position to allocate members of his ethnic community this land which was originally designated as government land. Interestingly, all land in what is Lamu today was referred to as administration and the indigenous people inhabiting it considered as squatters! The TJRC report had recommended that the National Land Commission reclaim all property previously improperly acquired and conduct demarcation and registration of all government-owned land (Institute for War and Peace Reporting, July 26, 2014). Such scenarios ultimately, therefore, paints a bleak future to the journey towards a participatory society for Kenya particularly when the goals of justice and reconciliation which are prerequisites prescribed in this study is not met.

This lack of political will and elite entrenchment was probably the biggest impediment to the operations of TJRC. This was very clear from the responses with several respondents who explicitly elaborated on how the political elites had failed to support the process since they were the main perpetrators of some of the historical injustices especially those that touched on land, political assassinations, ethnic clashes and the post-election violence of 2007/08. Indeed, this was not a surprise, and thus one would have expected that TJRCs mandate would be structured in a way that would have compelled the elites to participate in the process whether they liked it or not. In this sense, the TJRC Act would have been envisaged to have a self-perpetuating mechanism so that failure by parliament or the executive would not in any way stop the process from realising the expected outcome. Another issue that would have been of importance at conception is the powers of the TJRC. This is despite the fact that truth commissions usually have not prosecutorial powers. It, however, begs the question as to whether this is something that needs contemplation particularly in cases like Kenya where the political transition did not change the dynamics associated with authoritarianism. The TJRC would have been given powers deal with people who refused to honour summonses to shed more light on issues. Weaknesses in the institutional design of TJRC, therefore, offered the political elite an opportunity to sit on the recommendations of the report.

David Held (2006) writes that Pateman (1970) drew upon the central notions in the discourses of Rousseau and J.S. Mill. These notions claim that "*participatory democracy fosters human development, enhances a sense of political efficacy, reduces a sense estrangement from power centers, nurtures a concern for collective problems and contributes to the formation of an active and knowledgeable citizenry capable of taking a more acute interest in government affairs*" (cited in Held, 2006:212). Held further writes that knowledge about the existing opportunities for participation is critical for the citizenry to first of all believe in the worth of participation and, second to participate and trust that the decisions made through participation are binding. "*On the other hand, if people are systematically marginalised and poorly represented, they are likely to believe that only rarely will their views and preferences be taken seriously, weighted equally with those of others or assessed in a process that is fair or just*". They hence find enough reason to participate and trust in the processes and outcomes of participation (Held, 2006:212). The Constitution of Kenya prohibits discrimination by ethnicity. This is because this is a form of marginalisation. While this is the case, it has been reported that in Kenya marginalisation of people based on their ethnic backgrounds has been present. For example, an audit of ethnic diversity in the Civil Service reported in 2011 that there was a direct connection between serving presidents´

ethnicity as well as dominance by one or two ethnic communities in the Civil Service. This situation has not changed. The idea of *"it is our time to eat"* therefore still thrives in Kenya and can be explained by the desire to capture the presidency each election year by each community or alliances of communities as is the present dispensation in Kenya.

In addressing the myriad of injustices committed by previous regimes, the TJRC report suggested measures that would mitigate the denial of socio-economic rights in the country. The main areas of concern include high poverty levels, water and sanitation, healthcare and malnutrition. To this end, the resettlement of IDPs remains unsettled as well as the poor quality of education resulting from, amongst others, the Free Primary Education (FPE) program (KHRC 2014:13-14). As a consequence of this marginalisation of sections of the society such as IDPs, informal settlement areas and areas still exist. For example, a Government Taskforce on Resettlement of internally displaced persons and Forest evictees shows that as at September 2013 there remained a significant number of the internally displaced who had not been captured in the Government data and hence had been left out of the program. This brings to question the presence of a holistic approach to dealing with internal displacement (KHRC 2014:43-44). This issue, in addition to the marginalisation of ethnic communities; persons living with disabilities, ethnic groups with few members, indicates that sections of the country are still marginalised by law or practice (KHRC 2014:15). All these forms of marginalisation are deeply intertwined with the need for participatory democracy.

On another note, the TJRC recommended action towards resolving the historical land injustices as well as those that continued to happen. As seen in the study, the recommendations have not been implemented, and further to that land injustices continue to take place thereby hampering the participation of a significant majority in the development process. Moreover, *"the government appears deliberately shut to the truth that squatters are a result of injustice, and they will continue being there as long as the injustice is not corrected"* (Daily Nation February 14, 2017). Structures that are aimed at addressing the land issues have been developed, but their actualisation has not happened. Moreover, again, this has been the interference of the political elite. The Nairobi County government has, for example, reported that land cartels have continued to deprive hapless citizens of prime land (Daily Nation January 2, 2017). It is important to note the public expected the current regime to reform land registration and management, repossess illegally acquired public land and adjudicate and title community land, as promised in their manifesto (Daily Nation February 14, 2017). Elections were held on August 8, 2017, and very little of this had been achieved, and the

success is still far off the mark. Instead, expired leases have been at the centre of controversies because land cartels have obscured the renewal processes. At the same time, the Ministry of Lands has not been able to manage processes of renewal satisfactorily. The National Land Commission and the Ministry of Lands have also been in constant infighting thereby slowing down the land reform process. This has resulted in frustration and desperation of the citizenry.

According to the Kenya Human Rights Commission (2014), although some reforms have seemingly been implemented in the country, they have not followed a framework that is comprehensive and takes into account the complexities therein. In other words, it has been ad hoc and left different sections of the country feeling further marginalised. The process has also not brought stakeholders together to develop clear implementation strategies, plans and supportive budgets. Pateman (2012) writes about participatory budgeting (PB) in Porto Alegre and indicated that in PB *"all citizens have the opportunity and the right to participate each year in a major part of city government"*. She continues to say that it is *"not a specially commissioned event for which a few citizens are chosen"* but rather a part of their lives. PB democratises the governance structures that are in place (2012:11). The Kenya High Commission for Human Rights argues that the lack of bringing stakeholders together in Kenya to address issues of land has therefore made it *"difficult for stakeholders and the public to understand, monitor, review, or audit the progress of implementation"*. As a result, stakeholders do not understand their roles in the implementation process (KHRC 2014:38). As such therefore the process of land reforms is left in the hands of the political elite who then, on behalf, of the citizenry decide on the direction to go. Together with the marginalisation discussed earlier the issue of land and the lack of participation in matters to do with land limits the civic space in the country.

The problem of limitation of civic space is closely linked to participatory democracy which seeks to open up and provide the space to the citizenry to participate and own decision-making processes. In this regard, an amendment to the Kenya Information and Communications Act in 2013 further limited media freedom[43]. The Act provides for a tribunal with powers to punish journalists and

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[43] The Kenya Information and Communications (Amendment) Act No. 41A of 2013 was assented to on December 11, 2013 and commenced on January 2, 2014 (GOK, 2013). The Information and Communications Act of 2013 provides for a *"government-appointed communications and multimedia appeals tribunal with broad powers to revoke journalists´ accreditation, seize property and impose hefty fines on journalists and even greater fines on media companies"* (Greenslade, November 12, 2013). This *"quasi government"* commission may even *"decide to ban newspapers if their content, including cartoons, was deemed to pose a threat to national interest, public order or security"*. The national interest, public order or security are however not defined in the Act. A media outlet risks facing a fine of between one and twenty million Kenya shillings for failing to observe the set standards in the Act (Logan, December 6, 2013). According to Caldwell the laws are an effort by the parliamentarians to cushion themselves against the publication of stories that touch on them by envisaging stiff penalties or jail terms for journalists who publish *"false or scandalous*

media houses for their reporting (KHRC 2014:84). The net effect of the Act has been the shackling of media freedom since the government dominated tribunal set in the Act wields power to punish journalists and media house for their reporting. In addition to this attempts a capping foreign funding for civil society through the Public Benefits Organizations (PBO) Act are other efforts by the Jubilee government to limit the civic space by restricting the activities of civil societies through regulating the amount of total funding they receive to a maximum of 15 percent of their budgets. In this attempt, it was proposed that any amounts exceeding 15 percent of total budgets would have to be authorised by a government (KHRC 2014:84). This can be said to be an effort towards thwarting the civic space by the government. According to the Committee to Protect Journalists (CPJ) the laws imply that reporters and news outlets will self-censor themselves to survive. This is because the government-controlled regulatory board is empowered to enforce fines to reporters´ and media companies amounting to US$230,000 and US$5,500 respectively if found in breach (CPJ December 5, 2013). In their report of 2005, the Kenya Human Rights Commission highlighted the tensions of transition in an otherwise closed society. In this report, the right to information was equated as being adjunct to a participatory society. In a participatory society, according to them, the government is not far removed from the people, seeks to listen to her people and aims to enlist their participation in processes of governance. This is because freedom of information enables the people to question the government on various issues and as a result, brings about efficiency on the part of the government. In their view, the government of Kenya at that time stifled the right to information for her peoples. These rights included: the right to request access to information, the duty to supply the information required unless specific exemptions apply as well as the obligation of the government to proactively disclose information that is of particular interest even in the absence of claims from the citizenry (2005:vii).

The right of information further improves the quality of decision-making and impacts upon corruption and other ills in society. All in all, the importance of reforms in the Kenya Constitution and the gains found in the Access to Information Act of No. 31 of 2016. The Act stipulates the citizen´s right of access to information where that information is held by the state, private body or another person but is essential for the exercise or protection of any right or freedom. The fundamental freedom, therefore, becomes meaningless if there is still a disarticulation between state policies and citizens aspirations. This situation was prevalent, according to the publication by

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libel about parliament, its committees or proceedings". The law requires journalists to seek *"approval by the speaker or a chairman of a committee before proceedings are broadcast"* (Caldwel, August 27, 2015).

KHRC (2014:84). This disarticulation is exacerbated by certain gaps including, a citizenry that is unaware of their right to information (or that is kept unaware of their right to information). Further, a weak capacity of public officials and bodies partly caused by their unawareness of their obligations to provide information to the public coupled with retrogressive provisions barring release of government information as obtained in various Acts of Parliament – the Official Secrets Act – the Preservation of Public Security Act and others and poor information management worsen it. The above matter is further complicated by an insufficient infrastructure which can be qualified by the lack of implementation framework of the progress made so far in legislation as well as the absence of a complaints mechanism. There still exists in Kenya legislative, institutional and political barriers to information access (ARTICLE 19, n.d., 2014).

Elsewhere and in a supplement to the above Haider et al., (2011) have argued that on a practical level consultation and dialogue between a government and her citizenry can improve the public understanding and support for law and order as well as encourage ownership of reform processes. At the same time, access to information can help in holding government accountable and thereby increasing its legitimacy as well as improve on governments´ responsiveness to demands from the citizenry as a result of their participation (2011:10). Ultimately, access to information is critical because it enables citizens to exercise their voice, effectively monitor and hold governments to account and to enter into informed dialogue about decisions which affect their lives. Above all, access to information enables the marginalised groups in society to make decisions about their lives by demanding their broader rights and entitlements (Haider et al., 2011:56) resulting in a participatory society. This elucidates a clear consequence of this correlation between political and economic transparency by governments and improved socio-economic indicators. In other words, transparency generates accountability (Haider et al., 2011:57). In a nutshell, therefore, the reforms made so far in Kenya have not resulted in less abuse of power by the political elite and therefore are a mimic of the same old and closed structures which discouraged the presence of participatory democracy.

Other than the above, it is worth mentioning that this study also found out that *"despite President´s apology for past atrocities, torture is as prevalent today as it has ever been even if Article 25 (a) of the Constitution guarantees the right to freedom from torture"*. This was in addition to the announcement by the Cabinet Secretary Henry Rotich in his budget speech of 2015 that only Kenya Shillings one billion had been set aside for the Restorative Justice Fund to be administered in 2016,

according to Gabriel Dolan 2015. This casts doubt on the *"Jubilee administration´s commitment to addressing past atrocities"*. It also led to questioning *"its determination to ensure that such cruelty is not repeated under its watch"* (Dolan, June 19, 2015). A report by the Kenya Human Rights Commission (2015) corroborates this by indicating that the Kenya security forces responded to the alleged attacks on coastal Counties of Lamu and Tana River by Al-Shabaab by being slow to answer to attacks thereby leaving villages unprotected. Further, when they eventually responded, *"their actions were often discriminatory, beating, arbitrarily detaining and stealing personal property from Muslim and ethnic Somalis in the two Counties"*. This was further followed by arrests and mistreatment and further dropping of the said charges due to lack of evidence (KHRC 2015:1). Also, the Independent Medico-Legal Unit (IMLU) (2016) also found that *"torture and ill-treatment remain very much used tools of coercion and manipulations by the country´s security and law enforcement agencies"*. Further, *"physical and psychological torture and ill-treatment are very much evident in present-day Kenya with enforced disappearance of persons, unlawful detention, kidnapping and ransom-seeking, blackmail and extortion and extrajudicial killings by fear and intimidation by criminal gangs on the basis of police inaction extremely commonplace"* (IMLU 2016:3). This meant that the security forces do not only continue to torture people, but they also remain reluctant to deal with criminals that conduct such crimes. Underlying this inaction can, therefore, be deemed as silent sanctioning of the same crimes on the part of the system.

8.7   SUMMARY AND CONCLUSION

This chapter engaged with the fourth research question: did the TJR process facilitate the institutionalisation of participatory democracy, how and why? The discussion proceeded with considerations about the historical legacy and how this may have either promoted or hindered the realisation of a participatory society. The participatory society in mind here was one where the citizens, by participating in the social, cultural and economic aspect of society, begin to feel they are a part of that society and therefore obliged to contribute to its wellbeing. The findings of the TJRC indicated that this society did not exist in Kenya because of the historical injustices meted against individuals and communities. The recommendations were therefore made in line with the idea of purging the country from this past and initiating a new beginning.

The data has evidenced that the process did not do so primarily because there was no political will[44] from amongst the political elite and other reasons such as the inadequate conception of the TJRC Act which can also be traced back to the same elite who passed the law. As discussed in the previous chapters the elite has been adversely mentioned in the report, thereby making it difficult to `fry themselves` by implementing the recommendations formulated. The land injustice which is the gravest, for example, touches on them and their close associates such as family members. The chapter also found out that practice of governance in Kenya is deficient about the elements of participatory democracy as posited by Carole Pateman (1970 & 2012). The availability of information serves as the beginning of participatory democracy. This was found to be lacking starting with the fact that the final report of the TJRC has not been made public. Additionally, the government is implementing some of the recommendations in an ad hoc manner, and where this is the case, as in the land reforms, information leading to participation is lacking. Implementation is, therefore, being done at the convenience of the political elite and public officials. In any case, the government seems to be implementing some of those aspects that they consider less *"explosive"* in a piecemeal manner. This in turn does not guarantee the institutionalisation of participatory democracy.

The chapter further found out that the TJRC process came in at a time when Kenya was already engaged in other reform processes. Such processes included the constitutional review process which ended in the final promulgation in the Constitution of Kenya 2010. Concurrently running was the inquiry into the post-election violence that culminated into the Waki Report of 2008 and which made various recommendations related to the causes of the violence. This process also led to the ICC cases and process at the same period in mind. These parallel processes, therefore, stole the niche from the TJRC process and required a careful articulation of the TJRC mandate. This coincidence was coupled with the unwilling political elite to assist the commissioners to bring all these issues and processes under one umbrella. As such, therefore, the extent to which the TJR process would have directly contributed to participatory democracy is further blurred by these facts. This is not to say, however, that the process would not have facilitated the institutionalisation of

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[44] As discussed earlier, the critical approach in this research revealed that the lack of political will is the simplistic way of explaining the entrenched interests, patrimonialism, kleptocratic state that takes corruption as a way of life. The elite are captured and blatantly sabotage reforms. Instead they prefer to hide behind successive commissions whose reports are not implemented. Commissions have become tools for expending enormous amounts of public funds as a way of deflecting public interest in from the injustices committed. Recommendations from such commissions, when implemented, are done in an ad-hoc fashion with not clear implementation framework that can satisfy the expectations of the public. The result is a population or sections of that same population that feels disenfranchised and discontented. The participatory society envisaged by Pateman and indeed the Bill of Rights in the Constitution of Kenya 2010 remain a myth.

participatory democracy. In the next chapter, this study looks at the conditions which would, therefore, have been requisite for this facilitation to happen. It is in particular reference to the milieu in Kenya where a lack of commitment from the elite is seen as primarily being the obstacle to the success of such a process.

In conclusion, it is important to note that as put in the previous chapters the conception of such a process remains very critical. The drafters of the law, parliament and the executive must all be keen to have such a process in the first place. In the Kenya it seems therefore that undertaking the TJRC processes was a push from civil society, the opposition, the general masses and the international community. The idea was something the political elite did not support. This support was not there because of the historical legacy which created path dependence and occasioned the *"lock in"* condition.

CHAPTER 9. SUMMARY AND SIGNIFICANT CONTRIBUTIONS OF THE STUDY

9.1 CHAPTER PREVIEW, AIM AND SCOPE

This chapter provides a summary of the main findings of this research. The chapter also reflects on the relevance of the study and the contributions made to truth commission discourse. Particularly the chapter looks at the analytical and conceptual implications of the contribution. Further, the chapter discusses the empirical, contribution to the social sciences and the normative contributions made by the inquiry. After making conclusions the chapter suggests avenues for future research which are partly in line with the challenges and limitations of the study. These are pointed out as possibilities for future research.

9.2 INTRODUCTION

This exploration was inspired by the growing norm of instituting truth processes around the world as well as the growth in the discourse on the same. Processes of norm formation and dissemination have become common in a globalised world. However, while this is the case discussions around the applicability of standards is also growing. One such norm is the instituting of truth-telling processes, witnessed in the last twenty years. The researcher took a cue from this. The purpose of this study was to interrogate the extent to which *the TJRC process facilitated transitional justice and what are its implications for the institutionalisation of participatory democracy in Kenya*? Namely, the study sought to answer the following four research questions:

1. Why did Kenya establish the TJRC?

2. Did the TJR process contribute to Justice?

3. Did the TJR process contribute to Reconciliation?

4. Did the TJR process contribute to the institutionalisation of participatory democracy in Kenya?

The four research questions guided the study and were answered in four subsequent chapters. Before this, a conceptual framework and a research design were crafted to roll out the study systematically. The study design was qualitative and used qualitative methods to source data and analyses the data. This provided the rich findings and interpretations discussed in chapter five to eight.

As the research delves into summarising the successes of the truth commission process in Kenya, a reflection on the success of truth commissions, is, however, necessary at this point. In her reflections on the future commissioning the truth commissions, Hayner (1996) observed that at the time 19 truth commissions in 16 countries had been commissioned in a record 21 years; Argentina in 1984, Chile in 1991, El Salvador in 1993, Rwanda in 1993 and South Africa in 1995. She suggests certain minimal requirements for the implementation of future commissions. Hayner stresses the impartiality and good faith of truth commissions, independence from political forces, a resource base and unrestricted access to information for comprehensive inquiry and implementation immediately after the conflict. She also points out to the presence of a government transition, operation within a specified period, the power to make recommendations as part of the commissions´ mandate that can be seriously considered. Also, the publication of the report should be immediate, and the report made publicly available. Above all, the covenant to establish a truth commission should be a contract between the government in power, the opposition and all other relevant stakeholders so that it translates into real change (1996:25). A successful process, therefore, was the result of an agreement between all the parties involved based on the recognition that there was a need to purge Kenya from its past.

The high success was the inspiration by which the public pushed for the establishment of a truth process with the hope that the very process would usher a new beginning. As observed earlier, the need for a truth-telling process had been the subject of the socio-political discourse in Kenya from the period immediately after independence. This culminated in the commissioning of the Makau Mutua-led task force to find out the need for a truth commission. Bosire and Lynch (2014) citing the report of the working group observed that the truth commission *"would address past abuses, recreate the state, banish impunity, and set Kenyan on an irreversible trajectory to democracy and respect for basic freedoms"*. Further, the commission was therefore expected to be the Trojan horse able to push through a reform agenda much needed in Kenya at the time (2014:260). The findings of this study, however, have shown that as much as the establishment of the TJRC in Kenya may have learnt from previous experiences in other countries as well as the reflections from scholars and practitioners in transitional justice, the reality has proved to be different in many ways.

The application of the historical institutionalism approach as the metatheory in this research made it clear that Kenya is *"locked in"* by the historical legacy created in the past. This legacy consisted of gross violations and abuse of human rights by successive regimes. The violations were committed

by the state or state agents and were targeted at individuals, communities and the general public in the case of grand corruption cases. Although the study concentrated on the postcolonial past, it also took cognisance of the colonial past. This was also evident from the findings and recommendations of the TJRC which pointed out that it would be difficult to discuss the county´s past without looking at its colonial past. And, in their recommendations and implementation matrix the TJRC did not shy away from making recommendations to this effect, although their mandate covered from the period 1963 to 2008. The succinctly put it that *"In order to contextualise gross violations of human rights and historical injustices that occurred during the mandate period, the Commission divided the political history of Kenya into four distinct epochs"*. The distinctions matched *"the four political administrations that governed the country prior to and during the Commission´s mandate period"* (TJRC Report, Abridged Version 2013). In effect the Commission was indicating that Kenya´s historical legacy cannot be complete without taking into account the British Colonial era between 1895 and 1963. The historical injustices experienced in Kenya had roots in the colonial legacy to a great extent. Some of the decisions made by the first President and his successors around land for example found credit from the colonial decisions made earlier[45]. Finding credit in the actions of the colonisers was however a way of scapegoating by the political elite as they continue to perpetuate the same historical injustices during the second, third, fourth and by the current regime.

This research has shown that there existed a disconnect in the creation of the TJRC in Kenya and the implementation of the recommendations made by the commission. In answering the why and how the question in the design, the study has further illuminated the reasons behind the lack of or disinterest in the implementation of the recommendations made by the TJRC on the part of the political elite. Of particular interest has been the role of the political elite in either promoting the truth process or stifling it. This was done not only at the implementation stage but all through from the design of the commission, which then determined the structure and mandate and the legal gaps which went unnoticed by the drafters of the Act as well as parliament which finally passed the Act and later did not table the findings in the report for adoption and implementation. Indeed, goodwill needed to be exhibited from the beginning of the process. In so doing, the study has established that the truth process in Kenya did not facilitate the attainment of truth, justice and reconciliation. Subsequently, the long-term goal of participatory democracy remains unachieved in so long as, for example, the report remains unpublicized. This is however in contradiction with the thesis of this

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[45] Instead of dismantling the colonial legacy, Jomo Kenyatta maintained it and found personal benefit from this legacy as shown in this study. It is through this legacy that he was able to accumulate wealth and power.

study that: truth processes should facilitate the attainment of truth, justice and reconciliation and thereby contribute to the emergence of a participatory society.

Participatory democracy in Kenya would mean striving to address the realities facing the masses in Kenya such as the high levels of poverty, the inequitable distribution of resources, the regional development imbalances, unemployment amongst women and the youth, transparency, accountability and impunity, land injustices and, other human rights violations. These are the issues raised in the TJRC report and which the Commission recommended a series of actions for implementation. This is because the conception of participatory democracy is emancipatory and seeks to address issues of social justice as was envisaged in the recommendations of the TJRC report.

In dealing with the question of justice, the TJRC report embraced both a social justice and restorative justice conception. Advocates of restorative justice champion for the restructuring of relationships, otherwise broken, towards reconciliation. It is a movement towards self-determination of persons and communities that were otherwise marginalised. This is done through increased access to information which then leads to increased knowledge with which the citizenry can be able to participate in decision-making processes. It was observed in this study that although the Constitution of Kenya 2010 included the Bill of Rights, for example, this only put in a structure for the self-determination of the citizenry. The political elite has however stifled the expansion of the space needed to practice participation and thereby frustrated the institutionalisation of participatory democracy. By censoring the media, for example, the citizenry is deprived of the necessary information required for decision-making. This is because these actions have stifled the endeavours of social inclusion and further perpetrated the marginalisation of different sections of the society such as the urban and rural poor, the informal settlement dwellers and internally displaced persons. Truth commission processes, therefore, are an endeavour to learn from the past and forge a future that is inclusive and one which shuns the marginalisation of people.

The question of justice, therefore, remains tricky, complex and one which the regime would rather not confront particularly because of their involvement in past atrocities. Justice remains elusive because, as Pankhurst (1999) explains, there remains a challenge in most peaceful settlements to find a common conception of justice as well as the minimal structures through which justice can be achieved (1999:241). In all, what is the minimum justice that can be arrived at by all parties? In the Kenya, for example, the TJRC process arrived at a social conception of justice. On the other hand,

the non-commitment by the political elite, who were in some instances the perceived perpetrators of the injustices, to fully participate in the process in itself hindered a process of arriving at this minimum conception of justice as well as coming to the structures through which it could be attained. A sabotage of the course by this elite is therefore seen as a way to deliberately subvert the process of justice. This was evidenced by the non-appearance, for example, the Commission when required to. In other words, and as Pankhurst argues the centrality of the process of arriving at justice, which is based *on "establishing some basic truths and agreements about how crimes of the past should be defined and handled"* (1999:241), did not happen since only one side seemed to have participated in the process.

The above dilemma became the leviathan in the TJR operation in Kenya. This was evidenced by, for example, a former Commissioner observing that the devil in the TJRC was the *"J"* question and a government official claiming that the problem in the TJR process was the element of justice in the whole equation. In essence, the Commissioner and the government official, while believing in the TJR process, had doubts that the justice component would be achieved. Moreover, indeed their observations echo the opinion of Pankhurst (1990) above on the centrality of the process. Additionally, Pankhurst continues to indicate that the delivery of justice depends on whether the criteria of ownership, timing, impartiality, clear objectives, jurisdiction, publicity, information, punishment and reparation have been met. These elements, according to him determine whether long-term peace is achievable (1999:251-2). In the Kenya, for example, reparations and a comprehensive framework remain unaddressed, punishment of those found in the wrong is far from being a reality, a vast majority of the population do not know what became of the TJR process – for example the report has never been made public, and, questions around impartiality have been raised especially given the involvement of the embattled Chairman of the Commission (who had to step aside mid-process amid accusations of having been accused as a perpetrator in the Wagalla Massacre of 10th February,1984) and the fact that he was to later re-emerge as Chair to present the report to the President. In a nutshell, an agreement on what was just and by who provided room for contestation of the findings of the TJRC and was then an ingredient to the lack of successful implementation of the recommendations made in the report. All in all, these contestations had implications on both reconciliation and the emergence of a participatory society.

In the same vein, the essence of reconciliation as discussed in this study is embedded in this conception of truth within truth commission processes. Elizabeth Dahl argues that most often than

not attempts at bringing peace concentrate on correcting the misunderstandings between and amongst conflicting parties. They yield little results because they do not pay attention to the *"major power imbalances"*, *"historical grievances"* and the trepidations of the citizenry and *"social movements"* (2012:255). This study found out that while the TJRC, through the statement taking process may have led to the drafting of recommendations that sought to take care of the above; the reality is that the lack of implementation defeats the purpose of having such a process. In a nutshell, the process remains one of a public relations exercise deemed by the government as serving to quell the anger in the populace temporarily. The victims of the historical injustices remained unattended as a result of this. Moreover, in cases where there were some minimal yet ad hoc reparations given, they appeared to be imbalanced and to favour certain communities close to the sitting regime. The resettlement of internally displaced person program was criticised as favouring victims who suffered forced eviction from certain parts of the country. In some instances, the resettlement was also done in response to certain political expediencies such as the looming elections of 2017 and thereby deemed as a way of corrupting voters from, for example, Kisii and Nyamira counties in Kenya. In this way, the program of resettling victims of forced evictions ended up uncoordinated and lacking a comprehensive framework. A question emanating from the study, therefore, is that, given the elite sabotage of the TJRC process (by stalling the implementation of the recommendations) which would lead to the fostering of reconciliation, what is their strategy for reconciliation? Additionally, the implementation of the fund set aside for victims who were announced by the President during his State of the Nation address of 2015, remains vague because particulars of the fund as well as the framework under which it is operational are not clearly established. Finally, while reconciliation remains an unaddressed issue, the assurance for non-recurrence of the injustices as a result of the TJR process cannot be assumed.

The process of implementing the recommendations of the TJRC has also not been followed by the political elite according to the implementation matrix carefully laid out. The implementation matrix was laid out according to (a) the theme or kind of atrocity committed, (b) the recommendations, (d) the responsibility for implementation and, (d) the timeline for implementation (see Appendix H). From the implementation matrix in Appendix H it was clear that the TJRC envisioned that some of the recommendations and their implementation would have undertaken within six months while others would take up-to thirty six months. They therefore gave these as deadlines for implementation. Acknowledgement and apology from the government, for example, was given between six and twelve months from the date of the presentation of the report. The report also

indicated that further investigation into the *"illegal/irregular acquisition of land, survey, demarcation and registration of public land, adjudication and registration of land at the Coast and other areas where this has not been done, development and maintenance of a computerized inventory of all land"*, and the *"reparation"* of *"historical land injustices"* was going to take up to thirty six months. Clearly this showed that it was going to be an overwhelming task for the country and that it needed resources and time. The implementation of the recommendations on land was tasked to the National Land Commission (NLC), the Ministry of Lands and the Implementation Committee. Other injustices such as the Mount Elgon conflict which required reparation for victims and survivors and the establishment of a memorial for remembrance were also given the same weight because of the amount of resources this process required. Recognition was also given to process in terms of healing and reconciliation. This was in view of what the reconciliation process for victims and survivors and the public in general required. In a nutshell, implementation was foreseen in terms of immediate, mid-term and long term. The recommendations that required immediate action ranged from three to twelve months while those that were mid-term were assigned a deadline of between eighteen and twenty four months. The long term actions were on the other hand assigned a deadline of thirty six months (TJRC, May 26, 2013).

In addition to the above, recommendations relating to reducing ethnic tensions and fostering of national reconciliation were deemed as continuous. Some of the recommendations in this category included putting in place a national reconciliation conference/day and initiating comprehensive and sustained community dialogue processes. All in all, this study found out that the implementation of the recommendations of the TJRC needed to unfold in a harmonized approach. This was would have been made possible, first by taking the report through the parliamentary process of approval and, second, by setting up the implementation committee which would then work in synchrony with relevant government ministries and institutions as well as civil society organisations and community based organisations (TJRC, (Abridged Version) May 26, 2013).

This research further indicated that by the time of writing its report there was no meaningful process aimed at bringing into reality the recommendations and implementation matrix by the political elite. The contribution is of the view that this was not just a question of political will but a well-choreographed sabotage of the TJRC process. This was especially so given the obstacles as well as the omisssions and commissions on the part of the political elite. This study was also of the view that the land issue seemed to take a central part of the historical injustices and that it therefore

needed immediate addressing. However although this was the case, as evidenced particularly by the interviews and focused group discussions, other injustices also occupied a significant part of the historical legacy and required similar attention. In fact, it is the view of this study that the land question was highly connected to other injustices such as political assassinations, extra judicial killings, unlawful torture and detention without trial, economic marginalisation as well as forced displacement. This was because, for example, the killing of Pio Gama Pinto and Josiah Mwangi Kariuki, discussed earlier, were connected to their championing for rights related to the land question.

In addition this contribution is also of the argument that the need for justice and reconciliation in the country remains urgent for the public but not in the view of the political elite. This revelation came out from the findings of this research about the rhetoric on justice and the need for reconciliation evident in the discussions and actions of the political elite. In contrast, their rhetoric, as found out by the study, was merely meant to maintain status quo by hoodwinking the public about the seriousness they attached to these matters. By using the critical inquiry approach this research found out that the creation of numerous commissions by the same political elite to deal with their unjust practices such as c corruption and land grabbing was only meant to cloud the issues raised in relation to, for example, the Anglo Leasing and the Goldenberg corruption cases. In fact, the TJRC made a recommendation requiring the release of reports of previous commissions of inquiries and related bodies within a period of six months (TJRC, (Abridged Version) May 26, 2013). This can be explained from the historical institutionalist view to mean that the historical legacy created a *"lock in"* which prevented the political elite from turning rhetoric into reality. In fact, it was not even about turning rhetoric into reality but rather, this investigation found out that the rhetoric was intentionally meant to prevent that reality from happening.

9.3 ANALYTICAL CONTRIBUTION

Most studies about truth commission processes, while looking at impact tend to look at the structure and mandate. The studies also reflect on the implications that such processes have on individuals and communities as a whole. In essence, therefore, there is a dearth of critical studies that examine the overall process regarding institutions and the actors as well as their behaviours and how this contributes to the new structures and processes. This was a critical approach to the study of truth commissions. The analytical approach in this study sought to question the resultant structures that emanate from truth processes. By engaging in the critical approach, the study attempted to

challenge the otherwise assumed status quo when engaging in the discourse on truth commission impact. In Kenya, for example, this research found out that the "*accept and move on*" mantra, as propagated by the political elite sought to silence the public from further discussing the issues raised by the TJRC process. To them, the society would rather discuss the development and the future without looking at the past. In other words, the society is not supposed to heal through a process of justice and leads to reconciliation. The critical approach also sought to question the usage of the term "*lack of political will*". In the view of this inquiry, stretching this term further reveals that it translates to sabotage by the political elite. In other words the truth process in Kenya is suffering from sabotage by the political elite. This incapacitation of the process is occasioned by the historical legacy which initiated a "*lock in*".

The study further pointed out at the imbalances in power and relations that come with this. It indicated that the initiation of truth processes by regimes might not be for purposes of bringing about change. In the case of Kenya, the truth process seem to have been subverted to serve the purpose of temporarily quelling the anger of the populace in their demand for change and yearning for the addressing injustices committed against them by previous regimes. It was a temporary measure to the growing discord within the population. This notion was evidenced by the "*back to normalcy*" after the presentation of the report epitomized by the rampant corruption, the political and social exclusion of some areas of the society, the continued economic marginalization as well as the ongoing presence of a repressive state that strived to stifle the general population and prevent them from actively participating in governance. The reality is that the truth process was used by the political elite to sanitise their continued suppression of the majority. This only led to the normalisation of injustices given that they continued to be meted against the same society. The study, therefore, confirmed Priscilla Hayner´s caution to those that champion for truth processes arguing that such processes may not result in real change. Instead, these processes are merely intended at maintaining status quo as opposed to bringing about change. Evidence of that is the abuse of human rights continued even while investigations were underway and immediately after that is an assurance that such processes are not a guarantee to fewer violations of human rights in a country's future. Instead, by the fact that the elite inscribes such clauses within the mandates creating such Commissions, the realities may be very different as evidenced in the TJRC process.

9.4   CONCEPTUAL CONTRIBUTION

In the final analysis, the study argues that truth-telling processes should mediate the institutionalisation of participatory democracy. This study used historical institutionalism as the meta-theory in providing a framework for understanding truth commission outcomes. In doing so, the study argued that history matters and determines the behaviour of actors, institutions and the choices they make as well as their constraints, motivations and beliefs about the establishment of a commission, the life of the commission and the outcome (implementation of the recommendations) of the process. By looking at the historical legacy from the past, studies about truth commission processes may be able to answer why or why not such processes may deliver justice, reconciliation and the long-term goal of participatory democracy. Path dependence which then creates a *"lock in"*, informal and formal institutions as well as ideas and outcomes are useful concepts as applied in the historical institutionalist approach which prove useful in providing explanations. In so doing, the policy outcomes emanating from the truth process come to bear when this overall framework is applied. This was evidenced by the findings of the study which took the TJRC process as an example. The issues of non-implementation, as well as interference and non-commitment from the beginning, were brought to light by the study. The study also highlighted, to a great extent which actors and institutions (both formal and informal) made which decisions in the past and how all these bore on the outcome of the TJR process. Decisions made by successive Jomo Kenyatta, Daniel Moi, Mwai Kibaki and their informal networks around land and corruption hanged on and impeded on the implementation of the recommendations made by the TJRC. Such decisions led to elite capture and the unwillingness to take the reforms path.

The study followed from the works of other scholars who have discussed the subject of truth commission impact (Hayner, Bakiner, Brahm and others). Arguing from a historical institutionalism point of view, the study established that because of their direct or indirect involvement in historical injustices, the political elite within a particular regime is hindered from delivering truth-telling processes to the logical ends because of the entrapment they find themselves in. In other words, how do societies transit from the past without regime change? In the case of Kenya, although there have been changes in political administration, the incoming administrators are still part and parcel, directly or indirectly, of the past regimes. This causes unwillingness on their part. It, therefore, raises the question about the process of designing a truth process given such circumstances.

At the same time the conceptual framework used in this study, while using historical institutionalism as the meta-theory, also brought together John Paul Lederach´s comprehensive framework for reconciliation which sought to answer the second and third research questions: whether justice and reconciliation were achieved through the TJR process. The conceptual framework also brought to question the end goal of truth processes, in which case, according to the study was the attainment of a participatory society. The conceptual framework used therefore sought to answer the who, what, when and how questions that could be asked about a truth process. Through historical institutionalism, the conceptual framework did not only answer what happened and who was involved at the beginning. Rather, the framework also sought to respond to this question throughout the study. In other words, historical institutionalism was embedded in the process of answering all the research questions and provided the lead in understanding the phenomenon at hand.

In the same way, although inspiration was also sought from the comprehensive framework for reconciliation and which answered the second and third research questions, the concept of justice and reconciliation was also seen to run through ought the study, and this was also related to how they acted as prerequisites for the emergence of a participatory society. At the same time, the presence of a participatory society was explained as forming a part of the need for the truth process. This need ran through the entire study and was epitomized as the end goal desired by the people of Kenya. In the participatory society envisaged, an end to impunity, corruption, forceful eviction of individuals and communities, as well as other injustices deemed to have been committed in the past, was going to be no more. This then would pave the way for the emergence of this kind of society where every individual within all communities would feel a part as part and parcel of the society. As a result, this would provide the impetus for participation in governance. In this way, and through embedding the concepts as used within the framework of this study, a comprehensive way of analysing at the outcome of truth commission processes was provided.

9.5   EMPIRICAL CONTRIBUTION

This study focused on whether truth commission processes lead to the institutionalisation of participatory democracy in societies. The study sought to contribute to the broad discussion of the democratic experiment in Africa which is fraught with conjectures. Hence the democratic experiment has ended up in pseudo names of the variety of outcomes. This experiment has followed different pathways. One such pathway is the transitional justice route and particularly the

establishment of truth commissions as experienced in countries such as South Africa, Sierra Leone, Ghana and Uganda, amongst others. The study argued that through this pathway a country should be able to institutionalise democracy and particularly participatory democracy. With a dearth of studies that delve deeper into the claim that transitional justice processes lead to more democratisation, this study has contributed to this field by engaging in an in-depth study of the TJRC process.

The study did this by generating a rich and thick description of the TJRC process about its outcome, as it has unfolded in Kenya. The study conducted 67 interviews and four focused group discussions in six selected Counties in Kenya to obtain the rich data used as the basis for analysis. The study relied on a rich array of interview participants and participants in the focused group discussion which included, amongst others, government officials in respective ministries and departments, victims of historical injustices, members of civil society groups, scholars from academic institutions, former Commissioners and staff of the TJRC, media personnel and members of international think-tanks engaged in the transitional justice discourse to provide the rich views and experiences analysed for the study. The study also relied on the observation method. The secondary data used in the study emanated from archival and policy documents, reports, Newspaper articles, journal articles, books and other researched materials. These sources provided a basis for the findings that are found in this study. Qualitatively, the data collected in this study sought to answer the who, what, when, why and how variables in the historical injustices committed in Kenya between 1963 and 2008 by delving into the narratives of peoples stories (from all standpoints of victims, government as well as other stakeholders) and allowing the participants in the study to locate themselves within that realm so as to be able to provide concise responses to the research questions.

The findings in this study, therefore, represent an attempt to dive deep into a particular truth process with the aim of providing the nuances that have otherwise not been captured in other related studies. While some scholars might argue for a comparative approach to such a study, this study concludes that the approach taken provides an in-depth understanding of the dynamics, which would have otherwise not emerged in a comparative study. In so doing the study was able to demonstrate that, truth processes should contribute to the institutionalization of participatory democracy. However,

given certain contexts – which are to a large extent are determined by history[46] - such processes may not lead to this outcome. The in-depth character of this study helped in isolating the TJRC process and explaining why it was unable to lead to this result.

The study explained how the TJRC process might not have succeeded in contributing to justice and reconciling the society because the elite has sabotaged the process through parliament. This is because they stand to lose. However, this is not new to democratic processes. Sometimes democracies reverse. Bratton and van de Walle (1997) explains that this is not a new phenomenon in Africa and that signs that the gains made between 1990 and 1994 were eroding were evident at the time of their writing. In their view, the overthrowing of elected governments by military regimes and the return to authoritarianism were evident signs of these reversals. In other cases, while the new democracies survived, elected rulers lapsed back into manipulating political rules to consolidate their power. There was also a growing sense of neopatrimonialism (Bratton & van de Walle, 1997: 233-4).

The narrative of the TJRC process in Kenya can be likened to this scenario. The democratic path which was to be followed suffered an *"executive coup"* (Bratton & van de Walle 1997: 236). The political elite has ensured that the process does not apportion justice and therefore not produced a just society. This has hindered participation by the people and therefore has become an anti-climax to the institutionalisation of a participatory society. However, this does not mean that these negative findings of the study mean that the institutionalisation of a participatory society is not possible. In fact, the situation may form the basis for this institutionalisation especially if another regime that is not "locked-in" by the past should come to power. It may, therefore, form the point of departure for Kenya towards the institutionalisation of participatory democracy. This is from the perspective that we already have a report and its recommendations in place. A new regime should simply embark on the road to implementation to realise the dream of a participatory society.

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[46] In the Kenyan context the truth processes was overshadowed by path dependence and the *"lock in"* it created. This can be explained as beginning from the colonial to contemporary governance. At independence, for example, this research found out that the Jomo Kenyatta regime irregularly and illegally allocated public land to individuals. The Daniel Moi regime did the same and this trend has continued. These decisions and actions are the panacea of the land problem in Kenya. The political elite in contemporary Kenya are either direct or indirect beneficiaries of these practices. It therefore explains their unwillingness and sabotage of any such process that may lead to reforms in the land sector. In a nutshell, and as found out earlier in this research, the TJRC process *"was dead on arrival in parliament"* because the *"big fish wont fry themselves"*. Through the critical inquiry prism, this study also found out that the actions of the political elite such as popularising the *"accept and move on"* mantra and insistence that infrastructural development is what will lead the country to prosperity, is only but a tactic aimed at maintaining status quo. This is because the *"accept and move on"* call ignores the need justice and reconciliation which are at the core of the social fabric of the nation and are prerequisites for the development they are championing. This whole discussion brings to light the debate on regime change and transitional justice.

9.6   CONTRIBUTION TO THE SOCIAL SCIENCES

This study demonstrated the potency in applying the study of institutions through the prism of historical institutionalism to the discourse on truth-telling processes. The research has made an additional contribution to approaches that combine the institutional and socio-cultural conceptions of change to the design of scientific frameworks for the analysis of as well as insight into the political, social, economic as well as cultural undercurrents that confront democratisation via the transitional justice/truth commission route. The nature of the problem and the potential of the social sciences to unravel this by applying the conceptual as well as theoretical conceptions have been demonstrated. Studies analysed in the literature review apply legal, globalisation, institutional, socio-cultural, historical and the normative conceptions to understanding transitional justice processes. This study sought to further delve into the institutional approaches. In particular, the thesis singled out historical institutionalism which emphasises the importance of history in understanding the behaviour of actors – their motivations, constraints and perceptions – about the history and how this affects the outcome of contemporary political processes. Paul Lederach´s comprehensive reconciliation framework was also applied in discussing the conceptions of justice and reconciliation as outcomes of truth processes. Subsequently, such a process should lead to the anticipated end goals of transitional justice which is democratisation. This study conceptualised this ultimate aim in the framework of participatory democracy thereby linking transitional justice to participatory democracy. The conceptual framework used in this study adds a social scientific value to understand change processes better using the critical analytical framework used in analysing the data for this study.

9.7   NORMATIVE CONTRIBUTION

Truth and reconciliation commissions have gained importance lately and seem to take centre stage in charting the pathways of change in societies. In other words, they have acquired prominence as the norm is post-conflict and democratisation discourses. This raises the need to widen the discussion on truth commission impact. In discussing truth commission impact the questions raised are whether truth-telling process actually achieve: (1) reparations recommended and whether they were implemented immediately (2) immediate publication of final report (3) official endorsement by the regime (4) immediate creation of follow-up institutions (5) investigation and/or prosecution of victims as recommended (6) deter further violations - these have direct impact on the creation of a participatory society. While this is the case, the discussion around change ought to factor in

questions about who is managing the change. Discussions about the necessity of regime change or change in structures of governance that come without a change in the attitude of the system in place also seem to feature. This study shed light on this. It raised the question on the need to challenge the assumptions in norm creation and the implementation of one-size-fits-all models.

Hayner (1997) argues that truth commissions are set up in the midst of political transitions as a way of responding to dark pasts. She further indicates that while they may take different shapes and sizes, depending on the context of the society in transition, they, however, are expected to follow certain minimum standards (1997:173). This is because truth commissions are set to confront, record and acknowledge the past with the idea that this will contribute to reconciliation, further healing and the transformation of society (1997:175) that is, for example, the emergence of a participatory society. When properly constituted and because it is officially sanctioned by government thereby enjoying the legal status, the commission should help in ushering a serious process of reform, victim reparations and other forms of accountability. She cautions however that *"truth-seeking body might be created with no coinciding commitment to instituting real reform"*. This is particularly the case because such far-reaching changes can only occur when there is action on the part of the elite who have the power to institute reforms and make changes in government policy (Hayner 1997:175). In light of these and other considerations, Hayner proposes certain basic principles necessary in the creation of truth commissions.

Hayner (1997) proposes that the creation of truth commissions must adhere to certain principles. These include the following: *"public participation in crafting the commission, time and resources for preparation and set-up, the flexible but strong mandate for investigation, political backing and operational independence, appropriate funding and staffing, implementation of recommendations and the role of international community"* (178-80). This study agrees with the principles as outlined by Hayner but proposes that in addition to the principles laid out certain other considerations must also be made in addition to these principles. These considerations are a result of the findings from the study and go a long way in ensuring that truth commission processes become effective. The first proposal relates to the legal framework within which a truth process is anchored.

In this regard, this thesis found out that the legal framework around which the TJRC was anchored was *too thin* and did not take care of the political and social realities of Kenya that may lead to the sabotage of the process. Further, the contribution also found out that there was tension *"between the ambitious vision created for the TJRC, and the requirements for making it operational"* (Naughton,

2014:62). This meant that these *"inconsistencies and ambiguities in the TJR Act"* would intensify the challenges faced by the Commissioners and lead to the uneven findings and variation in the detail of the coverage where certain regions such as the north were covered in great detail while others were not (Naughton, 2014:61). This may also have amounted to the reality that some regions may have been left out as earlier stated in this study. These were issues which were supposed to be addressed particularly by officers at the then Ministry of Justice and Constitutional Affairs at the drafting stage. It remains unclear whether the intention was, therefore, one of omission or commission. Alternatively, one might conclude that the whole process was done in haste and the mistakes made may, therefore, have been as a result of this same haste. Indeed Hayner also pointed out that truth commissions may help in confirming change in human rights practices record of a government as well as legitimise and strengthen the popularity of a new administration. She further pointed out that on the subsequently, a government may agree to form a commission to manipulate the perception of the public around the otherwise tarnished and abusive image. In this case, human rights abuses continue to be meted against citizen's right in the middle of the truth process and immediately after (1996:22). Maathai (2009) argued that *"impunity has always been part of governance in Kenya"*. According to her the real intention of the political in establishing the TJRC was the furtherance of impunity. The TJRC was a ploy to hoodwink and massage the pains suffered by victims of injustice. Additionally, the process was intended at facilitating a cover-up of the errors committed by the political elite. This was because none of the elite was interested in either truth or justice (Maathai, August 6, 2009). The reluctance by parliament to table the TJRC findings for adoption and implementation point to the reality that indeed the political elite was not entirely interested in the truth commission process and that it may have well-been pressure both from the citizens as well as the international community that led to the establishment of the Commission. In so doing, the government may not have been serious right from the drafting of the law that put the Commission into place. As such therefore the result was an Act described as *too thin* to take care of such realities.

Naughton (2014) argues that *"parliament did not produce an anaemic mandate, but it produced an intricate, unrealistic one, complicated by the country´s legalistic traditions, which raised difficulties from the start"*. She further affirms the unrealistic mandate of the TJRC by stating that *"the extraordinary and paradoxical element in the Kenyan case is that the participants managed to create a deeply challenged exercise while ostensibly receiving and accepting the best possible practices and principles identified internationally"* (Naughton 2014:65). This then brought about

the conflict between institutional support for truth-seeking and the political will that impacted on the success of the TJR process (Naughton 2014:66). These realities were illuminated in this study through the application historical institutionalism and related to actors and their behaviours as conditioned by history. The actors, in this case, are the elite in Kenya who because of their actions or actions by those closely related to them in the past, they may not be keen on ensuring that a robust framework and process in place. Obel Hansen rightly observed that *"it seems as if some decision-makers´ support for the TJRC was inspired by other narrow interests, such as shielding from justice members of the selfsame political elites"* (September 19, 2011). If anything, they would like to sabotage the process to maintain status quo.

While referring to the International Criminal Court (ICC) cases Hansen quotes the Panel of Eminent Persons which indicated that *"the personalisation and politicization of the ICC had obscured dialogue of reforms that would prevent future violence and the need to find justice for the victims including IDPs"* (September 19, 2011). In the same way, the lack of a robust legal framework gave way to the *´personalization and politicization´* of the findings of the TJRC and in the same way obscured the tabling in parliament and consequently the implementation of the recommendations. A suggestion, therefore, was made to not only to have in place a robust legal framework that takes care of these realities but also one that is self-perpetuating. Indeed a suggestion from one of the interview participants to have a law which did not require parliament to sit and deliberate on the findings but rather have an automated process which would lead to the direct implementation of the findings. It is this proposal that such a mechanism need to be considered in the circumstances similar to that of Kenya where there is no clear-cut transition from one regime to the other that this study wishes to make. This is done with the full recognition of the debate around whether regime must change for transitions to happen.

A second issue is about the environment and context within and around which truth commissions are established. This has got to do with timing. As observed in this study, the environment got too clouded with a set of processes taking place in Kenya at the same time. It was the observation of this study this may have impacted on the TJRC´s efficacy. The ICC cases that involved prominent politicians in Kenya, notably the president and his deputy, stole the moment from the truth commission process. At the same time, other reform processes such as the Constitution of Kenya 2010, security sector reforms and judicial reforms were underway at the same time. In supporting this Obel Hansen, for example, opines that *"the TJRC experienced serious challenges in fulfilling*

its mandate partly because there was overwhelming focus on the ICC process". The ICC process clouded the political context around which the TJRC´s success would have been anchored (September 19, 2011).

9.8   CONCLUSION

Can states realise the emergence of a participatory society as an outcome of a truth processes and to what extent are the long-term goals of transitional justice process achieved in societies? This study examined the viability of this claim by engaging in an in-depth research by applying the qualitative paradigm in the quest for this answer. In so doing, the study also delved into the general debate on transitions to democracy and sought to contribute to this direction. The contribution was unique in its attempt to systematically focus on the process of transition from authoritarianism to democracy via the truth-telling route. The contribution, therefore, had the vantage of analysing actors and institutions as well as their actions, motivations and constraints to arrive at the outcome of the truth-telling process in Kenya. This contribution, therefore, added a voice to the central question being asked in the overall field of ´transitions´: what informs the dynamics, characteristics and different formations witnessed in the variety of transitions experienced across the globe and particularly in Africa.

This research further confirmed that different transitions would exhibit different kinds of transitions because of their historical, political, social, cultural as well as economic conditions. In this study, the historical circumstances enabling or hindering the delivery of justice and reconciliation and thereby a participatory society were illuminated. From the historical institutionalism point of view, the study has shown that societies may find themselves in a *"lock-in"* condition and this thereby will greatly affect the pace of which transformation may be realised. The political elite may not be willing to engage in this kind of process given the repercussions that come with it. This is despite the *"lipstick"* commitment that they will show on the surface. The contribution found out that this was the condition in Kenya which exhibited such characteristics.

The above simply means that we cannot apply a *"one-size-fits-all"* approach in the effort to transform society in the establishment of transitional justice mechanisms. This is because each country is unique. In fact, this is a caution to the epistemic communities´ idea of change. Indeed, these particularities revealed that history matters in as far as the discourse on transitions to democracy is concerned. This is because actors, institutions and their choices are both motivated

and constrained by decisions made earlier in history. In the case of Kenya, for example, the study found out that the political elite finds themselves entrapped within a system that seeks to perpetuate itself through the continued exclusion, marginalisation and exploitation of the society. This is because of the peculiar nature of Kenya´s politics which the founding political elite inherited from the British system (as explained in section 5.2) and further perpetuated it. This explains the paradox that the same elite can put in place a process such as the TJRC where huge amounts of public funds are spent only for purposes of public relations.

Further, the research also illuminated the reasons why the above may have happened. An incomplete regime change in the case of Kenya may have hampered the change process. This study observed that arguments in favour of a regime change as a prerequisite for the complete implementation of the TJRC were dominant in the data collected. The argument took the position that the implementation of the TJRC report was up against a rough road under Uhuru Kenyatta because, directly or indirectly, he was a part of the historical injustices that were committed against parts of the country. He, therefore, was seen as lacking the political will to make right the wrong past by implementing these historical errors. It may still be argued that the anticipated change may still come, albeit slowly and through an incremental nature. The Chilean experience which has exhibited that the quest for justice can be long is a case in point. Reference can be drawn from the ICC processes where, according to Cruz (2017), the Chilean process started 27 years ago with the end of Augusto Pinochet´s dictatorship. The democracies that followed obstructed proper trials by national courts from prosecuting those responsible for human rights violations. Despite this, however, prosecutions of the perpetrators finally got underway in 2000 making the landmark step towards ending impunity (Cruz, March 9, 2017).

This further suggests that the change process advocated by the truth-telling regime may be one that proposes radical change as opposed to an incremental one. This further suggests views and preferences about change processes in any country are never uniform. Some prefer incremental processes while others prefer a clear break with the past. This ushers into motion the debate around truth commissions and prosecutions and the delicate balance and caution with which such a process ought to grapple with. A debate around the viability of this observation is subject to future studies which may take a comparative form and was not the subject of this study. From this study, it was however clear that the political regime in place at the time was not in favour of the change anticipated by the truth-telling process. This was particularly because either they had participated in

committing the historical injustices or because people close or related to them had. Either way, they were responsible for either facilitating or committing the historical injustices. In this way, the change recommended by the TJRC directly affected them or their cronies.

From the research, several issues emerged that are worth pointing out. Although the outstanding influence of international actors in processes of transitions has been subject to debate, the TJRC process revealed that the role of international actors played only a minimal role in influencing the process of establishment and the outcome of the TJRC. The international community, given that they funded various civil society groups at the time, could be considered part of the calls for change and the instituting of a truth-commission but later did not feature prominently regarding influencing in the TJR process. To a great extent, the dominant influences in the TJRC process were nationally based. This provided for the legitimacy of the process, albeit the sabotaging orchestrated by the political elite which finally led to the disenfranchisement of individuals and communities. Another issue worth mentioning is that the TJRC process has been lauded to have had the largest number of interviews in the history of truth commissions evidenced by the 2,200 pages report. This overwhelming response indicated the willingness of people to come before the Commission. Further, it indicates to the issue of legitimacy and cements the view that the process was widely anticipated and accepted by the populace.

The outcome of the TJR process also points out to the role of institutions, and the structures and processes that help in mediating change processes. For example, the process of putting together a law that governed the establishment of the TJRC (the TJRC Act No. 6 of 2008) which was described in the study as lacking a self-perpetuating mechanism that would see through the implementation of recommendations. Such change processes are greatly shaped by historical conditions that have led to the injustices in question. The process of instituting such change must be acutely aware of the likely possibility of these historical circumstances to influence the current change process, as was the case in Kenya. The role of institutions and individual actors, therefore, comes to question. This is because their leadership and decisions are bound to be influenced by the circumstances that led to the current grievances. The tendency is that they may want to maintain status quo since change directly affects their positions as well as wealth that may have been ill-gotten from the previous years.

The TJRC process further brings to question issues of timing, the complex nature of the socio-political as well as the cultural fabric of the society in question. This research found out that at the

time Kenya established the TJRC other processes of change had already been underway. Processes such as the one that led to the promulgation of the Constitutions of Kenya 2010 as well as the reform processes within the security and judiciary arenas may have stolen the thunder from the truth-telling process. It is indeed clear that the cases at the ICC which involved prominent Kenyan politicians, including the then president and his deputy, shifted the focus of public from the TJRC process. Alternatively, otherwise put, enabled the political elite from shifting the focus of the public from the TJR process. As a result, emphasis on the ICC and the results of the cases took centre stage. When therefore is it appropriate to institute a truth-telling process? Of course, clouded in this picture is the issue of lack of political will and how this can be addressed in advocating for such a process in the future.

The outcome of the TJRC also points to the fact that Kenya did not approach the TJRC within the wider framework of reforms. Alternatively, rather, the other reforms were seen as acting on their own to bring about transformation in the country. This brings to light the need to understand all these processes in a country as acting in concert to achieve a desirable outcome. In this study, it was pointed out that, for example, the other processes such as the ICC, constitutional reforms as well as the security sector reforms seemed to have stolen the thunder from the TJRC. Further, the report of the TJRC appears to replicate the work of previous commissions. Among these is the Report on the illegal/irregular allocation of public land of 2004, the Kiliku Report of 1992 which investigated the ethnic clashes in Western and other parts of Kenya and the report of the parliamentary committee that investigated the death of the former foreign affairs minister Dr Robert Ouko who was killed in 1990. Their recommendations have never been taken seriously. In some cases reports such as the Cockar Commission[47] have never been made public. This seemed, therefore, to compound the problem and further convolute the implementation process. It simply points out the fact that the reform process in Kenya appears to be spontaneous and reactive to the moment. The TJRC process had previously been recommended by the Makau Mutua task force which made their report in 2003, but the Kibaki regime had ignored this. It was only after the violence in 2007/8 that pressure to establish the TJRC mounted and the political elite yielded to this pressure.

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[47] Retired Justice Abdul Majid Cockar led the investigations into the dubious sale of the Grand Regency Hotel. The then Finance Minister as well as the Lands ministry had been mentioned in the sale of the Hotel. The Hotel was sold at Kenya Shillings 2.9 Billion which was deemed far less than the value. The report was presented to President Kibaki on November 23, 2008. The government promised to study the report and take necessary action (Barasa, November 24, 2008).

When is it the right moment for a truth commission? This study found out that several moments presented themselves with the right atmosphere under which processes of transformation should have been instituted. These were pointed out at as the beginning of the Jomo Kenyatta regime, the beginning of the Moi regime and the most obvious and potent moment being in 2002 when Mwai Kibaki came into power. This was the time when the NARC government was overwhelmingly voted in. These particular elections showed that the nation at large was tired of the Daniel Moi autocratic tendencies (who had ruled for about four decades) and was, therefore, voting Moi and his preferred successor Uhuru Kenyatta out. The election's outcome revealed that Mwai Kibaki got 63 percent of the votes cast compared to Uhuru Kenyatta´s (who was his closed challenger) 20 percent. As observed in this study, Mwai Kibaki had promised to give Kenya a cabinet with a national outlook and set the country on the path of breaking away from the past. Unfortunately, this did not happen. Kibaki went back to the exclusive politics, witnessed in the past and favoured members of his community and relegated the rest to marginalisation.

As a result of the division created by Kibaki´s actions, there was friction and the outright fallout between him (his party) and other affiliate members. Kenya, therefore, lost the truth commission moment after the Makau Mutua task force presented their findings on the need to a TRC which Mwai Kibaki ignored. This was occasioned by the lack of unity within the ruling party NARC. According to the historical institutionalism thinking, he reneged on the promise made due to the realisation that he was bound by past actions and breaking away from these would mean dire consequences for him and those allied to him. He would, therefore, abandon the formally agreed rules and go back to the informal rules, unwritten and only known by those that had committed injustices in the past and who did not want any reforms to see the light of the day.

9.9 FUTURE RESEARCH

This subsection takes into consideration the contributions made by this study as well as the limitations into account and suggests possibilities for future research. In doing so, the section seeks to point out to certain lines of thought which appeared interesting in the process of this investigation but which were outside the purview of the study. The thesis can however only point out to a few lines of thought that it found interesting for consideration in future research.

This study marked a modest contribution to the discourse on transitions to democracy via the truth-telling route. By nature, the thesis was only able to systematically delve into the TJRC process and

bring out the nuances therein. Adopting the conceptual framework in the contribution also meant that the research acquired a particular lens which could only present a particular worldview to such a study. It is therefore worth noting that the thesis had certain limitations but which can be taken care of by subsequent studies to shed further light and learning on this topic. It is therefore at this point that this study wishes to concede that the incompleteness of this study can be filled by much more studies that need to be done. Possible directions for future research on this topic include the following:

A systematic comparison of similar cases in Africa needs to be done. This will provide the topic with nuances in the similarities and differences in contexts, institutions as well as actors. Such a study will provide a more detailed analysis that brings out the reasons why different players make a certain decision and which historical influences lead to such decisions. Similar experiences of the truth-telling process have been instituted in Ghana[48], South Africa[49] and Sierra Leone[50], Rwanda[51], Zimbabwe[52], Nigeria[53] and Liberia[54], for example. These countries present different historical realities. Despite this, a comparison can still be made to bring out the nuances that inform decisions within a variety of contexts.

The TJRC report found out that *"sexual violence was committed"* since 1963 and 2008. The Commission *"received a total of 1,104 statements from adults"* *"representing a victim count of 2,646 women and 346 men"*. The violence included *"gang rape, sodomy, defilement, sexual slavery and other forms of sexual violence"*. Further, government agents committed sexual violence against women. The vice also had a legacy from the colonial times and continued during the administrations after independence. To this end the Commission recommended the setting up of

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[48] Was in operation between 2003 and 2004 and investigated human rights violations in Ghana which happened from 1957 to 1993 and was mandated to establish an accurate and complete historical record of human rights violations and abuses related to the killing, abduction, disappearance, detention, torture, ill-treatment and seizure of property during the said period.

[49] Was in operation between 1995 and 2002 and investigated the injustices committed during the apartheid regime from 1960 to 1994 and was aimed at the promotion of national unity and reconciliation.

[50] Was in operation between 2002 and 2004 and was in response to the 11 year civil war that started in 1991.

[51] Established as a result of the civil war in Rwanda in 1990 when the Tutsi dominated Rwandan Patriotic Front (RPF) entered Rwanda from Uganda. The war officially ended on August 4, 1993 with the signing of the Arusha Accords. Tensions however continued to simmer and in 1994, after the assassination of President Habyarimana, there was a genocide that went on for more than 100 days and killed between 500,000 to 1,000,000 people.

[52] Operated between 1983 and 1984 and was established by President Mugabe to investigate the alleged massacres of the people of Matebeleland, a region in the west of Zimbabwe, inhabited by the Ndebele people who were in opposition to Mugabe´s rule.

[53] Was in operation between 1999 and 2002 and was mandated to investigate the causes, nature and extent of human rights violations between 1966 and 1999. Had the mandate of identifying perpetrators, determining the role of the state in these violations and to recommend means to pursue justice and prevent future abuses.

[54] Was in operation between 2006 and 2009 and was aimed at promoting national peace, security, unity and reconciliation by investigating gross human rights violations and violations of human rights law, sexual violations and economic crimes occurring between 1979 and 2003.

gender violence recovery centers in each county as well as the establishment of the Office of the Special Rapporteur on Sexual Violence (TJRC Report, (Abridged Version), May 26, 2013). The physical and psychological sufferings from such experiences affect the well-being of the victims (especially women). Subsequently, they also lead to the feeling of not being a part of a nation. This is a precipitate of the attitude towards victims which leads them to not only think but also believe that the state does not care. It is in this vein that research into the outcome of the TJR process with particular reference to victims of sexual violence needs to be conducted in order to find out how this contributes to the presence or lack of a participatory society.

Further studies can also be made that delve into the issues of process and sequence: which is the right combination – a truth process + institutional reforms + trials and so on? Moreover, which is the right combination and when does which combination work best. Is it when the socio-political and cultural contexts resemble the one in Kenya or are it best when coming from a history of apartheid like South Africa? In the case of a long-dictatorship like the situation in Zimbabwe where opposition politics has been met with full force and thwarted, then what kind of combination would work in such a situation? This contribution is, of course, aware that there was a truth commission in Zimbabwe which investigated the massacres of the Ndebele people. However, the commission was established by the very dictator in question. What then would be the outcome of such a process?

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APPENDICES

APPENDIX A: INTERVIEW GUIDE FOR INDIVIDUALS AND COMMUNITY PARTICIPANTS IN THE COUNTIES

Introduction:

My name is Michael Owiso. I am a Kenyan PhD student in the department of Political Science at Aalborg University, Denmark. Thank you for your willingness to be interviewed in this project. I would like to first assure you that, if you so wish, this interview will remain anonymous, and no records of the interview will be kept in your name. I would also like to request your permission to audio record this interview so that I accurately capture you responses and opinions. This will help greatly in the analysis I will do later. If you do not have any further questions I would now like to introduce you to the subject of this project.

This interview guide is to help in gathering information on the extent to which the Truth, Justice and Reconciliation Commission in Kenya has facilitated justice and therefore mediated the institutionalization of participatory democracy in the country. Mainly, it is to explore the extent to which the TJRC process has influenced the principles and practice of participatory democracy in the country since the presentation of the report. It seeks to solicit your perceptions and understanding on the following questions: have the recommendations of the TJRC been implemented and to what extent? Has Kenya moved towards participatory democracy? Have Kenyans experienced improvement in rule of law, equity, human rights protection/violations, participatory governance and justice for victims? What has changed? Your response will broadly contribute to the debate regarding the effectiveness of truth commissions in mediating the institutionalization of participatory democracy in post-conflict states. It will thus inform government policy in Kenya, Africa and internationally on the future engagement of truth commissions in building a stable democratic future of nations. Please respond as honestly as you can to all the three sections of the guide. Feel free to make further comments you may wish. The responses you give will be treated with utmost confidentiality.

BASIC INFORMATION ABOUT THE INTERVIEWEE

Name (Optional)…………………………………Sex…………………Age……………………….

Date of Interview……………………….Time……………………….Place………………………..

Name of County………………………….Designation of Interviewee……………………………..

Type of violation(s) experienced (Optional)…………………………………………………………

Initial Open-Ended Questions

1. Tell how you came to know about the existence of Truth, Justice and Reconciliation Commission (TJRC).

2. What was your understanding regarding the purpose of the TJRC?

3. What were your hopes and dreams of the TJRC process?

4. What was your understanding of the relationship between the TJRC process and the realization of political, cultural, economic, legal and social rights?

Intermediate Questions

1. Could you tell me about your thoughts and feelings when you learned about the TJRC finalizing its work and presenting its report to the president.

2. To what extent has the TJRC process addressed the root causes of conflicts in Kenya?

3. How about access to justice and guaranteeing non-recurrence of violence?

4. How, if at all, have your thoughts and feelings about the TJRC process changed since the presentation of the report?

5. To what extent was the TJRC process adequate in dealing with the root causes of conflict in Kenya and the injustices of the past?

6. In your opinion what have been the challenges and limitations either encouraging or hindering the success of the TJRC process?

7. Tell me about you perceptions about who are the main actors who are crucial in ensuring the successful implementation of the report and their position?

Ending Questions

1. Could you describe the most important lessons you have learned about truth commission processes, attainment of justice and facilitation of participatory democracy after experiencing the TJRC process in Kenya? What factors would indicate the success of such processes?

2. Tell me about how your perceptions may have changed since the presentation of the TJRC report to the president?

3. We have covered a lot of issues and you have been patient. But do you think there is anything else we have left out?

4. Would you like to see a transcript of the interview?

5. I will send you a summary of the research findings sometime towards the end of May 2016. Later on, in March of 2017 you are welcome to have a full copy of the final report.

6. Is there anything you would like to ask me?

APPENDIX B: INTERVIEW GUIDE FOR GOVERNMENT OFFICERS AND PUBLIC OFFICIALS

Introduction:

My name is Michael Owiso. I am a Kenyan PhD student in the department of Political Science at Aalborg University, Denmark. Thank you for your willingness to be interviewed in this project. I would like to first assure you that, if you so wish, this interview will remain anonymous, and no records of the interview will be kept in your name. I would also like to request your permission to audio record this interview so that I accurately capture you responses and opinions. This will help greatly in the analysis I will do later. If you do not have any further questions I would now like to introduce you to the subject of this project.

This interview guide is to help in gathering information on the extent to which the Truth, Justice and Reconciliation Commission in Kenya has facilitated justice and therefore mediated the institutionalization of participatory democracy in the country. Mainly, it is to explore the extent to which the TJRC process has influenced the principles and practice of participatory democracy in the country since the presentation of the report. It seeks to solicit your perceptions and understanding on the following questions: have the recommendations of the TJRC been implemented and to what extent? Has Kenya moved towards participatory democracy? Have Kenyans experienced improvement in rule of law, equity, human rights protection/violations, participatory governance and justice for victims? What has changed? Your response will broadly contribute to the debate regarding the effectiveness of truth commissions in mediating the institutionalization of participatory democracy in post-conflict states. It will thus inform government policy in Kenya, Africa and internationally on the future engagement of truth commissions in building the democratic future of nations. Please respond as honestly as you can to all the three sections of the guide. Feel free to make further comments you may wish. The responses you give will be treated with utmost confidentiality.

BASIC INFORMATION ABOUT THE INTERVIEWEE

Name (Optional)……………………………………Sex…………………Age……………………….

Date of Interview……………………….Time……………………….Place………………………..

Name of County……………………….Designation of Interviewee…………………………..

Type of violation(s) you are aware of (Optional)…………………………………………………………….

Initial Open-Ended Questions

1. What was your understanding regarding the purpose of the TJRC?
2. What were your hopes and dreams of the TJRC process?
3. What was your understanding of the relationship between the TJRC process and the realization of political, cultural, economic, legal and social rights?

Intermediate Questions

1. Could you tell me about your thoughts and feelings when the TJRC finalized its work and presented its report to the president?
2. To what extent has the entire TJRC process addressed the root causes of conflicts in Kenya?
3. How about access to justice and guaranteeing non-recurrence of violence?
4. How, if at all, have your thoughts and feelings about the TJRC process changed since the presentation of the report?
5. To what extent was the TJRC process adequate in dealing with the root causes of conflict in Kenya and the injustices of the past?
6. In your opinion what have been the challenges and limitations either encouraging or hindering the success of the TJRC process?
7. Tell me about your perceptions about who are the main actors who are crucial in ensuring the successful implementation of the report and their position?

Ending Questions

1. Could you describe the most important lessons you have learned about truth commission processes, attainment of justice and facilitation of participatory democracy after experiencing the TJRC process in Kenya? What factors would indicate the success of such processes?
2. Tell me about how your perceptions may have changed since the presentation of the TJRC report to the president?
3. We have covered a lot of issues and you have been patient. But do you think there is anything else we have left out?
4. Would you like to see a transcript of the interview?
5. I will send you a summary of the research findings sometime towards the end of May 2016. Later on, in March of 2017 you are welcome to have a full copy of the final report.
6. Is there anything you would like to ask me?

APPENDIX C: INTERVIEW GUIDE FOR OFFICERS IN CIVIL SOCIETY ORGANISATIONS

Introduction:

My name is Michael Owiso. I am a Kenyan PhD student in the department of Political Science at Aalborg University, Denmark. Thank you for your willingness to be interviewed in this project. I would like to first assure you that, if you so wish, this interview will remain anonymous, and no records of the interview will be kept in your name. I would also like to request your permission to audio record this interview so that I accurately capture you responses and opinions. This will help greatly in the analysis I will do later. If you do not have any further questions I would now like to introduce you to the subject of this project.

This interview guide is to help in gathering information on the extent to which the Truth, Justice and Reconciliation Commission in Kenya has facilitated justice and therefore mediated the institutionalization of participatory democracy in the country. Mainly, it is to explore the extent to which the TJRC process has influenced the principles and practice of participatory democracy in the country since the presentation of the report. It seeks to solicit your perceptions and understanding on the following questions: have the recommendations of the TJRC been implemented and to what extent? Has Kenya moved towards participatory democracy? Have Kenyans experienced improvement in rule of law, equity, human rights protection/violations, participatory governance and justice for victims? What has changed? Your response will broadly contribute to the debate regarding the effectiveness of truth commissions in mediating the institutionalization of participatory democracy in post-conflict states. It will thus inform government policy in Kenya, Africa and internationally on the future engagement of truth commissions in building a stable democratic future of nations. Please respond as honestly as you can to all the three sections of the guide. Feel free to make further comments you may wish. The responses you give will be treated with utmost confidentiality.

BASIC INFORMATION ABOUT THE INTERVIEWEE

Name (Optional)…………………………………Sex…………………Age……………………….

Date of Interview……………………….Time……………………….Place……………………..

Name of County………………………….Designation of Interviewee…………………………..

Type of violation(s) experienced (Optional)…………………………………………………………

Initial Open-Ended Questions

1. Tell how you came to know about the existence of Truth, Justice and Reconciliation Commission (TJRC).

2. What was your understanding regarding the purpose of the TJRC?

3. What were your hopes and dreams of the TJRC process?

4. What was your understanding of the relationship between the TJRC process and the realization of political, cultural, economic, legal and social rights?

Intermediate Questions

1. Could you tell me about your thoughts and feelings when you learned about the TJRC finalizing its work and presenting its report to the president.

2. To what extent has the TJRC process addressed the root causes of conflicts in Kenya?

3. How about access to justice and guaranteeing non-recurrence of violence?

4. How, if at all, have your thoughts and feelings about the TJRC process changed since the presentation of the report?

5. To what extent was the TJRC process adequate in dealing with the root causes of conflict in Kenya and the injustices of the past?

6. In your opinion what have been the challenges and limitations either encouraging or hindering the success of the TJRC process?

7. Tell me about your perceptions about who are the main actors who are crucial in ensuring the successful implementation of the report and their position?

Ending Questions

1. Could you describe the most important lessons you have learned about truth commission processes, attainment of justice and facilitation of participatory democracy after experiencing the TJRC process in Kenya? What factors would indicate the success of such processes?

2. Tell me about how your perceptions may have changed since the presentation of the TJRC report to the president?

3. We have covered a lot of issues and you have been patient. But do you think there is anything else we have left out?

4. Would you like to see a transcript of the interview?

5. I will send you a summary of the research findings sometime towards the end of May 2016. Later on, in March of 2017 you are welcome to have a full copy of the final report.

6. Is there anything you would like to ask me?

APPENDIX D: INTERVIEW GUIDE FOR MEMBERS OF THE PUBLIC

Introduction:

My name is Michael Owiso. I am a Kenyan PhD student in the department of Political Science at Aalborg University, Denmark. Thank you for your willingness to be interviewed in this project. I would like to first assure you that, if you so wish, this interview will remain anonymous, and no records of the interview will be kept in your name. I would also like to request your permission to audio record this interview so that I accurately capture you responses and opinions. This will help greatly in the analysis I will do later. If you do not have any further questions I would now like to introduce you to the subject of this project.

This interview guide is to help in gathering information on the extent to which the Truth, Justice and Reconciliation Commission in Kenya has facilitated justice and therefore mediated the institutionalization of participatory democracy in the country. Mainly, it is to explore the extent to which the TJRC process has influenced the principles and practice of participatory democracy in the country since the presentation of the report. It seeks to solicit your perceptions and understanding on the following questions: have the recommendations of the TJRC been implemented and to what extent? Has Kenya moved towards participatory democracy? Have Kenyans experienced improvement in rule of law, equity, human rights protection/violations, participatory governance and justice for victims? What has changed? Your response will broadly contribute to the debate regarding the effectiveness of truth commissions in mediating the institutionalization of participatory democracy in post-conflict states. It will thus inform government policy in Kenya, Africa and internationally on the future engagement of truth commissions in building a stable democratic future of nations. Please respond as honestly as you can to all the three sections of the guide. Feel free to make further comments you may wish. The responses you give will be treated with utmost confidentiality.

BASIC INFORMATION ABOUT THE INTERVIEWEE

Name (Optional)…………………………………Sex…………………Age………………………….

Date of Interview……………………….Time……………………….Place………………………..

Name of County………………………….Designation of Interviewee……………………………..

Type of violation(s) experienced (Optional)………………………………………………………

Initial Open-Ended Questions

1. Tell how you came to know about the existence of Truth, Justice and Reconciliation Commission (TJRC).

2. What was your understanding regarding the purpose of the TJRC?

3. What were your hopes and dreams of the TJRC process?

4. What was your understanding of the relationship between the TJRC process and the realization of political, cultural, economic, legal and social rights?

Intermediate Questions

1. Could you tell me about your thoughts and feelings when you learned about the TJRC finalizing its work and presenting its report to the president.

2. To what extent has the TJRC process addressed the root causes of conflicts in Kenya?

3. How about access to justice and guaranteeing non-recurrence of violence?

4. How, if at all, have your thoughts and feelings about the TJRC process changed since the presentation of the report?

5. To what extent was the TJRC process adequate in dealing with the root causes of conflict in Kenya and the injustices of the past?

6. In your opinion what have been the challenges and limitations either encouraging or hindering the success of the TJRC process?

7. Tell me about your perceptions about who are the main actors who are crucial in ensuring the successful implementation of the report and their position?

Ending Questions

1. Could you describe the most important lessons you have learned about truth commission processes, attainment of justice and facilitation of participatory democracy after experiencing the TJRC process in Kenya? What factors would indicate the success of such processes?

2. Tell me about how your perceptions may have changed since the presentation of the TJRC report to the president?

3. We have covered a lot of issues and you have been patient. But do you think there is anything else we have left out?

4. Would you like to see a transcript of the interview?

5. I will send you a summary of the research findings sometime towards the end of May 2016. Later on, in March of 2017 you are welcome to have a full copy of the final report.

6. Is there anything you would like to ask me?

APPENDIX E: INTERVIEW GUIDE FOR FORMER COMMISSIONER/STAFF OF THE TJRC

Introduction:

My name is Michael Owiso. I am a Kenyan PhD student in the department of Political Science at Aalborg University, Denmark. Thank you for your willingness to be interviewed in this project. I would like to first assure you that, if you so wish, this interview will remain anonymous, and no records of the interview will be kept in your name. I would also like to request your permission to audio record this interview so that I accurately capture you responses and opinions. This will help greatly in the analysis I will do later. If you do not have any further questions I would now like to introduce you to the subject of this project.

This interview guide is to help in gathering information on the extent to which the Truth, Justice and Reconciliation Commission in Kenya has facilitated justice and therefore mediated the institutionalization of participatory democracy in the country. Mainly, it is to explore the extent to which the TJRC process has influenced the principles and practice of participatory democracy in the country since the presentation of the report. It seeks to solicit your perceptions and understanding on the following questions: have the recommendations of the TJRC been implemented and to what extent? Has Kenya moved towards participatory democracy? Have Kenyans experienced improvement in rule of law, equity, human rights protection/violations, participatory governance and justice for victims? What has changed? Your response will broadly contribute to the debate regarding the effectiveness of truth commissions in mediating the institutionalization of participatory democracy in post-conflict states. It will thus inform government policy in Kenya, Africa and internationally on the future engagement of truth commissions in building a stable democratic future of nations. Please respond as honestly as you can to all the three sections of the guide. Feel free to make further comments you may wish. The responses you give will be treated with utmost confidentiality.

BASIC INFORMATION ABOUT THE INTERVIEWEE

Name (Optional)………………………………Sex…………………Age……………………….

Date of Interview……………………….Time……………………….Place……………………..

Name of County……………………….Designation of Interviewee……………………………..

Type of violation(s) experienced (Optional)……………………………………………………………

Initial Open-Ended Questions

1. Tell me about you experience working with the TJRC?

2. What were your hopes and dreams of the TJRC process?

3. What was your understanding of the relationship between the TJRC process and the realization of political, cultural, economic, legal and social rights?

Intermediate Questions

1. Could you tell me about your thoughts and feelings when the TJRC finalized its work and presented its report to the president?

2. In your opinion to what extent did the TJRC process address the root causes of conflicts in Kenya?

3. How about access to justice and guaranteeing non-recurrence of violence?

4. How, if at all, have your thoughts and feelings about the TJRC process changed since the presentation of the report?

5. To what extent was the TJRC process adequate in dealing with the root causes of conflict in Kenya and the injustices of the past?

6. In your opinion what have been the challenges and limitations either encouraging or hindering the success of the TJRC process?

7. Tell me about your perceptions about who are the main actors who are crucial in ensuring the successful implementation of the report and their position?

Ending Questions

1. Could you describe the most important lessons you have learned about truth commission processes, attainment of justice and facilitation of participatory democracy after experiencing the TJRC process in Kenya? What factors would indicate the success of such processes?

2. Tell me about how your perceptions may have changed since the presentation of the TJRC report to the president?

3. We have covered a lot of issues and you have been patient. But do you think there is anything else we have left out?

4. Would you like to see a transcript of the interview?

5. I will send you a summary of the research findings sometime towards the end of May 2016. Later on, in March of 2017 you are welcome to have a full copy of the final report.

6. Is there anything you would like to ask me?

APPENDIX F: INTERVIEW GUIDE FOR FOCUSED GROUP DISCUSSIONS

Introduction:

My name is Michael Owiso. I am a Kenyan PhD student in the department of Political Science at Aalborg University, Denmark. Thank you for your willingness to be interviewed in this project. I would like to first assure you that, if you so wish, this interview will remain anonymous, and no records of the interview will be kept in your name. I would also like to request your permission to audio record this interview so that I accurately capture you responses and opinions. This will help greatly in the analysis I will do later. If you do not have any further questions I would now like to introduce you to the subject of this project.

This interview guide is to help in gathering information on the extent to which the Truth, Justice and Reconciliation Commission in Kenya has facilitated justice and therefore mediated the institutionalization of participatory democracy in the country. Mainly, it is to explore the extent to which the TJRC process has influenced the principles and practice of participatory democracy in the country since the presentation of the report. It seeks to solicit your perceptions and understanding on the following questions: have the recommendations of the TJRC been implemented and to what extent? Has Kenya moved towards participatory democracy? Have Kenyans experienced improvement in rule of law, equity, human rights protection/violations, participatory governance and justice for victims? What has changed? Your response will broadly contribute to the debate regarding the effectiveness of truth commissions in mediating the institutionalization of participatory democracy in post-conflict states. It will thus inform government policy in Kenya, Africa and internationally on the future engagement of truth commissions in building a stable democratic future of nations. Please respond as honestly as you can to all the three sections of the guide. Feel free to make further comments you may wish. The responses you give will be treated with utmost confidentiality.

Before we start, I would like to remind you that there are or right or wrong answers in this discussion. We are interested in knowing what each of you think, so please feel free to be frank and to share your point of view, regardless of whether you agree or disagree with what you hear. I highly value all opinions. Kindly treat others in the group as you want to be treated by not telling anyone about what you hear in this discussion today. Let's start by going around the circle and having each person introduce him/herself.

Initial Open-Ended Questions

1. Tell how you came to know about the existence of Truth, Justice and Reconciliation Commission (TJRC) and the community reception to the process?

2. What was community´s understanding of the purpose of the TJRC?

3. What were your hopes and dreams of the TJRC process?

4. What was your understanding of the relationship between the TJRC process and the realization of political, cultural, economic, legal and social rights?

Intermediate Questions

1. Could you tell me about your thoughts and feelings when you learned about the TJRC finalizing its work and presenting its report to the president.
2. To what extent has the TJRC process addressed the root causes of conflicts in Kenya?
3. How about access to justice and guaranteeing non-recurrence of violence?
4. How, if at all, have your thoughts and feelings about the TJRC process changed since the presentation of the report?
5. To what extent was the TJRC process adequate in dealing with the root causes of conflict in Kenya and the injustices of the past?
6. In your opinion what have been the challenges and limitations either encouraging or hindering the success of the TJRC process?
7. Tell me about your perceptions about who are the main actors who are crucial in ensuring the successful implementation of the report and their position?
8. Tell me about the transition the community has experienced into more freedoms and equitable distribution of resources as a result of the TJRC process?

Ending Questions

1. Could you describe the most important lessons you have learned about truth commission processes, attainment of justice and facilitation of participatory democracy after experiencing the TJRC process in Kenya? What factors would indicate the success of such processes?
2. Tell me about how your perceptions may have changed since the presentation of the TJRC report to the president?
3. We have covered a lot of issues and you have been patient. But do you think there is anything else we have left out?
4. Would you like to see a transcript of the interview?
5. I will send you a summary of the research findings sometime towards the end of May 2016. Later on, in March of 2017 you are welcome to have a full copy of the final report.
6. Is there anything you would like to ask me?

APPENDIX H: IMPLEMENTATION MATRIX

Table 4: TRJC Recommendations and Implementation Matrix

TRUTH, JUSTICE AND RECONCILIATION COMMISSION
Promoting Peace, Justice, National Unity, Dignity, Healing and Reconciliation Among The People of Kenya

Annex: Recommendations and Implementation Matrix

	Theme/Subject	Recommendations	Responsibility for implementation	Timeline
1	**Atrocities committed during colonial era**	Acknowledgment and apology	British government	
		Negotiation for compensation from the British government	Kenyan government and British government	12 months
2	**Shifta War**	Acknowledgment and apology	President and Chief of Defence Forces	6 months
		Repeal of Indemnity Act	Attorney General and Parliament	9 months
		Publication and dissemination of the 1967 Arusha Agreement between Kenya and Somalia	Ministry of Foreign Affairs/Office of the President	9 months
		Establishment of a public memorial	Implementation Mechanism/Ministry responsible for National Heritage/National Museum	24 months
3	**Massacres**	Acknowledgment and apology	President, Inspector General of Police and Chief of Defence Forces	6 months
		Reparation for victims and survivors	Implementation Mechanism	36 months
		Release of all minutes of the relevant District Security Committees, Provincial Security Committee, Kenya Intelligence Committee and National Security Council	President/Office of the President	6 months
		Establishment of memorials at the sites of massacres	Implementation mechanism/Ministry responsible for National Heritage/National Museum	24 months
		Return of Father Adrian Joseph Janito for purposes of giving testimony on Bubisa Massacre	Catholic Church	
4	**Political assassinations**	Acknowledgment and apology	President	6 months
		Release of all reports and materials of all previous investigations of political assassinations	President/Office of the President	6 months
		Further investigations relating to the assassination of JM Kariuki, Robert Ouko, Crispin Odhiambo-Mbai and Father Antony Kaiser	Director of Public Prosecutions	18 months
		Further investigation of the assassination of Father Antony Kaiser	Director of Public Prosecutions to appoint independent investigator(s)	18 months
		Establishment of public memorials	Implementation Mechanism/ministry responsible for national heritage/National Museum	24 months
5	**Extra-judicial killings**	Acknowledgment and apology	President, Inspector General of Police and Chief of Defence Forces	6 months
		Ratification of International Convention for the Protection of All Persons from Enforced Disappearance	Ministry of Foreign Affairs	24 months
		Fast-tracking of reforms in the Police Service, including introduction of new standard operating procedures on the use of force	Inspector General of Police and Police Service Commission	
		Establishment of a fully equipped modern national forensic laboratory	Ministry responsible for internal security and other relevant ministries/institutions	36 months
		Establishment of fully equipped modern forensic laboratories in each county	Ministry responsible for internal security and other relevant ministries/institutions	36 months
		Abolition of the death penalty and commuting of all death penalties to life imprisonment	Attorney General and Parliament	24 months
		Reparation for victims and survivors	Implementation mechanism	36 months
6	**Unlawful detention, torture and ill-treatment**	Acknowledgment and apology	President	3 months
		Enactment of legislation prohibiting torture	Attorney General and Parliament	12 months
		Legislation on and establishment of the Office of the Independent Inspector of Prisons and All Places of Detention	Attorney General and Parliament	12 months
		Prosecution of individuals involved in torture and ill-treatment	Director of Public Prosecutions	18 months
		Designation of Nyayo House as memorial for victims of detention and torture	Implementation mechanism/Ministry responsible for National Heritage/National Museum	12 months
		Reparation for victims and survivors	Implementation mechanism	36 months
7	**Sexual violence**	Acknowledgment and apology	President, Inspector General of Police and Chief of Defence Forces, and British government	6 months
		Negotiation for compensation (in relation to victims and survivors of sexual violence committed by British soldiers in Laikipia and Samburu)	Kenyan government and British government	
		Establishment of one-stop gender recovery centers for provision of comprehensive services to victims and survivors of sexual violence, including medical, counseling and legal services	Relevant government ministries, departments and bodies including: Ministry of Health; Ministry of Justice; Director of Public Prosecutions; Police Service; NGEC; etc.	
		Legislation on and establishment of the Office of the Special Rapporteur on Sexual Violence	Attorney General and Parliament	12 months
		Fast-tracking of the establishment of a sexual offenders registry	Chief Registrar of the Judiciary	12 months
		Reparation for victims and survivors	Implementation Mechanism	36 months
8	**Access to justice**	Fast-tracking of the establishment of the International Crimes Division of the High Court	Chief Justice	12 months
		Fast-tracking of establishment of a nationwide legal aid system	Ministry of Justice/National Legal Aid (And Awareness) Programme in Kenya (NALEAP)	18 months
		Declaration under article 34(6) of the Protocol to the African Charter on Human and Peoples' Rights on the Establishment of the African Court on Human and Peoples' Rights	Ministry of Foreign Affairs	12 months
		Issuance of a public report on the progress of investigations and prosecution of 2007/2008 post-election related violence	Director of Public Prosecutions	3 months (and in 3 months intervals thereafter)

	Theme/Subject	Recommendations	Responsibility for implementation	Timeline
		Fast-tracking of enactment of human rights related laws as envisaged by the Constitution of Kenya: ▪ Legislation on freedom of the media (section 34) ▪ Legislation on fair hearing (section 50) ▪ Legislation on the rights of persons detained, held in custody or detained (section 51)		
9	Women	Acknowledgment and apology	President	3 months
		Stepping up of measures to raise awareness about harmful cultural practices	Equality and Gender Commission	
		Enactment of relevant laws (e.g. marriage; matrimonial property; family protection/domestic violence)	Attorney General and Parliament	18 months
		Adoption and implementation of a Plan of Action to increase and improve maternal health facilities and measures to reduce delivery at home	Ministry of Health	12 months
10	Children	Acknowledgment and apology	President	6 months
		Psychosocial counseling for children victims of atrocities	Implementation Mechanism and relevant government departments/institutions	
		Reparation for children victims of atrocities and injustices	Implementation Mechanism	36 months
		Reorganization of Borstal institutions to fall under the Department of Children's Services	Office of the President	12 months
		Adequate funding of the Department of Children's Services	Ministry of Finance	Continuous
		Robust plan for Integration of children with disabilities in mainstream educational facilities	Ministry of Education	12 months
11	Minority groups and indigenous people	Acknowledgment and apology	President	6 months
		Implementation of decisions relating to minority/indigenous communities: ▪ Decision of the African Commission on Human and Peoples' Rights in Communication No. 276/2003 *Center for Minority Rights Development (Kenya) & Minority Rights Group International (on behalf of Endorois Welfare Council) v Kenya* ▪ Decision of the African Committee of Experts on the Rights and Welfare of the Child in Communication No. 002/09 *IHRDA & OSJI (on behalf of children of Nubian descent in Kenya) v Kenya* ▪ Decision of the High Court of Kenya in *Charles Lekuyen Nabori & 9 Others v Attorney General and 3 Others* [Petition No. 466 of 2006, High Court at Nairobi]	Various relevant ministries and institutions	12 months
		Ratification of relevant treaties: ▪ ILO Convention 169 ▪ Convention on the Prevention and Punishment of the Crime of Genocide ▪ Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families ▪ Convention Against Discrimination in Education ▪ Statelessness Conventions	Ministry of Foreign Affairs	24 months
		Fast-tracking of legislation on as envisaged by section 100 of the Constitution of Kenya	Attorney General, Constitutional Implementation Committee, and National Gender and Equality Commission	
		Review of all legislation to eliminate *de jure* and *de facto* discrimination against minority/indigenous communities	Kenya Law Reform Commission and National Gender and Equality Commission	6 months
		Development and implementation of a plan on data collection on minority and indigenous communities	Kenya Bureau of Statistics and Ministry of National Planning	
		Implementation of the recommendations of the Presidential Special Action Committee to Address Specific Concerns of the Muslim Community in Regard to Alleged Harassment and/or Discrimination in the Application/Enforcement of the Law	Relevant ministries and institutions	
12	Economic marginalization and violations of socio-economic rights	Formulation, adoption and implementation of a policy on the economic development of marginalized regions identified by the Commission Focus: ▪ Roads and infrastructure ▪ Health ▪ Education ▪ Water	Relevant Ministries and institutions including Ministry for Finance, Ministry of Health, Ministry of Education, Commission on Revenue Allocation, etc.	12 months
		Collective reparation for communities in marginalized regions identified by the Commission	Implementation mechanism and relevant state ministries and institutions	36 months

	Theme/Subject	Recommendations	Responsibility for implementation	Timeline
13	Land	Further investigations of alleged illegal or irregular acquisition of land	National Land Commission	
		Survey, demarcation and registration of public land		
		Adjudication and registration of land at the Coast and other areas where this has not been done	National Land Commission	
		Development and maintenance of a computerized inventory of all land	Ministry of Lands and National Land Commission	
		Reparation for historical land injustices	Implementation Mechanism and National Land Commission	36 months
14	**Economic Crimes and Grand Corruption**	Harmonization of the various laws relating to combating economic crimes and grand corruption	Attorney General and Parliament	18 months
		Domestic criminalization of certain offences stipulated in the UN Convention Against Corruption	Attorney General and Parliament	18 months
		Expansion of the Ethics and Anti-Corruption Commission (from 3 to 9 commissioners)	Attorney General and Parliament	18 months
		Fast-tracking of investigations of corruption cases which have remained unresolved for many years	EACC	18 months
		Clarification of 'integrity test'	EACC	6 months
15	**Ethnic tension and reconciliation**	National Reconciliation Conference/Day	President/Implementation Mechanism/NCIC/NSC	6 months
		Investigation and prosecution of all adversely mentioned persons in official reports on political instigated ethnic violence or clashes	Director of Public Prosecutions	
		Audit of institutions and mechanism involved in peacebuilding, reconciliation and early warning with a view to harmonizing their activities and adopting a coordinated approach.	Joint Task Force of the NCIC, NSC and CSOs/CBOs	6 months
		Comprehensive and sustained nation-wide community dialogues	NCIC and National Steering Committee on Peacebuilding and Conflict Management (NSC)	Continuous
16	**Mt. Elgon conflict**	Acknowledgment and apology	President/Inspector General of Police/Chief of Defence Forces	6 months
		Establishment of a counseling and healing center	Implementation Mechanism and relevant government ministries/institutions	12 months
		Establishment of a memorial for victims and survivors	Implementation mechanism/Ministry responsible for National Heritage/National Museum	36 months
		Reparation for victims and survivors	Implementation Mechanism	36 months
		Exhumation and reburial	Implementation Mechanism and relevant government ministry/institution	36 months
		Prosecution of individuals alleged to have been involved in the planning, financing and instigating violence and other atrocities	Director of Public Prosecutions	18 months
		Prosecution of army commander in charge of *Operation Okoa Maisha*	Director of Public Prosecutions	18 months
17	**Forced displacement**	Facilitation and resettlement of Kenyan refugees in Uganda who are willing to return to Kenya	Relevant Government Ministry/Department responsible for matters relating to internal displacement.	18 months
		Fast-tracking of the operationalisation of the Prevention, Protection and Assistance to Internally Displaced Persons and Affected Communities Act, No. 56 of 2012	Relevant Government Ministry/Department responsible for matters relating to internal displacement.	6 months
		Audit and registration of all IDPs who did not benefit from *Operation Rudi Nyumbani* with a particular focus on integrated IDPs	Implementation Mechanism and National Consultative Coordination Committee on Internally Displaced Persons	12 months
		Reparation for IDPs and refugees	Implementation Mechanism	36 months
		Ratification of the African Union Convention for the Protection and Assistance of Internally Displaced Persons	Ministry of Foreign Affairs	24 months
18	**Reports of commissions of inquiry**	Release of reports of previous commission of inquiries and related bodies: • Report of the Commission of Inquiry into the 1992 Raid on Bishop Gitari's House in Kirinyaga • Report of the Commission of Inquiry into the Conduct of the Artur Brothers and their Associates ('Kiruki Report') • Report of the Presidential Action Committee to Address Specific Concerns of the Muslim Community in Regard to Harrassment and/or Discrimination in the Application and Enforcement of the Law ('Sharawe Report')	President	6 months

Source: http://digitalcommons.law.seattleu.edu/tjrc/10

APPENDIX I: COPY OF AUTHORIZATION LETTER FROM THE NATIONAL COMMISSION FOR SCIENCE, TECHNOLOGY AND INNOVATION

NATIONAL COMMISSION FOR SCIENCE, TECHNOLOGY AND INNOVATION

Telephone: +254-20-2213471, 2241349, 310571, 2219420
Fax: +254-20-318245, 318249
Email: secretary@nacosti.go.ke
Website: www.nacosti.go.ke
When replying please quote

9th Floor, Utalii House
Uhuru Highway
P.O. Box 30623-00100
NAIROBI-KENYA

Ref: No.

Date:

9th July, 2015

NACOSTI/P/15/6747/6387

Owiso Omondi Michael
Aalborg University
DENMARK.

RE: RESEARCH AUTHORIZATION

Following your application for authority to carry out research on *"Transitional justice and the institutionalization of democracy: A study of the Truth, Justice and Reconciliation Commission in Kenya,"* i am pleased to inform you that you have been authorized to undertake research in **selected Counties** for a period ending **29th April, 2016.**

You are advised to report to **the Principal Secretaries of the selected Ministries, Chief Executive Officers of the selected Government Agencies, the County Commissioners and the County Directors of Education of the selected Counties** before embarking on the research project.

On completion of the research, you are expected to submit **two hard copies and one soft copy in pdf** of the research report/thesis to our office.

**DR. S. K. LANGAT, OGW
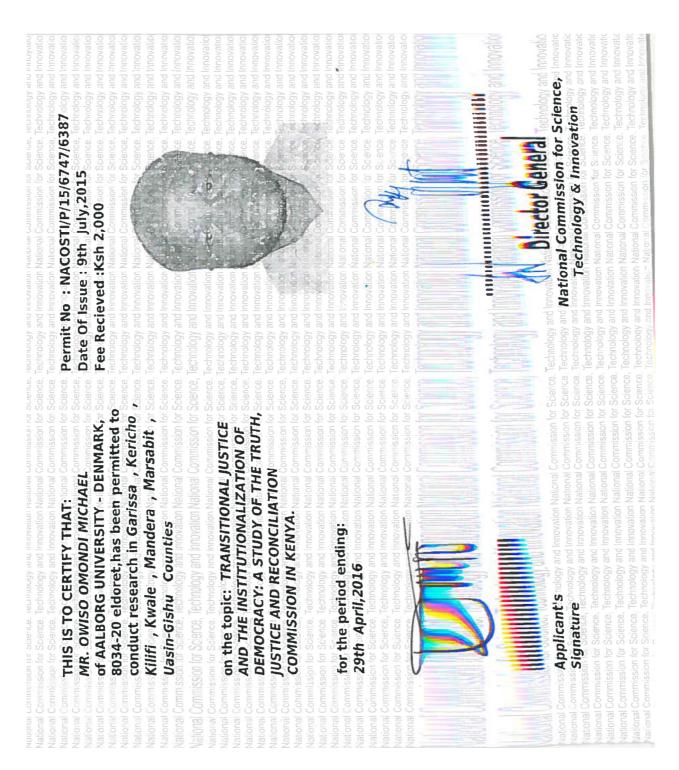FOR: DIRECTOR-GENERAL/CEO**

Copy to:

The Principal Secretaries
Selected Ministries.

The Chief Executive Officers
Selected Government Agencies.

National Commission for Science, Technology and Innovation is ISO 9001: 2008 Certified

APPENDIX J: COPY OF RESEARCH PERMIT FROM THE NATIONAL COMMISSION FOR SCIENCE, TECHNOLOGY AND INNOVATION

Permit No : NACOSTI/P/15/6747/6387

Date Of Issue : 9th July,2015

Fee Recieved : Ksh 2,000

THIS IS TO CERTIFY THAT:

MR. OWISO OMONDI MICHAEL
of AALBORG UNIVERSITY - DENMARK,
8034-20 eldoret,has been permitted to
conduct research in *Garissa , Kericho ,*
Kilifi , Kwale , Mandera , Marsabit ,
Uasin-Gishu Counties

on the topic: *TRANSITIONAL JUSTICE*
AND THE INSTITUTIONALIZATION OF
DEMOCRACY: A STUDY OF THE TRUTH,
JUSTICE AND RECONCILIATION
COMMISSION IN KENYA.

for the period ending:
29th April,2016

Director General

National Commission for Science,
Technology & Innovation

Applicant's
Signature

385

REPUBLIC OF KENYA

National Commission for Science,
Technology and Innovation

RESEARCH CLEARANCE PERMIT

Serial No. A 5701

CONDITIONS: see back page

CONDITIONS

1. You must report to the County Commissioner and the County Education Officer of the area before embarking on your research. Failure to do that may lead to the cancellation of your permit

2. Government Officers will not be interviewed without prior appointment.

3. No questionnaire will be used unless it has been approved.

4. Excavation, filming and collection of biological specimens are subject to further permission from the relevant Government Ministries.

5. You are required to submit at least two(2) hard copies and one(1) soft copy of your final report.

6. The Government of Kenya reserves the right to modify the conditions of this permit including its cancellation without notice