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COUNCIL FOR THE DEVELOPMENT OF SOCIAL SCIENCE RESEARCH IN AFRICA / CONSEIL POUR LE DEVELOPPEMENT DE LA RECHERCHE EN SCIENCES SOCIALES EN AFRIQUE
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Africa Development, Volume XLIX No. 4, 2024, pp. 151-176
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(ISSN: 0850 3907) https://doi.org/10.57054/ad.v49i4.

Commissions of Inquiry: The Hybrid Hollowing out of State Governance in South Africa

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Abstract

The release in mid-2022 of *The Judicial Commission of Inquiry into Allegations of State Capture Report* brought the number of completed official commissions of inquiry (CoIs) since 2001 to twelve. In this time, there has been a substantial increase in the use and establishment of CoIs. This article contends that the establishment of CoIs in inappropriate circumstances should be seen as a disturbing practice by the African National Congress (ANC)-led government to outsource its political and institutional leadership role to quasi-legal arrangements like CoIs. This article uses Rational Choice Theory/ Choice Theory to examine the terms of reference of two recent CoIs. It then contends that there has been a marked decline in state capacity, and that appointing CoIs because of ANC political party decisions is a form of the hybrid 'hollowing out of state governance', that is outsourcing governance and leadership to CoIs. This jeopardises the government's ability to address socio-economic and institutional public policy problems. New government usage standards are needed to guide decisions on when it is indeed appropriate in South Africa to establish a CoI to examine and report on an important societal concern.

Keywords: Commissions of inquiry, South Africa, African National Congress, Rational Choice Theory, Choice Theory, governance

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Résumé

La publication, mi-2022, du rapport de la Commission d'enquête judiciaire sur les allégations de captation de l'État a porté à douze le nombre de commissions d'enquête officielles (CE) menées à terme depuis 2001. Au cours de cette période, le recours à et la création de CE ont considérablement augmenté. Cet article soutient que la création, dans des circonstances inappropriées, de CE doit être considérée comme une pratique inquiétante de la part du gouvernement dirigé par le Congrès national africain (ANC) qui a pour objectif d'externaliser son rôle de leadership politique et institutionnel vers des dispositifs quasi juridiques tels que les CE. Cet article s'appuie sur la théorie du choix rationnel/théorie du choix pour examiner les termes de référence de deux dernières CE. Il soutient ensuite que les capacités de l'État ont connu un déclin marqué et que la mise en place de commissions d'enquête sur la base de décisions politiques de l'ANC constitue une forme hybride de « désagrégation de la gouvernance étatique », c'est-à-dire une externalisation de la gouvernance et du leadership vers des commissions d'enquête. Cela compromet la capacité du gouvernement à résoudre les problèmes socio-économiques et institutionnels de politique publique. En Afrique du Sud, de nouvelles normes d'usage gouvernementales sont nécessaires pour décider de l'opportunité de créer des commissions d'enquête chargée d'examiner et de rendre compte d'une préoccupation sociétale importante.

Mots-clés : commissions d'enquête ; Afrique du Sud ; Congrès national africain ; théorie du choix rationnel ; théorie du choix ; gouvernance.

Introduction

Since 2001, South Africa's African National Congress (ANC)-led national government has frequently used the political-legal apparatus known as a commission of inquiry (CoI), also known as a public inquiry, to address various socio-economic and political problems plaguing the state. In the period 2018 to 2022, the revelations about South African political and economic elites' abuse of authority that emerged from hearings of the Judicial Commission of Inquiry into Allegations of State Capture, Corruption and Fraud in the Public Sector including Organs of State (colloquially known as the Zondo Commission) shocked people across the world (Nicol 2022).

While the Zondo Commission was critical in distilling various moral and institutional lapses in the state and organs of state, the fact that it cost about R1 billion (about U$55 million) (Ramela 2022) raises serious questions about the efficacy of using CoIs to address critical governance problems (AZAPO Voice 2018). So, while the Zondo Commission should be seen as a positive development for holding the government to account

(Haffajee and Chipkin 2022), and enhancing oversight of the highest office and many powerful individuals, it must be seen as a step, and not a panacea, for addressing misgovernance (Kohn 2024).

This article adds new thinking to ideas about CoIs and how they are being used by the South African government. It contends that, rather than adding to the understanding of various socio-political and institutional weaknesses in South Africa, more recent CoIs are proof of a decline of governance political and institutional leadership capacity (Mazzucato et al. 2021). This type of action by the South African government is referred to in the current article as a 'hybrid hollowing out of the state' for reasons described below.

Howlett (2000) introduced the idea of 'the hollow state' which refers to governments which outsource the management of critical public utilities like energy, water and healthcare to private/ non-government actors rather than governing these critical areas themselves:

> Many states have undergone a kind of 'hollowing out,' as various functions and activities traditionally undertaken by governments – from highway maintenance to psychiatric care – have been contracted-out or otherwise devolved to non or quasi-governmental organizations, further deepening the network structure and character of contemporary life (Howlett 2000: 413).

This article extends Howlett's concept of 'hollowed-out' state governance by contending that, when it exercises the choice to appoint CoIs, the South African state is not only outsourcing its governance role, it is also outsourcing its leadership. This is referred to in the current article as a 'hybrid hollowing out' of the state.

This article's main contention is illustrated by examining the terms of reference (TORs) of two recent CoIs – the Judicial Commission of Enquiry into Allegations of Impropriety at the Public Investment Corporation (2020) and the Report of the Commission of Inquiry into Higher Education and Training (2017).

Historical background to CoIs

The idea of commissions of inquiry/ public inquiries has come to occupy quite a prominent role in the thinking of average (non-legal expert) South African citizens (Mkhatshwa 2018), especially as it relates to how they view the use of political and institutional power by prominent government authorities. The current article is open to finding out about the practice of CoIs in other non-Western states, and will begin by using the interpretation of the concept that emerged in twelfth-century England.

Elaborating on their origins of CoIs, Lester (2016) explains,

> In medieval England they were variously used as tribunals, to determine legal guilt or innocence, or as investigative instruments when treason or sedition was suspected, or to prosecute those who posed a threat to the Monarchy. (Lester 2016: 25).

Two key ideas emerge from the preceding paragraph.

Firstly, CoIs were used as legal instruments to arrive at determinations of the threat posed by certain individuals to the authority of, for example, monarchies in medieval England (Lester 2016). Secondly, while they were legal instruments to determine a legal outcome of guilt or innocence, COIs were and (some might argue) continue to be, political instruments, not simply legal instruments. Put differently, it can be contended that authorities of the time – the monarchy in the early twelfth century or authorities in the present time – have a significant influence on how and when CoIs are appointed. This continues to be the case in the current time.

One arena where this applies is multilateral institutions such as the United Nations High Commissioner for Human Rights (OHCHR) where international CoIs have come to be favoured by the United Nations Security Council, the General Assembly, the Human Rights Council, the United Nations Secretary-General, the High Commissioner for Human Rights, as well as regional multilateral entities (OHCHR 2015: V).

This statement about the use of CoIs by entities that are not state governments clearly indicates the popularity and growing importance of CoIs as policy tools and, perhaps, as mechanisms. This brief historical overview of CoIs has intentionally used what can be termed an international or Western prism of analysis. The following section focuses specifically on South Africa.

The South African landscape pre- and post-1994

Pre-1994 South Africa

A good starting point for examining the history of CoIs in South Africa is Gardiol van Niekerk's doctoral study *The Interaction of Indigenous Law and Western Law in South Africa: A Historical and Comparative Perspective* (Van Niekerk 1995). Van Niekerk explains how pre-1994 commissions were appointed under the imposition of Western white colonial rule. Some notable examples of colonial-era CoIs in South Africa include the Cape Native Laws and Customs Commission (1881) and the Cape Native Laws and Customs Commission (1883). One of the many benefits of Van Niekerk's work is that it gives a good insight into how CoIs can operate under a politically and socially immoral system such as British colonialism.

Two other insights can be garnered from the work of Van Niekerk as it relates to the current article's argument on the use of CoIs.

Firstly, it shows that CoIs in South Africa that date back to the era of British colonial rule and the apartheid era were like the British monarch's political tools – to be used by political elites and leaders to achieve semi-legal outcomes (or quasi-legal outcomes) for their rule. In the case of British and Afrikaner despotic rule, most Africans were disregarded, and the law was used to continue their subjugation, seen most clearly in the section entitled 'Inter-colonial Native Affairs Commission of 1903–1905' (Van Niekerk 1995: 95).

The second point is that under British and Afrikaner despotic rule, CoIs became blunt tools for advancing white minority rule. The National Party (NP) rulers of South Africa used the 1976 Cillié Commission (named after Judge Petrus M Cillié) to examine the uprising in Soweto and other places in the same year. The 1976 Cillié Commission clearly illustrated the NP's and apartheid South Africa's government's ability to manufacture what seemed to be legal outcomes, even when the wider international community could see that the government apparatus (police) had killed people (Anisin 2021: 308). The use of CoIs in pre-1994 South Africa can therefore be seen as an extension of Western imperialist thought that negated the existence of native African populations and kingdoms.

Post-1994 South Africa

Between 2001 and 2025, the ANC-led government had appointed twelve commissions of inquiry/ public inquiries, and another three enquiries under the National Prosecution Authority Act.[1] CoIs/ public inquiries during this time include the recently concluded Commission of Inquiry Into Allegations of State Capture, Corruption and Fraud in the Public Sector, Including Organs of State (2018–2022), the Commission of Inquiry into Ellis Park Stadium Soccer Disaster (2001), and the Donen Commission into the Alleged Illicit Activities of Certain South African Companies or Individuals Relating to the United Nations Oil for Food Programme in Iraq (2011).

Professor of Law Stephen Peté of the University of KwaZulu-Natal contends that the value of post-1994 CoIs rests on three ideas. Firstly, they are a lived expression of South Africa moving from an era of repression and secrecy to openness. Secondly, CoIs are an embodiment of the South African state's commitment to liberal democratic order. Thirdly, and perhaps most interestingly, they permit public and private institutions to be held to account, even though individuals in these institutions have astonishing authority and power (Peté 2021).

While the current article agrees with some of Peté observations, the author contends that the purpose of early CoIs in South Africa's democratic era, specifically the 2001 Commission of Inquiry into the Ellis Park Stadium Soccer Disaster (a tragic event resulting in numerous deaths) and the 2001 Nel Commission of Inquiry into the Affairs of the Masterbond Group and Investor Protection in South Africa (focusing on complex Ponzi schemes fleecing vulnerable citizens), were aligned with the Norris and Shepheard understanding of the purpose of CoIs, namely that CoIs are appointed to investigate 'events in which people have suffered, or even lost their lives, and where in some cases there is a danger of those events being repeated' (Norris and Shepheard 2017: 4). By contrast, more recent CoIs in South Africa can be described as demonstrations of the ANC-led government's failure to make decisions, lead and govern.

Study Methodology

Because of its contentions, the current study required a novel methodology. Firstly, the study used purposive sampling and a qualitative approach to closely analyse the TORs of two specific CoIs appointed in post-1994 South Africa. Secondly, the study divided the twelve CoIs appointed since 2001 into three categories. Thirdly, the study applied a Rational Choice Theory (RCT)/ Choice Theory lens through which to examine all this CoI data.

The purposive sampling for the first part of the study took the form of examining the TORs of two selected CoIs, namely the Judicial Commission of Enquiry into Allegations of Impropriety at the Public Investment Corporation (PIC) (2020) (referred to here as the PIC Inquiry), and the Commission of Inquiry into Higher Education and Training (HET) (2017) (referred to here as the HET Inquiry). The results of this analysis are tabulated in Tables 1, 2 and 3.

The key reason for choosing the TORs of these specific CoIs is that the analysis shows that, in both cases, the problems these CoIs had been appointed to investigate were public policy problems that could and should have been managed by a capable and institutionally sound government.

The PIC Inquiry was chosen for three other reasons. Firstly, the PIC manages state employee pensions worth around R2.13 trillion (approximately US$120 billion), which highlights its societal importance (Kew 2020). Secondly, in its role as an asset manager for the Government Employees' Pension Fund (Hendricks 2018), the PIC accounted for over 10% of the value of the Johannesburg Stock Exchange in 2001 (WBA 2021). The PIC's significance as a stock exchange investor means that, if things were to

go wrong, this would be a potential financial contagion risk to the whole South African economy. Thirdly, the PIC is Africa's largest asset manager, investing in the continent's power, transport and logistics, natural resources, telecommunications and heavy industrial sectors (AFC 2022).

The HET Inquiry report serves as an example of the state's inability to deal with longstanding unresolved policy matters. As long ago as 1997, the White Paper on Education 3 (DoE 1997) provided government with clear advice on how to address the problem of student access to higher education, and how failing to address this problem would stunt South Africa's post-apartheid development potential, especially with respect to Black students (Ayuk and Koma 2019: 180). Furthermore, in 2001, the Department of Education's National Plan for Higher Education gave guidance about the need to find new forms of funding and formulas to address the problem of financial exclusion for numerous South Africa, especially those dealing with apartheid legacy problems (DoE 2001: 10

Understanding TORs

The World Bank's Independent Evaluation Group uses the following definition of terms of reference:

> A ToR presents an overview of the requirements and expectations of the evaluation. It provides an explicit statement of the objectives of the evaluation, roles and responsibilities of the evaluators and the evaluation client, and resources available for the evaluation (World Bank 2011: 2).

This explanation informs the analysis of the TORs of the two CoIs under close study. Firstly, this analysis provides a deep understanding of the prevailing societal or institutional problems plaguing the South African state. Secondly, this analysis helps to ascertain whether the problem being investigated by each CoI is a real problem that is best tackled by a fact-finding mission, or whether it is a problem that is better addressed through public policy interventions.

A list of CoIs appointed since 2001 were divided into categories using the Norris and Shepheard (2017) definition of a public inquiry/ CoI (see Table 4). Then the Rational Choice Theory/ Choice Theory was employed to produce data about the selected CoIs and analyse it using thematic analysis. The themes which emerged from this approach helped to provide a description and explanation of how government approaches socio-economic, political and institutional governance decisions.

Rational Choice Theory/ Choice Theory as a Theoretical Analytic Framework

The most useful approach for this study is Rational Choice Theory (RCT)/ Choice Theory.

Origins of RCT/ Choice Theory

RCT/ Choice Theory has its roots in attempts by certain economists and political scientists to understand how political actors (government, politicians and voters) make the choices that inform their decisions.

Early pioneers in this field of study date back to the 1950s and 1960s, including Kenneth J. Arrow (2012)*, Social Choice and Individual Values,* Anthony Downs (2020), *An Economic Theory of Democracy,* James M. Buchanan and Gordon Tullock (1962)*, The Calculus of Consent*, and William Riker (1962), *The Theory of Political Coalitions*. RCT/ Choice Theory came to the fore in more mainstream and popular understanding through the work of 1992 Economics Nobel Prize winner Garry Becker. Becker's most notable publications in this field include *The Economic Approach to Human Behavior* (Becker 1976), *A Theory of Rational Addiction* (Becker and Murphy 1988), and *An Empirical Analysis of Cigarette Addiction* (Becker et al. 1994.

A cursory analysis of the pre-1992 publication of the work of Becker and earlier pioneers in the field highlights three major themes. Firstly, the importance of RCT/ Choice Theory was widely acknowledged when Becker won the 1992 Nobel Prize for work which encompasses many fields of study, including political science, sociology, economics, and behavioural science. Secondly, RCT/ Choice Theory examines how to assess and almost forecast the decisions and choices of individuals across multiple fields of study. Thirdly, and perhaps more interestingly, when Becker's post Nobel Prize literature is considered, RCT/ Choice Theory has moved beyond macro-economic and political matters to also include sociological and psychological matters such as addiction.

In a critique of RCT/ Choice Theory, Debu Gandhi contends that,

> …the prominence of rational choice theory has to do with more dubious factors that have little to do with the analytical achievements of rational choices: a) The Physics envy phenomenon; b) A desire to command the positions (and salaries) in academia and in the policy worlds that mathematically oriented economists have succeeded in obtaining for themselves; c) A misguided and widely shared obsession with 'advancing' the discipline at the cost of actually trying to understand political phenomena… (Gandhi 2005: 82).

The current article will not take a position on how valid Gandhi's critique may be, but the author believes it is important to present this countervailing view in the interests of providing a well-rounded understanding of the history and operation of RCT/ Choice Theory. *Interpretation and definition of RCT/ Choice Theory*

Interpretation and Definition of RCT/ Choice Theory

This section analyses four major definitions of the concept of RCT/ Choice Theory.

A good starting point is to look at the work of Jon Elster, who said that, 'when faced with several courses of action, people usually do what they believe is likely to have the best overall outcome' Elster 1989: 99). In other words, for Elster, RCT/ Choice Theory is about people understanding the myriad of options before them and making the choice that best suits each person.

Nakaska (2010: 127) adds to this understanding by saying that 'RCT is a utility-maximization methodology, by which choices are made on the basis of the "best interest of the actor making the selection" '. This adds to Elster's conception of RCT/ Choice Theory being about actors (political, economic and government) arriving at a decision/ choice, but presenting it as a methodology for interest-based decision making.

The third definition used by the author of the current article is by political scientist Gerardo Munck who explains that,

> it bears stressing that RCT is first and foremost a theory of decision making that rests on the expected utility principle, which states that individuals make decisions that maximize the utility they expect to derive from making choices (Munck 2001: 175).

Munck's interpretation builds on the work of Elster and Nakaska by saying RCT/ Choice Theory is that individuals make decisions based on maximising the gains they expect to get.

The fourth definition used by the author of the current article is that of Kulawik (2020) who, using Brummerhoff (2011), explains,

> the essence of the public choice theory to analyse the state's decision-making processes, which reflect the relationship between the preferences of members of a given society and decisions made by public authorities (Kulawik 2020: 146).

This interpretation of the Choice Theory concept is perhaps different to the three discussed above because it focuses the practice of RCT/ Choice Theory on state/ government actions and decisions. This is important for the current article because the study focuses on government choices and actions.

Before presenting this article's working definition of RCT / Choice Theory, it is important to briefly discuss an important aspect of the theory, which has not been well expanded upon, namely the idea of rationality. Without being overly doctrinaire, the concept of rationality is well presented by Ogu (2013), who he explains that,

> 'rationality' defined by the rational choice theory adopts a more specific and narrower definition, which simply means that 'an individual acts as if balancing costs against benefits to arrive at action that maximizes personal advantage' (Ogu 2013: 90).

The idea of rationality is an ever-growing field of study which attempts to understand whether and how the idea of rationality influences individuals/ institutions or state behaviour as the work of Herfeld (2022: 3) illustrates.

Key ideas and usage model

Ogu (2013: 94) describes six steps for how RCT/ Choice Theory can be applied in decision-making.

1. Definition of the problem: The actors or individuals in question agree upon a problem to be solved or resolved.
2. Identification of decision criteria: As the problem is discussed or debated, there is need to decide upon how to arrive at a decision.
3. Weighing the criteria: This stage focuses on the internal and external debates about how to properly ascertain critical questions and values linked to the decision and identified problem.
4. Generation of valid alternatives: Once the previous deliberation stage is complete or nearing an end, there is a stage for the creation of possible solutions.
5. Rating of each alternative on each criterion: Once the various decisions or options are provided, each is assigned some form of value.
6. Computation of optimal decision: This is more of a modern phenomenon in which specific potential solutions are captured in digital computer form and tested using mathematical tools and applications.

This section concludes by saying the author of the current article's working definition of RCT/ Choice Theory is that it is concerned with the process micro or macro actors use to make decisions and choices for outcomes

that, in the main, bring them advantage, or can be argued to be rational. The six decision-making steps above show the idea and practice of RCT/ Choice Theory can be described as some form of linear easy-to-follow process. However, it is important to note that these six steps will not always have been followed. The key point here is to argue for the ongoing development of improved ways of thinking about how to understand choice and decision-making.

Results Discussion, Theme-informed Analysis

In the methodology section, this article uses a two-step approach to analysing the use of CoIs in post-1994 South Africa. The first approach focuses on the two selected CoIs – the PIC Inquiry and the HET Inquiry. This is followed by an examination of the history and nature of a number of CoIs in post-2001 South Africa. Finally, this section uses thematic analysis to present and explore the dominant themes that have emerged from these two approaches to analysing the quality of government decision-making.

First approach: Analysis of the TORs of two selected CoIs

The focus on, and analysis of, the TORs of the chosen two CoIs: the PIC Inquiry (Table 2), HET Inquiry (Tables 2 and 3) was a novel approach to ascertain the nexus between politics, governance, institutional governance and legal practice in South Africa.

Table 1: Selected TORs of the PIC Inquiry

1.1 Whether any alleged impropriety regarding investment decisions: by the PIC in media reports in 2017 and 2018 contravened any legislation, PIC policy or contractual obligations and resulted in any undue benefit for any PIC director, employee or any associate or family member of any PIC director or employee at the time	**1.2 Whether any findings of impropriety following the investigation:** in terms of paragraph 1.1 resulted from ineffective governance and/or functioning by the PIC Board
1.3 Whether any PIC director or employee used his or her position or privileges, or confidential information: for personal gain or to improperly benefit another person	**1.4 Whether any legislation or PIC policies concerning the reporting of alleged corrupt activities:** and the protection of whistle-blowers were not complied with in respect of any alleged impropriety referred to in paragraph 1.1

The TORs presented in Table 1 show that the issues presented to the PIC Inquiry for investigation did not necessarily need a CoI for two reasons.

Firstly, before the PIC Inquiry had been established, the South African government had investigated and tried to explain what was happening at the PIC. As the PIC Inquiry report explains,

> During August 2018 the Board, on the recommendation of the then Minister of Finance, Mr N Nene, commissioned a forensic investigation into the allegations levelled against Dr Matjila in the email, including the alleged relationship between him and Ms Louw (Presidency of South Africa 2000: 187).

It is thus quite apparent that while the PIC Inquiry should be welcomed, the weaknesses of the PIC could and should have been addressed before the actual PIC Inquiry was appointed in 2018.

Secondly, one of the chronic problems plaguing the PIC, as stated throughout the proceedings of the PIC Inquiry, was that a lack of political and governmental leadership allowed a catastrophic situation to develop at the PIC. The PIC Inquiry report explains,

> The role of the Shareholder, coupled with the frequent changes to the Minister, Deputy Minister and consequently the Chairperson of the PIC, created instability and a vacuum of leadership at the helm of the PIC (Presidency of South Africa 2000: 187).

This statement, perhaps like no other, perfectly explains the problematic nature of the impact of a lack of leadership on institutions and, eventually, on government performance.

When the TORs in Table 1 are critically examined, it is hard to argue that a CoI was ever needed to investigate the dysfunction of the PIC. If anything, the TORs in this section clearly illustrate how the ANC, as the leader of the South African government, had failed in its duty to provide quality leadership (or candidates) and had failed to exercise political oversight over governmental institutions over which it had strong influence. Over and above this, if the PIC had proper internal controls and systems, many of the issues raised in the TORs would have been addressed internally. For this reason, the current article contends that the PIC Inquiry is a good example of political obfuscation of responsibilities, rather than a response to the systemic failure of an institution. The PIC can be argued to have become a complex problem because of destructive politics in the South African government and, by extension, the ANC.

Table 2: Selected TORs of the HET Inquiry

The Commission of Enquiry into Higher Education and Training was appointed by the President on 14 January 2016 with the following terms of reference… The Commission shall enquire into, make findings, report on and make recommendations on the following: The feasibility of making higher education and training (higher education) fee-free in South Africa, having regard to:
1.1 the Constitution of the Republic of South Africa, all relevant higher and basic education legislation, all findings and recommendations of the various presidential and ministerial task teams as well as all relevant educational policies, reports and guidelines;
1.2 the multiple facets of financial sustainability, analysing and assessing the role of government together with its agencies, students, institutions, business sector and employers in funding higher education and training;
1.3 the institutional independence and autonomy which should occur vis-à-vis the financial funding model.

Table 3: Additional notes on selected HET Inquiry TORs

188.	According to the terms of reference of the Fees Commission, the main focus for the Commission was on the feasibility of free education, in particular for the higher education sector. *The Commission took a broad view of feasibility, to include a broad discussion of the points in favour of and those against the introduction of free education for all (or some) in the South African context…*
189.	The parameters of free education were also a point of discussion, but *there was general agreement from all parties that whatever form financial aid should take in South Africa, funding should cover the total cost of study*.

Firstly, the macro theme running across the selected TORs in Tables 2 and 3 are public policy and public finance matters of choice. A prime example of this contention is in Table 3 (Section 188), where the task given to the HET Inquiry is, in fact, a public policy choice matter falling in the arena of public finance.

Hyman (2010) provides an understanding of the link between public finance and political decision-making as follows:

> Public finance is the field of economics that studies government activities and the alternative means of financing government expenditures… A crucial objective of the analysis is to understand the impact of government expenditures, regulations, taxes, and borrowing on incentives to work, invest, and spend income (Hyman 2010: 5).

While broad, this explanation of public finance highlights the importance of governmental public policy or political decisions in a numerical/ quantitative manner (public finance). The importance of policy and political decisions is not simply a question of rands, dollars or cents, but is one that significantly explains whether a state will develop or not. Barrios and Schaechter expanded on this idea by explaining, 'Sound fiscal positions, over the medium and long term, are a precondition for macroeconomic stability and sustainable economic growth' (Barrios and Schaechter 2008: 12).

Firstly, the appointment of CoIs like the HET Inquiry highlights the political and institutional weaknesses of the South African government. The problem the HET Inquiry was established to investigate is an example of a public inquiry, a matter that should have been handled by the relevant political processes and systems, but is instead an example of a politically outsourced inquiry.

Secondly, the HET Inquiry illustrates the South African government's lack of consistency in policy decision-making and its lack of strategic follow-through on identified critical problems. It is interesting to note that the HET Inquiry report starts by reminding the ANC government of its own documents, such as the 1955 Freedom Charter and the Ministry of Education's 2001 National Plan for Higher Education (DoE 2001) which alludes the problem of funding for higher education – the very matter the HET Inquiry was established to consider. This lack of consistency in policy decision-making and lack of strategic follow-through is best illustrated in this comment made in the Ministry of Education's 2001 National Plan for Higher Education (DoE 2001) about the funding of higher education:

> Increased access… is meaningless if students do not succeed in their studies. Although this is the primary responsibility of institutions, the Ministry is committed to ensuring that the underlying factors that hinder success are addressed. The Ministry's support will focus primarily on three areas, namely, the funding of academic development programmes, improving the quality of schooling … and student financial aid (DoE 2001: 1).

This extract and other points made in this report detail how the problems highlighted in the HET Inquiry's TORs are public policy problems rather than matters requiring the appointment of a CoI. Moreover, the issues identified in the HET Inquiry highlight the South African government's lack of consistency in policy decision-making and illustrate the fact it cannot provide a strategic solution or follow through on key problems associated with public policy problems. As is the case with the PIC Inquiry, the HET Inquiry is a politically outsourced inquiry in nature and form.

Concluding this section, this article contends that, having examined and provided a thorough analysis, the TORs of both of these CoIs are textbook examples a lack of political leadership and consistency in policy decision-making on strategic problems affecting South African society. This being the case, it is lamentable that, rather than attending to these weaknesses, the South African government has outsourced/ obfuscated its political and governance leadership responsibilities to judges and quasi-legal structures in CoIs. For this reason, this article argues that a hybrid form of 'hollowing out of the state' is taking place as the government outsources its governance and leadership responsibilities to CoIs.

Second approach: The nature and form of CoIs post-1994

To begin with, the early CoIs in post-1994 South Africa can be argued to have followed the internationally advised form of setting them up, namely that CoIs, while part of political and legal processes, are established to investigate complex and problematic occurrences with a view to avoiding a recurrence of such events. According to Norris and Shepheard:

> Public inquiries investigate events in which people have suffered, or even lost their lives, and where in some cases there is a danger of those events being repeated (Norris and Shepheard 2017: 4).

In the early post-1994 period, this is indeed what CoIs in South Africa were mainly used for. Two examples are discussed below.

The first example is the Commission of Inquiry into the Ellis Park Stadium Soccer Disaster, which investigated a stampede on 11 April 2001 during a football game between Kaizer Chiefs Football Club and Orlando Pirates Football Club at the Ellis Park Stadium, Johannesburg. Forty-three people died (Tshwaku 2021).

The second example is the Nel Commission of Inquiry into the Affairs of the Masterbond Group and Investor Protection in South Africa. The Nel Commission was tasked with investigating and making recommendations on a Ponzi scheme that caused many South Africans pensioners to lose a total of R620m. The Independent Regulatory Board for Auditors described the significance of the Nel Commission report as follows:

> As part of its work into the investigation of the 1991 Masterbond collapse, the Nel Commission invited comments from interested parties on a consultation paper titled 'The Role of the Auditor – The Elimination of the Expectation Gap'. The content of the consultation paper outlined the reasons why the Commission believed that the contents of financial statements, the audits of these statements and the resulting auditors' reports were inadequate for the needs of users and why a 'structural shift towards transparency was regarded as a necessity' (IRBA 2021).

As a result of the Nel Commission, the South African government and financial institutions came to develop new policies and legal instruments to protect investors.

It is fascinating to note that the number of CoIs has more than doubled since 2007, the year in which Thabo Mbeki lost the leadership of the ANC to Jacob Zuma at the party's 52nd National Conference (Booysen 2011: 33–84). This section contends that the change of leadership that occurred in the ANC in 2007 has also changed the nature of CoIs in South Africa since that time.

Norris and Shepheard say of public inquiries, the term in England for what is called a CoI in South Africa: 'public enquiries are a common tool for investigating some of the tragic, complex and controversial issues in society' (Norris and Shepheard 2017: ii).

The current article argues that responding to 'tragic' situations and 'complex' issues could be good reasons for the South African government to appoint a CoI. Table 4 categorises a select list of CoIs appointed in South Africa since 2001 as 'standard' (responses to tragedy), 'complex' (responses to complex situations), or 'politically outsourced' (hybrid hollowing out of the state by outsourcing governance and leadership responsibilities to a CoI).

Table 4: Categorisation of selected CoIs since 2001

Year	**Name**	**Category**
2001	Commission of Inquiry into the Ellis Park Stadium Soccer Disaster	Standard inquiry
2001	Nel Commission of Inquiry into the Affairs of the Masterbond Group and Investor Protection in South Africa	Complex inquiry
2002	Commission of Inquiry into the Rapid Devaluation of the Exchange Rate of the Rand and Related Matters	Complex inquiry
2003	None	
2004	Hefer Commission of Enquiry into Allegations of Spying Against the National Director of Public Prosecutions, Mr B.T. Ngcuka	Complex inquiry
2005–2007	None	
2008	Khampepe Commission of Inquiry into the Mandate and Location of the Directorate of Special Operations	Politically outsourced inquiry

Year	Name	Category
2009–2010	None	
2011	Donen Commission into the Alleged Illicit Activities of Certain South African Companies or Individuals Relating to the United Nations Oil for Food Programme in Iraq	Standard inquiry
2011	Commission of Inquiry into Allegations of Fraud, Corruption, Impropriety or Irregularity in the Strategic Defence Procurement Packages	Politically outsourced inquiry/ Complex inquiry
2012	Marikana Commission of Enquiry: into the Tragic Incidents at or Near the Area Commonly Known as Marikana Mine in Rustenburg, North West Province, South Africa	Standard inquiry
2013–2015	None	
2016	The Commission of Inquiry into Higher Education and Training	Politically outsourced inquiry
2017	None	
2018	Commission of Inquiry into Allegations of State Capture, Corruption and Fraud in the Public Sector Including Organs of State	Politically outsourced inquiry
2018	Commission of Inquiry into Tax Administration and Governance by SARS [South African Revenue Service]	Politically outsourced inquiry/ Complex inquiry
2018	Commission of Inquiry into Allegations of Impropriety Regarding Public Investment Corporation	Politically outsourced inquiry/ Complex inquiry
2019–2021	None	

Three of the twelve (25 per cent) of the CoIs listed in Table 4 can be classified as standard public inquiries. Another three CoIs (also 25 percent of the twelve in the list) CoIs can be said to be complex inquiries, for example, the Nel Commission (which focused on complex financial transactions) and the Hefer Commission (which investigated secret service activities). In other words, fifty percent of CoIs in South Africa since 2001 were standard inquiries, two of which took place in adjacent years (2011 and 2012). The remaining six of (50 percent) were either complex or politically outsourced inquiries. Three (25 percent) were categorised as politically outsourced inquiries and three were a mixture of politically outsourced inquiries and complex inquiries.

Having performed this analysis of CoIs, four dominant themes now seem to shape the analysis of the establishment of CoIs by the government.

Theme-informed analysis and RCT/ Choice Theory discussion

Theme 1: Insufficient institutional and administrative leadership guardrails allows for nefarious actions

The analysis of the PIC Inquiry's TORs in Table 1 highlighted the fact that identified problems could and should, firstly, have been dealt with by the PIC as an institution and, secondly, the leadership structures and laws such as the Public Investment Corporation Act, 2004, Companies Act, 2008, and Public Finance Management Act, 1999, inter alia. In addition to this, the PIC has a Board of Directors, which had leading business, political and other leadings figures entrusted with,

> Steering the PIC and setting its strategic direction; Approving policy and planning that give effect to the direction provided; Overseeing and monitoring implementation and execution by management; and Ensuring accountability for the PIC's performance by means of, amongst others, reporting and disclosures (PIC, n.d.).

This article contends that the PIC problem highlights the fact that when insufficient institutional and administrative leadership guardrails are in place, or are in place but allowed to deteriorate, illegal or improper action will follow.

Additional support to this theme finding can be found in the Commission of Inquiry into Tax Administration and Governance by SARS [South African Revenue Service] (better known as the Nugent Commission). The Nugent Commission detailed how public finance, tax and other public finance actions can be circumvented or simply corrupted by weakened or disappearing guardrails:

> the disbanding of certain units with SARS dedicated to chasing non-compliant large business taxpayers has contributed to the perception that many taxpayers are not meeting their tax liability. Political interference… contributed to tax administration corruption and a lack of focus on the important mandate of revenue collection (Dicey 2019: 7).

While these CoIs focused on two different institutions, the result of both investigations revealed that, over time, institutions and administrative leadership deficiencies manifest in poor governance and, when allowed to deteriorate poor governance, encourages untoward and illegal behaviour and actions.

Theme 2: A broken political environment creates increasingly complex problems

CoIs such as the Zondo Commission and the Nugent Commission have shown that politically induced problems in the ANC become more complex if they are not attended to politically. The ANC then tends to outsource the governance and solution of the problem to a politically outsourced CoI. For example, during the Zondo Commission,

> Perhaps the single most significant moment in South Africa's state-capture revelations was the admission by Gwede Mantashe, then secretary general of the ruling African National Congress, that the list of names announced by then President Jacob Zuma as appointees in a Cabinet reshuffle 'came from somewhere else; we were not consulted, we were informed'. When the political institutions given the electoral mandate to govern are 'informed' of significant decisions, the extent to which power has shifted away from accountable institutions is clearly revealed (Masterson 2018: 187).

What can no longer be denied is the fact that the broken political system of the governing ANC permitted problems to become very complex. Instead of taking courageous steps inside party structures to address these problems, the ruling party chose the expedient step of appointing a politically outsourced inquiry.

Theme 3: When correctly deployed, CoIs are effective instruments of governance and institutional reform

Following the categorisation in Table 4, complex and standard CoIs are the correct instruments for addressing institutional and policy gaps in state operations. For example, as discussed above, the Nel Commission has been acknowledged by the Independent Regulatory Board for Auditors as having made important recommendations for managing risk in the context of a global shift in financial markets (IRBA 2021). The result of the Nel Commission was the development of policy parameters to protect investors from the risks of Ponzi schemes.

Theme 4: Increasing numbers of CoIs reflect a lack of accountability to the state

Ten more CoIs have been appointed by the South African government since 2008. The current article contends that this can be linked to the increasing political complexity and problematic nature of developments in the ANC. Even the ANC is aware of this. The most recent ANC Policy

Conference Document, particularly the second chapter entitled ANC Organisational Renewal: Progress and Challenges, details how, over the last decade, the ANC has become an inward-looking institution, rife with internal fights and individuals eager to engage in corrupt activities (ANC 2022: 7). This malpractice by the governing party has so entrenched itself in how the ANC works that it has affected how the state and its various institutions operate, as the Zondo Commission revealed. This made it possible for individuals to undermine and destroy state institutions in order to acquire personal wealth.

Therefore, it should come as no surprise that the increase of CoIs is directly linked to the loss of institutional morality in the governing party of South Africa. Individuals and certain parliamentary processes created an environment which led the government to outsource its governance and leadership to CoIs (Pillay 2022).

Interpretation of the Four Themes through the Six RCT/ Choice Theory Steps

Definition of the problem

This article analysed themes and analysed data to contend that the main problem associated with CoIs in South Africa is in some cases they have been used to cover up the lack of political leadership in the ANC and institutional weaknesses in the state.

Identification of decision criteria

Two overriding criteria seem to have been used since 2008 for the establishment of CoIs. Firstly, CoIs have been appointed as a result of legal processes established elsewhere by parliamentary processes or other offices e.g., the Zondo Commission, which was an outcome of a report by the Public Protector's Office. Secondly, large-scale political developments impressed upon the governing party that it needed to be seen to be taking certain problems seriously, e.g. the student-led Fees Must Fall protests, which led to the HET Inquiry. As a caveat, it is important to note that, before 2008, certain CoIs were established for good reasons, e.g. the Ellis Park Disaster Inquiry.

Weighing the criteria

After applying the previous step, the current article contends that the most important criterion for appointing CoIs since 2008 can now be described as political outsourcing of governance and leadership linked to the weaknesses

of the state and the ANC. As discussed above, many of the post-2008 CoIs are addressing problems that could and should have been addressed by a properly functioning state apparatus and leadership in the ANC.

Generation of valid alternatives

It is most interesting to note that neither the PIC Inquiry nor the HET Inquiry have generated the types of recommendations that go beyond what many policy makers and processes would have made. For example, the PIC Inquiry report's recommendation that responded to the first TOR listed in Table 1 states,

> The Commission recommends that the Board should develop clear policies to guide the involvement of PIC employees and non-executive directors in investee companies (Presidency of the Republic of South Africa, 2000: 300).

While this is an appropriate recommendation in response to the TOR, this is something that could and should have been part and parcel of the PIC's standard operating practice. While some recommendations may be more useful in practice than others, in the main, many will simply ask the institutions and individuals in question to follow the set laws and policies of the Republic.

Rating of each alternative on each criterion

This articled contends that the rating of alternatives should be focused on whether and how CoIs were able to bring about substantive public policy ideas to unforeseen or deeply problematic issues. In this regard, the key CoIs which can be positively rated are the Commission of Inquiry into the Ellis Park Stadium Soccer Disaster, the Nel Commission of Inquiry into the Affairs of the Masterbond Group and the Investor Protection in South Africa, the Commission of Inquiry into the Rapid Devaluation of the Exchange Rate of the Rand and Related Matters, and the Hefer Commission of Enquiry into Allegations of Spying Against the National Director of Public Prosecutions Mr B.T. Ngcuka. They are positively rated because the level of complexity of the issues they were investigating required new thinking.

Computation of optimal decision

While it would have been interesting to compute what the optimal decisions would have been for many of the CoIs discussed here, CoIs operate within a framework of existing policies, legal instruments and institutional practices.

Conclusion and Recommendations

This article's main contention is that recent CoIs, especially those after 2008, have become a form of political and governance outsourcing/ obfuscation which led to a hybrid 'hollowing out of the state' as the state and the ANC outsourced its governance and leadership responsibility.

The result is that policy makers and institutions are rendered as willing, but unfortunate bystanders in the business of statecraft and state actions, all because the ANC in government has failed to make important public policy and political decisions and sees the traditional roles of the state as something which can easily be outsourced to CoIs.

It is now more important than ever to rethink the use and role of CoIs in the future. This article makes three critical recommendations could help halt the slide towards the hybrid 'hollowing out of the state' described above and seen in the appointment of politically outsourced CoIs since 2008.

Firstly, clear legal and policy criteria should be formulated for what CoIs should not do, beyond the current guidance provided by section 82 of the Constitution of the Republic of South Africa, 1996. The Office of the Chief Justice should guide the process through asking retired judges and elected politicians to devise a set of criteria for determining whether a problem proposed for investigation by a CoI is a standard problem, a complex problem, or a politically outsourced inquiry. Clearly, politically outsourced inquiries should never be permitted to proceed. Once this process is finalised, these criteria should be formulated as a legal instrument and brought before Parliament and voted on with a sixty percent majority required in favour for the criteria to be adopted.

Secondly, government should be required to present a well-reasoned explanation of why it believes a CoI is necessary to undertake a specific inquiry. The document must contain clear detail as to why the investigation in question cannot be carried out by the South African government or the state institution that is responsible, accompanied by a legal opinion in favour of appointing a CoI. If government fails to achieve a sixty percent vote in Parliament in favour of establishing a CoI, this could be a reason to call a snap election.

Thirdly, a financial penalty should be imposed to discourage politicians and government institutions dealing with public policy matters from hollowing out the state through using politically outsourced CoIs to resolve matters that should be addressed by the state.

Ultimately, this article is arguing for the South African government through the ANC or any other political leader of government to stop the practice of 'hollowing out of the state' through appointing CoIs for reasons of political expediency. The continued use of CoIs to address political and government governance failings needs to be stopped and public officials and public institutions made to do their jobs, lest the South African state find itself becoming inadequately skilled. If this decline in capacity is not arrested, there is a risk that public policy decisions and institutions are too influenced by judges, possibly even remotely ruled by judges, rather than elected policy actors such as political leaders, governmental institutional bureaucrats and their processes and systems.

Note

1. These were: the enquiry into the fitness of Adv. Nomgcobo Jiba and Adv. Lawrence Sithembiso Mrwebi to hold the office of office of Deputy National Director of Public Prosecutions and Special Director of Public Prosecutions, 2018; the Cassim Inquiry into the National Director of Public Prosecutions' fitness to hold office, 2015; and the Ginwala Enquiry into the fitness of Advocate VP Pikoli to hold the office of National Director of Public Prosecutions, 2008.

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