



AFRICA CENTRE FOR OPEN GOVERNANCE (AfricOG)

_____**FIRST REPORT**_____

A study of Commissions of Inquiries in Kenya

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1.0 INTRODUCTION

Commissions of Inquiry have been a favored tool of both the Moi and the Kibaki Government. However, a cursory survey of the results of commissions of inquiry since the 1980s raises disturbing questions whether such inquiries serve any purpose at all. Or alternatively, whether the public resources justify the use they serve invested in them.

The Goldenberg Commission of Inquiry completed its report in October 2005. Its chairman Justice Bosire only presented its reported to the President in February 2006. Concerns have been raised as to the timing of the presentation of the report and the underlying motivation. This may in itself tend to cast a shadow over the report's conclusions. Justice Bosire is quoted in the media expressing reservations on the effects on the independence of the judiciary of entrusting it with what are essentially political tasks.

In the wake of the Anglo-Leasing scandals, voices have been raised calling for a commission of inquiry into the scandal. It may be inappropriate to institute such a commission before the conduct of an audit into whether such a strategy is appropriate and will fulfill the aims with which it is likely to be tasked.

The purpose of this audit is six fold:

1. To assess the public interest arguments that have been used to justify establishing commissions of inquiry;
2. To determine how effective commissions of inquiries have been in answering the issues before them and making implement able recommendations;
3. To audit the extent to which government has implemented recommendations made by commissions, task forces and probes;
4. To determine the scale of public investments in such probes and commissions and provide information which would allow conclusions as to the value for money of such investments.
5. To identify accountability gaps and recommend ways of closing them
6. Using examples from Common wealth to propose ways of designing reform probes, commissions and task forces for the future. These proposals should also make recommendations as to the sort of objectives, which such commissions of inquiry can reasonably be expected to fulfill.

The audit is not exhaustive. Several factors are responsible for this. Among them is the difficulty in obtaining relevant research information in view of poor record keeping on the part of the government which has custody of previous commissions reports. Secondly, space constraints would not have allowed an exhaustive study. This audit is therefore only exemplar and is intended to provoke public debate on the matters under its coverage. Although there have been commissions of inquiry going back to colonial times a decision was made to restrict this audit to activities during the last twenty five years. The reason for this is, again, partly to do with space constraints but also to do with the fact that the most recent experiences are likely to provide the most relevant information.

1.1 **The History of Commissions of Inquiry**

Commissions of inquiry have been defined as ad hoc advisory bodies set up by the government to obtain information. In their working they are expected to make an assessment of the facts and later recommendations to the government in power. The government can accept or ignore the recommendations.

Commissions of inquiry are a feature of English law dating back to the 12th century. By the time colonialism arrived in Kenya, Royal Commissions were already well established in England and were an important part of the government system. It was natural that the colonial experience in Kenya would embrace such commissions. The earliest known commission in colonial Kenya is the Native Labor Commission, appointed in 1913 to inquire into the reasons for persistent labor shortages in the colony as a result of which settlers were unable to access the labor required for their plantations. The Commission in its findings established that the natives were not interested in taking up work as labourers in white-owned plantations because of the poor conditions of work.

1.2 **Classification of inquiries**

The primary function of all commissions of inquiry is to inform governments. Commissions of inquiry have been classified into two groups, based on the methods used to ascertain the facts. The first category of commissions are those charged with gathering information which is to be used for policy formulation or review, or the assessment of the functionality of a public entity. These are referred to as investigatory inquiries. These types of commissions play the same function as a researcher. Examples include the Davy Koech Commission, which investigated the question of the appropriateness of Kenya's education system. The second category of commissions is those charged with ascertaining the facts of a particular issue. Their role has been equated with that of an inquisitor and they are referred to as inquisitorial inquiries. This category of inquiry usually investigates the facts surrounding a scandal or allegations of wrongdoing. The Miller inquiry, which investigated allegations of wrongdoing against former Attorney General Charles Njonjo, is a good example of this type of inquiry. While both types of commission will ultimately "inform" their methods will most likely be different.

1.3 **Entities Similar to Commissions of Inquiry**

Other than commissions there are a number of commissions set up by the President but which are not commissions of inquiry. For example the Permanent Presidential Commission on Soil Conservation set up in 1981 by President Moi and the Permanent Presidential Music Commission also set up by President Moi. Until 2002 there was also the Kenya National Commission on Human Rights before this was established on a statutory footing. These are administrative instruments that should not be confused with commissions of inquiry, which are the subject of this presentation. Also in the 1990s the Attorney General established a number of task forces that were asked to study various legal problems and make recommendations on reforms. These task forces played the same role as the inquiries set up under the colonial government and during the Kenyatta regime, when a number of law reform issues were referred to commissions of inquiry.

1.4 **Appointment of Commission of inquiry**

The legal authority for the establishment and management of commissions in Kenya is The Commissions of Inquiry Act. The legislation empowers the President, whenever he considers it advisable to do so, to issue a commission appointing a commissioner or commissioners to inquire into the conduct of any public body, or into any matter into which an inquiry would in the opinion of the President be in the public interest.

The Commissions of Inquiry Act allows for the appointment of any number of persons to a commission, as the President considers advisable. Of the commissions appointed during the Moi administration, the Miller Commission (1984) had three members; the ill fated Gicheru Commission (1989) had three members; the Devil Worship Commission (1994) had ten members; the Hancox Commission had one member; the Mtongwe Ferry Disaster Commission (1994) had five members; the Davy Koech Commission (1999) had twenty six members; while the Akiwumi Commission (1998) had three members. Of the commissions appointed by the Kibaki administration, the Ndung'u Commission (2003) had twenty members while the Bosire Commission (2003) had three members; and the Muthoga Commission (2003) had only one member.

In England, a distinction exists between Royal Commissions and Tribunals of Inquiry. Royal Commissions investigate issues of policy and administration while tribunals of inquiry appointed to inquire into allegations of wrongdoing. The sovereign at the instance of executive government appoints Royal Commissions. The appointment of tribunals of inquiry is regulated by The Tribunals of Inquiry (Evidence) Act 1921. These are appointed only upon a resolution of both Houses of Parliament.

In Australia inquiries, which are called royal commissions, are appointed in two ways; firstly, under a specific Act of Parliament which sets up the commission and defines its functions. For example The Royal Commission (Communist Party) Act (1949) conferred upon the Governor-in-Council (equivalent to the cabinet) authority to issue a commission to one person to inquire into matters, which were specified in the Act. Thus the terms of reference and the name of the person to conduct the inquiry were stated in the Act of Parliament. The West Gate Bridge Royal Commission Act (1970) also empowered the Governor to issue a commission to three persons (named in the Act) to conduct an inquiry into matters that were specified in the legislation.

In England and Australia, there is opportunity for direct parliamentary involvement in the appointment of inquiries. In Kenya, the appointment of inquiries is the sole preserve of the President. He alone determines the subject matter of the inquiry, the timing of the appointment of the commission, and the personnel to conduct the inquiry. There has been criticism of the arrangements in Kenya, and suggestions have been made that there should be direct parliamentary participation in the appointment of inquiries.

It is argued that direct parliamentary involvement in the establishment of inquiries would promote objectivity deciding whether to appoint an inquiry, would result in improving the terms of reference for the inquiry and would also most likely result in the selection of personnel to serve in the inquiry who enjoy public confidence.

Secondly the governor may in exercise of the power that established his office, appoint a Royal commission. When the governor exercises this power, he is understood to be exercising the power of the sovereign. A commission is a delegated authority of the Governor.

1.5 **Qualifications of Commissioners**

There are no specific qualifications for appointment as a commissioner. Any person that the president considers suitable can be appointed to a commission of inquiry. Similarly in England and Australia there are no specific qualifications for the appointment of commissioners. During the last 25 years however, there has been a distinct tendency to appoint lawyers, whether practitioners or serving, or retired judges, as members of commissions of inquiry. The three members of the Miller commission were all serving

judges; the Devil Worship Commission had one member who was a lawyer, the other nine perhaps sensibly were religious leaders; the Mtongwe Ferry Commission which investigated a Ferry accident was chaired by a serving judge, the other four members were either naval officers or marine experts. The three members each of the Gicheru and The Akiwumi Commissions were all serving judges. The Ndung'u Commission was chaired by a practicing lawyer and had a number of legal practitioners as members. The Bosire Commission had two serving judges as members at the onset and when one of them, Justice DKS Aganyanya, ceased being a judge, he was removed from the commission and replaced by a practicing lawyer.

Whereas the use of retired judges and legal practitioners in inquiries is easily understood, the participation of serving judges in such inquiries came into question in at least, the Bosire Commission.

The Commission in its report specifically recommended that in future serving judges, especially of the Court of Appeal, should not be appointed to membership of a commission of inquiry. The Commission based this recommendation on a number of reasons: firstly, the Commission argued that judges who serve in politically motivated inquiries run the risk of being dragged into politics and having their reputation for impartiality ruined; secondly, the tendency to sue members of commissions for things done as commissioners exposes judges to the risk of being condemned to personally pay costs of the suit. Thirdly, the appointment of serving judges keeps them away from their substantive duties for inordinately long periods to the detriment of litigants. Fourthly, any shortcomings in the reports of commissions may follow the judge to the bench since there is no system of appeal through which the judge could be vindicated. Based on these reasons, the Commission wrote:

We recommend that before the issue is finally settled; no sitting judge should be appointed to participate in a public inquiry unless the Chief Justice has satisfied himself that the nature of the intended public inquiry has no political implications and signified his consent to the appointment.

Further, the participation of Justice Bosire in the Bosire inquiry, which he chaired, resulted in embarrassment when the conduct of the Commission was challenged in the High Court. As a judge of appeal, Justice Bosire was a member of a higher court than the High Court and he would ordinarily sit on appeal in decisions made by the High Court. As a member of the inquiry, however, he was subject to the jurisdiction of the High Court.

The embarrassment which was caused by the frequent challenges of the decisions of the inquiry in the High Court led the Commission to recommend in its report that, in future, if the government should ignore the advice of the Commission and appoint judges to inquiries, they should be from the High Court and not the Court of Appeal, to avoid exposure of judges of appeal to similar embarrassment.

In Australia, as well, there is domination by lawyers and retired judges in the Royal Commissions. This has been explained on the grounds that by their training, they are accustomed to research, inquiry and the evaluation of facts. Their experiences are considered particularly useful in inquiries into alleged wrongdoing. Further, the reputation for impartiality that judges are associated with is considered a factor in giving credibility to the inquiry.

However, the appointment of serving judges to conduct inquiries is very rare in Australia. In 1923, the Chief Justice of Victoria, Sir William Irvine, was requested by the Attorney

General to allow the appointment of one of the judges of the Supreme Court to serve in an inquiry. The Chief Justice consulted all the judges of the court and in declining the request wrote to the Attorney General as follows:

The duty of His Majesty's Judges is to hear and determine issues of fact and law arising between the King, and a subject or between subjects and subjects.... There begins and ends the function of the Judiciary.

The Chief Justice explained that 'Parliament supported by a wise public opinion, had jealously guarded the bench from the danger of being drawn into the region of political controversy'. It was his view that it should remain that way. He explained that even inquiries, which on their face had a judicial character, were likely to result in reports, which generate political debate. Further, determinations of inquiries often end up in court. This may raise a conflict between the findings of a judge as a commissioner and the findings of another judge on the same facts in a court of law.

The letter by Chief Justice Irvine came to be known as the "Irvine Memorandum." It has held sway at least in the state of Victoria during the last almost 100 years. In 1952, the justices of the Supreme Court passed three resolutions: First, that there is no obligation for any judge of the Supreme Court to undertake the duties of a Royal Commissioner and except during emergencies it is undesirable that a judge of the Supreme Court should accept to serve as a Royal Commissioner. Secondly, if a judge of the court is requested to act on a Royal Commission, he will not commit himself to accede until he has put the matter before a meeting of the judges and, thirdly, the Chief Justice was requested to communicate these resolutions to the Attorney General. In England, the practice has been to appoint judges to Royal Commission and even to Tribunals of Inquiry, which they often chair. Resulting from other activities in such inquiries, the judges have been the subjects of severe public attack from time to time, but this has not caused a change of practice.

In the United States, the American Bar Association in 1969 issued the American Code of Judicial Conduct, which prohibits judges from serving on inquiries unless these are concerned with law reform or the administration of justice.

The strong stand taken by the Bosire Commission regarding the appointment of judges to inquiries is unlikely to be ignored. However, as the case of Australia shows, the reluctance of judges to serve on inquiries hardly deters the government from trying to have them serve. It is not unlikely that the government of Kenya will, in future, try to appoint a judge, even of the Court of Appeal, to an inquiry. The advantages that judges give to inquiries will always provide a temptation that governments cannot resist. However, whether or not judges in Kenya will in future serve on inquiries is not the responsibility of the government but of the judiciary. If the Kenyan judiciary mobilizes itself to take a strong stand as that taken in Australia, it will be able to resist government pressure to have its members serve on inquiries. With a relatively small legal profession and an even smaller number of retired judges, the government has very few alternatives outside the serving judiciary and may, for this reason alone, be forced to look to the judiciary again, notwithstanding the strong views of Bosire Commission.

The Judiciary, if it feels strongly about this matter, would have to lobby for reforms to the Commissions of Inquiry Act to make sitting judges ineligible for appointment to inquiries.

To sum up it has been argued that although judges have undoubted qualifications of fairness and impartiality in inquiries, they are ignorant of the techniques required in social

research. Therefore, although judges would be suitable for appointment to inquisitorial inquiries they may be unsuitable for conducting investigatory inquiries for which persons trained in different skills, like analyzing specific data would be more suitable.

1.6 Internal Organization of Commissions of Inquiry

The internal organization of an inquiry is dependent, firstly, on legislation, secondly, on the instruments that establish the inquiry and, thirdly, on the arrangements made by the inquiry itself for the purposes of discharging its mandate. The arrangements made by the members of the inquiry will, of course, be influenced by very many factors, including their number, social status, age and so on.

The Commissions or Inquiry Act empowers the President, where more than one commissioner is appointed, to designate a chairman and deputy chairman of the commission. In all the commissions appointed in Kenya, which had more than one member the practice has been for the President to designate a chairman. In the Bosire Commission and also in the Ndungu Commission, the President designated a deputy chairman in addition to the chairman. In all the other commissions appointed during the last twenty-five years, there was no designation of a deputy chairman.

The Commissions of Inquiry Act empowers the minister to make regulations, including for the internal management of commissions of inquiry. However, no such regulations have been made. The Act also empowers an inquiry to make rules for the conduct and management of proceedings of the inquiry. Some of the commissions of inquiry appointed during the last twenty-five years have made rules for the management of their own affairs while others have not.

The rules of commissions, where these had been made, were given great formality through publication in the Gazette. There was a rigid application of the rules in the day-to-day work of the commissions. For example, the Bosire Commission invoked its rules on several occasions, in disallowing the evidence of witnesses who would mention other persons adversely without prior notice to those other persons. Although this is also a requirement of the Act, the fact that the Bosire Commission invoked its own internal rules on such occasions demonstrates the seriousness with which such rules have come to be viewed by the commissions. On another occasion the Bosire Commission relied on, among other authorities, its own rules in dismissing an application by one of the counsel assisting that the chairman or the entire commission should disqualify themselves for having failed to give counsel assisting a free hand in choosing what evidence to bring before the inquiry. The Commission ruled that its own rules required that counsel assisting should seek the guidance of the commissioners on what evidence to present.

Also, invoking an internal rule, which prohibited the receiving of evidence prejudicial to the Head of State, the Akiwumi Commission expunged from the record, evidence that had been adduced by a witness, Father John Kaiser. The Commission ruled:

The evidence made adverse the Head of State must be expunged from the records of those proceedings.

That evidence came without warning. Rule 4 of our rules of procedure provides that without the leave of the Commissions, "No evidence..." The only action we must now take is to order that the evidence wherein the President is mentioned must be expunged from records of these proceedings.

The Commission also ordered the media not to report that evidence, as it had been expunged.

The Miller Commission appears to be the first commission to have exercised the power to make rules for the internal management of the inquiry. The Commission produced a set of rules, which it then published in the Gazette. The rules were mainly procedural and mostly reiterated matters already contained in the Act. For example, the rules provided that the Commission could exclude from its proceedings any person, or class of persons if it considered it necessary to do so in the public interest. The rules also provided the right to be represented by counsel, the right of implicated persons to call exonerating evidence and the power of the Commission to require the production of documents in evidence.

A rule of the Commission that merits some discussion provided that no evidence would be heard in public that was prejudicial to the security of the state or to the Head of State. The Miller Commission was set up to investigate the personal conduct of a former Attorney General, Charles Njonjo. One of its terms of reference required the Commission to investigate the allegation that Njonjo “had conducted himself in a manner prejudicial to the security of the State, the position of the Head of State, the image of the President and the Constitutional government of the Republic of Kenya.”

It would have been very difficult to have an open inquiry in view of this rule since, by its own terms of reference; the heart of the inquiry was intricately tied to the security of the state and the interests of the Head of State. Notwithstanding this rule, most of the evidence before the Miller Commission was conducted in public. There was one occasion on which the Commission went into camera, but it did not do so to receive evidence that was prejudicial to state security or the Head of State, but at the request of a witness.

If the rule in question was considered necessary in the Miller Commission because the subject matter of its inquiry was directly linked to both state security and the position of the Head of State, an identical rule has appeared as one of the rules in all the commissions after the Miller Commission that have made formal rules to govern their proceedings.

The Mtongwe Ferry Disaster Commission, which was an inquiry into a marine accident, had an identical rule. The Akiwumi Commission, which investigated ethnic cleansing which had occurred in parts of Kenya also prohibited evidence in public prejudicial to the state security or the Head of State. The Bosire Commission, which investigated a financial scandal that happened more than a decade before the current Head of State came to office also had a similar rule.

A report of the Law Society of Kenya on the Akiwumi Commission discussed at great length this rule as made by that Commission. According to the Society, the rules of the Akiwumi Commission were molded on and in many cases were a “verbatim rendition” of those of the Miller Commission. The rule under discussion has been worded in exactly identical terms in all the four commissions. The Society strongly criticized this rule which it termed “potentially meaningless or outrightly obstructionist as applied to the Akiwumi Commission.” The Society reasoned that the whole subject of the Akiwumi inquiry represented a threat to the state security and wondered what purpose would have been served by such a rule. The Society pointed out that the rule was ultra vires section 7 of the Commissions of Inquiry Act, which placed on every commission the duty to make “a full faithful and impartial inquiry.” The Society wondered, “Why the Commission would ditch this plenary rule in favour of the mean-spirited one from the Njonjo inquiry?”

The Society's suggestion, which this study agrees with, was that evidence that is prejudicial to the Head of State is automatically admissible but in camera.

Relevant to the question of internal arrangements is whether there are provisions regarding quorum for commissions of inquiry in Kenya. The Act makes passing mention of this when it empowers the President, where he appoints more than one commissioner, to authorize the commissioners, "or any specified quorum of them," to inquire into a given matter. In principle, therefore, the applicable quorum of a commission can, if the President considers it advisable, be provided. The significance of this question is clear if the commission adopts a method of inquiry by which it divides different responsibilities among available commissioners. The Davy Koech Commission divided itself into several panels. Different panels visited different parts of the country and obviated the need for the whole commission having to cover the entire country.

Although the President has power to define the quorum of a commission, the instruments appointing commissions of inquiry have been silent on this point. The Bosire inquiry report carried the recommendation that in future the quorum of an inquiry should be stipulated.

In Australia, multi-member commissions are now the exception rather than the rule it being more usual to have one-member commissions. There are advantages and also disadvantages in appointing multi-member commissions. A procedure for internal decision-making must be agreed on in multi-member commissions, which is not the case in single member commissions. The proceedings will necessarily be slower because of the need to consult and carry all members along.

The possibility of disagreement exists in multi-member commissions and also a higher possibility that there will be disclosure of confidential information to unauthorized persons. Where a large number of people are members of an inquiry, the chances of unavailability of some of them increases. If the quorum is all members, this may lead to delay.

Multi-member commissions on the other hand are likely to encompass greater expertise and to provide multiple points of view, which single member inquiries cannot. Further, multi-member inquiries are better able to withstand external pressure and to protect their own independence than single member inquiries.

Other jurisdictions have moved away from multi-member inquiries in favour of single-member inquiries. It is suggested that in future, unless there is good cause, inquiries should constitute of as small a number as possible. Small inquiries are easier to manage and more cost effective.

It is suggested that in every case where an inquiry is established, the quorum for its meetings should be stated in the instrument appointing the inquiry. It is further suggested that the threshold for quorum should be kept low so that quorum is easily achieved.

1.7 **Duration of commissions of inquiry**

The Commissions of Inquiry Act suggests that the President may determine the duration of a commission of inquiry, by providing that the President "shall direct where and when the inquiry shall be made and the report thereof rendered".

The instruments appointing the Mtongwe Ferry Disaster Commission required the commission to complete its work and render a report within two months. The Ndungu Commission was appointed for a period of nine months, which was extended by a further

three months at the request of the Commission. The Akiwumi Commission had a specified duration, which was contained in the instrument of appointment. The instrument was varied from time to time to extend the time for the Commission to complete its work. The rest of the commissions of inquiry during the Moi and Kibaki era have been silent as the duration of the inquiry.

Part of the criticism against the Bosire Commission is the duration of three years, which it took to complete its work. It was pointed out that the commission could and should have taken a shorter duration and that one of the reasons why so much time was taken was the open-ended nature of its term of office. The report of the Bosire Commission devoted a significant amount of space to a heading it referred to as "Problem Faced during the Inquiry" in which it explained the delay in completing its work.

On the other hand, the Ndungu Commission, which ran alongside the Bosire Commission, was appointed for a specified amount of time, stipulated in the instrument of appointment, and this was considered a better way of managing costs. As the commission itself remarked in its report, "the time limit meant that the Commission would conclude its work without exerting too much cost on the Exchequer". The Commission however made a great deal of the inadequate time it was allocated.

It wrote:

One of the most intractable problems that faced the Commission throughout its tenure was the limited amount of time within which it was to conduct and complete its inquiry.

Having initially been allowed 180 days, its tenure was extended by a further 90 days when it was realized that the initial time allocation was inadequate. Even then the time was still grossly inadequate. The establishment of a secretariat alone took a long time. As a result the Commission had to cut down on some planned activities and also had to abandon the verification of some of the information received.

Previously, the Akiwumi Commission had also been appointed on a fixed duration. This duration was reviewed severally to allow the Commission more time to complete its work. This method of running the Commission came under severe criticism from the Law Society of Kenya in a report it prepared on the Commission.

According to the Society:

As soon as it was set up, it became clear that the Commission would have to work at a roller coaster pace. Knowing that its work would lack credibility if it did not cover as many areas as were afflicted by the clashes, the Commission soon realized that it was caught up in a near impossible race against both geography and time... And though this deadline was extended from time to time, it is clear that this dilatory time management had its toll. In the end, depth was sacrificed for breadth: a record number of witnesses gave evidence but crucial questions were not answered.

The Society concluded:

Given Commission would have framed the issues and directed the inquiry in a manner that would have ensured both depth and breadth.

It is difficult to reconcile the positions represented by the foregoing arguments. On the one hand, there is a justifiable concern about cost and the need to impose measures that protect the public revenue from open-ended costs. It should be possible for the government to have an idea about the cost of running an intended commission. Without this the government

might fear appointing an inquiry even in the most deserving circumstances for fear of incurring uncertain costs. Further, long inquiries soon lose public and end up causing public anxiety. The only way, in which cost can be controlled, more or less with certainty, is to stipulate the duration of an inquiry. This will also prevent the inquiry from developing into a career for members of the commission. Attempts to establish deadlines have, however, been met with the kind of concern expressed by the Ndungu Commission and, so forcefully, the Law Society of Kenya.

One way in, which the concerns of the exchequer and those of a full inquiry might be met, is to provide, at the time of appointment, a fixed duration for the commission. If the inquiry should require this time to be reviewed, the members would be required to make a written request, which contains sufficient details on the amount of extra time needed, and a justification for requesting the extra time. The inquiry cannot thereafter complain of arbitrariness since it would have participated in a reasoned dialogue on whether it needs additional time.

1.8 **Reasons for Establishing Inquiries**

In England, commissions of inquiry are established when there are “rumored instances, or lapses in accepted standards of public administration and other matters causing public concern which cannot be dealt with by ordinary civil or criminal process but which require investigation to allay public anxiety”

No official explanation is ever given for the appointment of inquiries in Kenya. In the absence of such explanation, the exact reasons for the establishment of each inquiry will be difficult to know. The question of why each inquiry was established can, therefore, only be answered using circumstantial evidence.

President Moi established the Devil Worship Commission following a sustained campaign by the Church, supported by the media, that claims as to the existence and extent of devil worship in Kenya should be investigated. In retrospect, it is incredible that public funds should have been spent on such a subjective adventure as looking for evidence on the devil led by the Christian leadership. At the time, however, the pressure on the government was unrelenting and the powerful Church managed to galvanize the public into believing that the inquiry into the existence of the devil was of great necessity.

President Kibaki, when releasing the report of the Bosire Commission to the public issued a statement in which he said:

I have today directed the immediate release of the Goldenberg Commission report to the public. The release of the report marks the beginning of a new phase in the war against corruption... The Government has made public the recommendation for the Commission and will move decisively and with speed to implement these recommendations.

The President’s statement also referred to the Ndungu Commission and its recommendations. The President thus confirmed that the Bosire Commissions had been set up as part of the activities in the first phase of his government’s anti-corruption strategy.

The death of a cabinet minister in a plane crash in Busia and the exposure of a large number of senior members of the government to peril in the same crash must have severely embarrassed the government which then set up the Muthoga Commission to investigate the crash.

Two of the inquiries established during the Moi era were the Devil Worship Commission and the Mtongwe Ferry Disaster Commission.

The Gicheru inquiry was set up during a period of great political pressure resulting from the death of a cabinet minister. The government was accused of responsibility for the death or at least of attempts to block an investigation into the death. The establishment of the Gicheru inquiry served to pacify an agitated public but also postponed any reckoning resulting from the death of the minister. When the proceedings of the inquiry drew influential members of the government into the inquiry, the Commission was disbanded.

The Davy Koech Commission appears to have been established for more benign reasons. The government had been implementing the 8+4+4 system of education for just over two decades and felt that it was time to review the impact of the new education system. The government would have been open to any reasonable suggestions resulting from the review. The subject of investigation during the Bosire and Ndungu inquiries can similarly be classified. In both cases, the new government would have welcomed suggestions on how to address two past wrongs that it now found itself having to deal with.

The Miller inquiry stands alone for several reasons. Firstly, it is the only recorded occasion when an inquiry was established into the personal conduct of only one individual, Charles Njonjo. Although both the Ndungu and Bosire inquiries also investigated aspects of personal conduct, it was the conduct of a large number of people, whether state officials or businessmen, rather than that of one person. Secondly, the conduct complained about in relation to Charles Njonjo could only have directly and materially aggrieved one person: the President.

In effect, therefore, the complainant in the Miller inquiry was the President. The matters complained about would, if true, constitute serious criminal offences, including the offence of treason, punishable by death. It was possible to deal with Njonjo using the criminal law and to prosecute him for treason and allied offences. However, this cause of action was shunned in favour of an inquiry.

The Miller inquiry was preceded by a complaint by the President that an unnamed person, with the support of foreigners, was being groomed to overthrow the government. In time, this unnamed individual came to be referred to as a "traitor" and he was finally publicly named in an atmosphere of considerable political melodrama.

It is arguable, in retrospect, that the events leading up to the formation of the Miller inquiry was a well choreographed political strategy for getting rid of Njonjo, at the time a highly influential member of the government. The government would have considered the available options for proving Njonjo's "guilt" which presumably it was necessary to establish in order to justify his removal. For whatever reason, an inquiry would have been found to be the most expedient way of establishing such guilt. If so, the Miller inquiry provided one additional use for inquiries, not mentioned above.

1.9 **Commissions of Inquiry: Finance and Administration**

The Commission of Inquiry Act provides for the appointment of a secretary to an inquiry. The Act does not specify the responsibilities of the secretary to a commission. The practice has developed for the appointment of two secretaries (referred to as Joint Secretaries) in the commissions appointed during the recent past.

The secretary is the administrative head of an inquiry and takes responsibility for the myriad administrative arrangements that facilitate an inquiry. These include oversight of arrangements regarding transport, security, and administration support for commissioners, issuance of notices, issuance of summonses, and oversight of investigations.

The secretary oversees a staff compliment that is usually appointed to assist the inquiry in the discharge of its mandate. The Commissions of Inquiry Act provides that the President may direct the Commission of Police to detail police officers to attend upon commissioners to preserve order during proceedings of the inquiry, to serve summonses on witnesses and to perform such administrative duties as the commissioner may direct. In practice, there has been great reliance on police officers during inquiries, and these have been an important part of especially inquisitorial inquiries. They are employed in the maintenance of order, in the provision of security, in the service of summonses, in effecting arrests (if this should ever be necessary), in the conduct of investigations and in other general responsibilities.

The reports of some of the inquiries held in Kenya list the staff that assisted in the inquiry and are usually very complimentary of the role of such staff, which they regard as having been one source of great assistance.

Administrative responsibility for the inquiries established in Kenya is usually placed in the Cabinet Office, a department of the office of the President. It is usual for a co-coordinator of the inquiry to be designated within the office. The coordinator would be the contact person for the inquiry on a day-to-day basis and would be responsible for meeting the ordinary needs of the inquiry. The secretary to an inquiry would ordinarily work closely with the coordinator.

In dealing with the requests of an inquiry the co-coordinator would, where necessary, initiate internal consultations in the Cabinet Office and such consultations may, if necessary, involve the Head of the Public Service.

Other government departments may be involved in the support of an inquiry, depending on the subject matter. The office of the Attorney General is an obvious example. The Bosire Commission, which inquired into losses made by the Central Bank of Kenya in a series of financial scandals, could not have been possible without a large amount of support from the Bank. The bank deployed a large number of members of staff to assist the inquiry on a permanent basis. The Ndungu Commission, which dealt with irregular allocation of land, received the support of the Ministry of Lands in its work.

In Australia, similar administrative arrangements as described above are observed and need not be described separately.

1.10 **Counsel Assisting**

The Commissions of Inquiry Act makes no provision for the appointment of counsel assisting commissions of inquiry. There is therefore no legal requirement for an inquiry to have counsel assisting. The practice has, however, evolved that inquiries, especially those that inquire into alleged wrongdoing, will have counsel assisting. The President usually appoints counsel assisting at the time of establishing the inquiry. Counsel assisting is regarded as an integral part of an inquiry in the same way as the commissioners and the secretary, whose roles are provided for under the law.

All the recent inquiries that investigated alleged wrongdoing had as part of their compliment, counsel assisting. It is usual for at least two persons to be appointed as counsel

assisting. It has not been usual for inquiries looking into policy matters to have counsel assisting. Thus, the Davy Koech Commission, the Devil Worship Commission and the Muthoga Commission did not have counsel assisting. However as an exception, the Ndungu Commission, although organized as an investigation into issues of policy on land, had two Counsel assisting.

The role of counsel assisting remained largely non-controversial until the Akiwumi inquiry. That inquiry had, at inception, Mr. Nyagah Gacivih and Ms Dorcas Oduor both state counsel in the office of the Attorney General, as counsel assisting. Mid-way into the inquiry, Mr. Gacivih was removed and replaced by Mr. Bernard Chunga, the Director of Public Prosecutions in the office of the Attorney General.

The Law Society of Kenya, which participated in that inquiry and wrote its own report on the proceedings, was highly critical of the appointment of a state counsel as counsel assisting. The main argument was that given that the role of the Attorney General would conceivably come into question during the inquiry and that the Attorney General might possibly be found blameworthy, it would have been desirable to have counsel assisting who was independent of the office of the Attorney General. Wrote the Society:

Given the inertia that the office of the Attorney General has shown in prosecuting those suspected of inciting and supporting the clashes the Law Society felt that the involvement of the Attorney General and his office in the Commission would dampen the search for the truth. Moreover, it was the view of the Law Society that the law enforcement officers, having failed to deal with the clashes when they occurred, were themselves a subject of investigation by the Commission.

The Society's report notes that its fear was allayed because Mr. Gacivih had an open and fair approach as counsel assisting. However, when Mr. Chunga came in it became clear that he was determined:

- i) To exonerate the top leadership of responsibility for the clashes and to generally defend the government.
- ii) to depoliticize the violence of to and portray it as a spate of criminal assaults arising from "ordinary" disputes between neighbours;
- iii) Sanitize the violence of its genocidal elements by removing the tag of ethnic cleansing from it;
- iv) Focus blame on low ranking provincial administrators and police officers and shift the inquiry from looking into political incitement;
- v) Impugn the victims and exonerate the aggressor communities from blame by explaining away the violence as a typical case of the aggressors unbearably provoked by their victims.

The Society was highly critical of the role played by Mr. Chunga in the inquiry which it viewed as obstructionist and mischievous. The Society formally applied that Mr. Chunga should step down as counsel assisting in view of the lack of confidence it had in him, and that he should be called as a witness, in view of the fact that, as Director of Public Prosecutions during the material time, he owed an explanation on the responses by law enforcement agencies to the clashes.

The Commission, however, rejected the Society's application for counsel assisting to be asked to take the witness stand on the grounds that it is the Attorney General who should

be answerable for the failures of the law enforcement agencies. In the end, however, neither the Attorney General nor Mr. Chunga was called as a witness.

In the Akiwumi inquiry, the commissioners went to great lengths to shield counsel assisting from what appeared like a legitimate assault. The next inquiry in which the role of counsel assisting came into great controversy was the Bosire inquiry. It began with an application by Gibson Kamau Kuria, one of the four Counsel assisting, and who had had a difficult relationship with the commissioners, applying in open hearing, that either the chairman, Mr. Justice Bosire, or all the commissioners, should disqualify themselves from the inquiry.

The basis of the application was that counsel took objection to the fact that the Commission had purported to direct them on how to call witnesses. Mr. Kuria viewed this as interference with the independent role of counsel assisting. In his view counsel assisting must act independently in making decisions on what evidence to present to the inquiry.

The Commission, in dismissing the application, relied on section 9 of the Commissions of Inquiry Act which makes it the duty of the commissioners, and not counsel, to inquire and also on its own rules of procedure, which provided that evidence that the Commission desired to be adduced shall be called by counsel assisting on its behalf. The Commission found that the application was “preposterous, lacks in merits and was, in our view, made with a view to annoy”.

Another clash between the commissioners and counsel assisting occurred when the commissioners, having excluded counsel from its proceedings for unruly conduct, the counsel went to court and obtained orders reinstating them to the proceedings. The Commission then adjourned, as it was not able to agree with the order returning the expelled counsel, which it viewed as diluting its authority to regulate the proceedings of the inquiry. In the end Counsel voluntarily discharged the order and were subsequently allowed back to the inquiry after an appropriate apology.

The conflict between counsel assisting and the commissioners in the Bosire inquiry brought into question the role of counsel and also raised questions on how such an unseemly conflict can be avoided. As pointed out, the role of counsel assisting is not provided for in law and the logical consideration would be to provide for it with a view to regulating it. Secondly, the Bosire inquiry saw a contest as to what the respective roles of counsel assisting and the commissioners are. The commissioners ruled that it is their role to inquire although one of the Counsel assisting viewed the role of counsel assisting as requiring some autonomy from commissioners.

In Australia, when an inquiry is established, it is the practice for the Crown Solicitor to be instructed to brief counsel. The question arose, in Australia, as to whether counsel assisting should be “briefed” or appointed”. If briefed, he would be free not to follow any particular line of argument and would be independent during the inquiry. In that event, the Crown Solicitor would be expected to deliver to counsel a brief, which would be the basis of his role in the inquiry. If “appointed” counsel assisting would not be free to act independently and would have to present a predetermined case.

The Bar Council of Victoria resolved that counsel should be briefed and not appointed.

The fees payable to counsel assisting are taken out of allocation given to the inquiry. No money allocated to an inquiry can be spent without the written authority of the chairman. It

follows that the chairman controls the fees of counsel assisting and that in instructing counsel, the Crown Solicitor is doing so on behalf of the Commission.

In England, counsel assisting in Tribunals of Inquiry is regarded as acting not on behalf of the government, but on behalf of the Tribunal.

The case in Kenya is quite different: since counsel assisting is appointed by the President alongside the Commissioner and secretary he is regarded as acting on behalf of the government. The basis of the tension between counsel assisting and the commissioners, which was witnessed in the Bosire inquiry, lies in this fact. Since the commissioners do not appoint counsel and since he is not regarded as representing them, they will have very little control over counsel and cannot, ultimately, exercise as much control over counsel as might be necessary. The argument by Mr. Kuria, that counsel occupies an independent position would, in Kenya's case, appear to be incorrect because, in fact, counsel is not independent, having been appointed by the government to represent its interests in the inquiry.

The role of the Attorney General has come into question in such inquiries. In Kenya it has been the practice for inquisitorial inquiry to provide in the rules of inquiry that the Attorney General is to serve as *amicus curiae* to the inquiry. "*Amicus curiae*" as used means a friend of the commission. Under the common law, one of the manifold functions of the Attorney General in criminal law is to act as *amicus curiae* in relation to any proceedings commenced before a court of law. As *amicus curiae* the Attorney General has a right of audience in those proceedings, either personally or by representatives. The appointment of the Attorney General as *amicus curiae* by inquiries is based on his common law functions in relation to criminal proceedings. The Bosire inquiry appointed as *amicus curiae* the Attorney General under the rules of procedure promulgated by the commission. At the commencement of the inquiry, the Attorney General was allowed to make an opening address alongside the chairman of the Law Society of Kenya and counsel assisting the inquiry.

At various stages during the inquiry, the Attorney General attended before the Bosire inquiry, usually to address the inquiry on extraordinary matters touching on, but not forming part of, the evidence before the commission. On one occasion, the Attorney General attended before the inquiry following allegations, subsequently found to be unfounded, of bribery of members of the inquiry by a potential witness. The appearance of the Attorney General on that occasion was to assure the inquiry and the public that the allegations would receive the full attention of the government as they tended to cast aspersions on the independence of the inquiry. On another occasion, the Attorney General appeared following allegations that evidence tendered before the inquiry was the subject of an alleged conspiracy by parties to parallel proceedings outside of Kenya, intended to defeat justice. On this occasion the Attorney General's appearance was with a view to assuring the inquiry that those allegations would receive a full investigation.

The Attorney General therefore played a protective role over the inquiry, shielding it from unwarranted attack, investigating claims, which the inquiry desired to be investigated, and giving assurance to the public, through the forum of the inquiry, which the commission could not do by itself.

It has been the practice in England, before the Salmon Royal Commission, for the Attorney General to appear and conduct proceedings before the Tribunals of Inquiry. Indeed, representations were made to the Commission that this practice should continue. In its favour, it was urged that the Attorney General ordinarily represented the public interest

and it was misconceived that in the Tribunal of Inquiry an exception should be made to this role.

The Commission, however, found in its report that the participation of the Attorney General in such inquiries was most confusing to the public because of his membership of the government and that, however he performed in an inquiry, he would almost certainly be criticized.

In Victoria, as in Kenya, private counsel have been used in inquiries in the place of the Attorney General and are thought to have improved the credibility of such inquiries in ways the Attorney General never could have.

The experience in Kenya suggests that there is need for reforms in the manner of appointing counsel assisting. The power to appoint such counsel is, as stated not vested anywhere and the President in practice makes the appointment. Because of the need to establish and maintain answerability, the appointment of counsel assisting should be the responsibility of the commissioners themselves. This would maintain the expectation that ultimately, responsibility for the inquiry rests with the commissioners and not any other person.

An alternative suggestion is that the Attorney General should instruct counsel assisting. As indicated this is the procedure followed in Australia. It maintains the independence of counsel from the appointing authority and at the same time ensures that counsel do not, as a result of the way they were appointed, assume that they have equal status with the commissioners.

1.11 **Commissions of Inquiry: State of Implementation**

This part discusses the state of implementation of the recommendations made by previous commissions of inquiry.

The secretive release of the report of the Devil Worship Commission is discussed elsewhere in this presentation. A number of recommendations made by the report would have required an open and high profile release of the report of the Commission for these to be implemented successfully. Further the government would have been expected to provide leadership in dialogue on the contents of the report. This is because those recommendations would have required the participation of other stakeholders for effective implementation. Further, public awareness of the contents of the report would have promoted public awareness on the practice of devil worship, which the Commission strongly recommended. As the report was released to the public in great secrecy, this undermined the realization of these recommendations, which, could not have been implementable under the circumstances. It is as though the government regretted the very existence of the report, which it quietly disowned through a secretive release.

A number of the matters recommended by the Commission were already the subject of existing government programmes or policies, for example, a recommendation that proposed the curbing of drug abuse, a recommendation that proposed the creation of more jobs and a recommendation that proposed the censorship of material for viewing on television and in cinemas. Subsequent to the release of the report there has been no linkage, at least not publicly, between the pre-existing programmes and the recommendations of the Commission. It is safe to assume, that these programmes are being carried out as a result of a pre-existing commitment and not as a result of the recommendations of the Commission.

There is no evidence that any efforts were made to implement any of the 30 recommendations.

The Ndungu Commission, which dealt with the irregular or illegal allocation of public land made a series of findings of fact. The findings ascribed responsibility for established wrongdoing to a number of individuals. It also made a series of recommendations intended to correct the wrongdoing. These are referred to as secondary recommendations. The Commission recognized that the implementation of the various recommendations would be an on-going task and therefore proposed a number of structures to be established for this purpose. These include:

1. An amendment of the Government Lands Act to establish a tribunal which, as a quasi judicial body, would have the same powers as those conferred on the High Court and which would oversee the implementation of the detailed recommendations.
2. A Task Force to be established under section 23 of the Constitution of Kenya, consisting of specialists in land administration and whose responsibility would be to advise the Ministry on the revocation of illegal registered titles, repossession of land, measures to be taken regarding claims filed in the courts; information retrieval systems for multiple purposes and the verification of registered titles.
3. A steering system and strategic unit to monitor the implementation of the policy and identify slippages and drifts in the course of implementation.

The three recommendations above are referred to as primary or foundational recommendations. The government has not implemented any of these foundational recommendations by the Ndungu Commission and does not appear to be interested in implementing any of them. The President has however publicly stated the commitment of the government to implementing the report of the Ndungu Commission, and the government has said it will implement the recommendations.

There is some evidence of implementation, taking the form of a public announcement by the Kenya Anti-Corruption Commission that those who hold illegal title to land and who do not take steps to surrender such title will be prosecuted. It appears that the government is taking steps to implement the secondary recommendations while ignoring the primary recommendations. Former members of the Ndungu Commission have expressed their deep displeasure over this, claiming that it will not succeed since the government appears to have ignored the logic on which the Commission's recommendations were based.

The Bosire Commission made several recommendations including that:

- i) There should be a separation between the Central Bank of Kenya and the Deposit Protection Fund Board. This would require statutory intervention.
- ii) The power to license banks, as a corollary of regulation, should be conferred and the Central Bank of Kenya and not the Minister, as is currently the case. The Central Bank should come under audit by the Controller and Audit General
- iii) Ex gratia payments by the government should be discontinued.
- iv) Handling of pending income tax cases is unacceptably lax. These should be expedited and concluded as soon as possible.
- v) The quorum for a commission of inquiry should be provided in the instrument appointing the inquiry as should the remuneration of Commissioners.
- vi) Proceeds of crime legislation should be enacted as soon as possible

- vii) The Commission recommended that, at the discretion of the Attorney General, further investigations be carried out to determine the culpability of certain named individuals in the Goldenberg scandal and also named another list of persons it recommended should be prosecuted.

Although it is still relatively soon after the release of the Bosire report and the government would claim that it would implement the recommendations in the fullness of time, only the recommendation regarding prosecution and further investigation has appeared to receive official attention. A number of arrests have been made and cases brought to court against named individuals. The government also claims that further investigations are taking place, as recommended.

The report of the Muthoga Commission found that most rural airstrips had potholed runways and also found that the airstrips were unusable because they were too short, lacked navigation equipment and were generally in a state of disrepair. The Commission recommended that the Kenya Civil Aviation Authority should, in future, strictly enforce air traffic rules to avoid accidents.

The report also recommended that District Commissioners should fence off airstrips to prevent encroachment by local people who regard them as grazing grounds. It further recommended that trees on tall buildings and next to airstrips should be removed to enhance visibility.

On 13 April 2006 another high profile aircraft accident happened in Marsabit in Kenya in which several members of the government, including cabinet ministers were killed. There was public concern about air safety in the country if senior members of the government could die in two air accidents in the space of less than three years.

In the wake of the accident the *Daily Nation* revisited the recommendations of the Muthoga inquiry with a view of establishing if these had been implemented. The newspaper concluded that, "few, if any, of the safety recommendations made after the previously deadly plane crash - at Busia in 2003 - have been implemented".

A review of the recommendations of previous commissions of inquiry make it abundantly clear that very few if any of these recommendations have ever been implemented. This raises the question as to why the inquiries were established in the first place if there was no intention of carrying out their recommendations.

1.12 **Conclusion of Inquiries**

The Commissions of Inquiry Act does not address, with any clarity, the question of when an inquiry comes to an end. It merely provides that "every commission and every revocation of a commission, under this Act shall be published in the Gazette, and shall take effect... from the date of publication".

The practice in Kenya has been for the President to publish a notice in the Gazette establishing a commission. No notice of the revocation of a commission following completion of its work could be traced. It seems that commissions are regarded as coming to an end following the completion of their work, even in the absence of a formal notice of revocation. The situation is different for commissions established for a specified period of time. These, it is logical to assume, cease to exist once the period for which they were appointed lapses.

All recent commissions completed their work and were generally understood to have ceased to exist notwithstanding the failure to publish a formal notice of revocation. Two recent cases however, challenge this assumption. The first involved the Akiwumi Commission, which had been established for a defined period of time and which, as argued above, would logically have come to an end following the expiry of that time. The Commission stopped taking evidence on 11th June 1999, the date on which, according to a notice in the Gazette, its life would have come to an end. Thereafter, the Commissioners retired to write their report, which was eventually handed over to President Moi.

There was a long lull between the time of presentation of the report and its release to the public. Aggrieved by the contents of the report, Nicolas Biwott, a minister in the Moi government, brought successful legal proceedings to expunge his name from the report on the grounds that the Commission, which had made adverse findings against him in the report, had not afforded him a hearing as required by the Commissions of Inquiry Act. The suit by Mr. Biwott named the Attorney General and the three members of the Commission, as defendants. The success of the suit re-defined the frontiers of the completion of a commission of inquiry.

More recently, the release of the report of the Bosire Commission also formed the basis of a suit by a person similarly aggrieved by the contents of the report. George Saitoti, a minister in the Kibaki government, was the subject of adverse findings by the Bosire Commission. By the time of his suit, the Commission had wound up its work, and given up the premises it had occupied during the inquiry. The members of the Commission had also resumed their ordinary duties. The suit by Saitoti named the three members of the Commission and the Attorney General as the defendants. Service of the suit would ordinarily have been on each of these defendants directly. The High Court, on an application on behalf of Saitoti, however, directed that the former secretary of the Commission be served on behalf of the three defendants.

The Saitoti case also brings into question the exact time when a commission comes to an end. Can a commission, which has handed in its report, be held responsible for the contents of the report at any time? If the formal revocation of a commission were published as provided in the Commissions of Inquiry Act, would it still be possible to bring proceedings against an inquiry whose commission has been revoked?

If it is the attitude of the courts that formal revocation is necessary for a commission to cease to exist after it has completed its work, care should be taken to ensure that the revocation is published. This will avoid the situation where commissioners are sued for the contents of a report of a commission that they wrote but in respect of which they are no longer responsible.

In England a Royal Commission continues in existence until it has “completed its labours, unless the duration is expressly limited by the letters Patent or Act of Parliament by which it was appointed”, or unless it is revoked and discharged by the crown.

1.13 **Release of the Report of a Commission**

The Commissions of Inquiry Act is silent on the release of the report of a commission of inquiry. In the circumstances, the manner in which the President deals with the report of an inquiry that he appointed remains unregulated by the law.

There are stark differences in the manner in which previous reports have been handled. The differences, it seems, are based on the personality of the individual President that appointed the inquiry. As far as could be ascertained, the reports of all inquiries set up by the colonial government were released to the public, more or less promptly. This practice continued during the Kenyatta administration (1963 - 1978), which was responsible for the appointment of far more inquiries than those appointed by the combined Moi and Kibaki regimes.

The first of the Moi regime inquiries was the Miller Commission; its report was released soon after it was handed over to the President. Subsequent reports, however, were dealt with differently. The report of the Gicheru Commission was not released to the public. The report of the Hancox Commission was released only to selected stakeholders within the insurance industry and, to date has not been formally released to the public.

The report of the Devil Worship Commission was made to President Moi. There was some agitation for the release of the report but this soon died off and, except periodically, no public reference to the report was ever made. Then in August 1999, the Minister for Internal Security informed Parliament that the report had been released to the public three months previously. This was remarkable because no notice of the release of the report was ever given and Parliament and the public seemed to be unaware of the availability of the report. The minister also advised Parliament that the report would be tabled for debate in the House the following week. However, there is no record that this ever happened. The following week the *Daily Nation* published excerpts of the report.

By the time of the Mtwonge Ferry Disaster in 1994, the Moi administration had built a record of consistent failure to release the reports of its own inquiries sufficient to make those calling for the establishment of an inquiry over Mtwonge to, at the same time, express their dismay over the failure to release past reports.

The release of the report of the Akiwumi Commission followed the pattern of delay witnessed in relation to the previous reports. The incident of ethnic cleansing, which the inquiry has been appointed to look into, was associated with electioneering, having occurred just before the 1992 general elections and again just before the 1997 general elections. With general elections approaching again in 2002, public pressure for the release of the report started mounting. The Attorney General was asked to secure the release of the report so as to forestall further election-related violence during the forthcoming elections.

The reason for delay in releasing the Akiwumi Commission report was, according to the Attorney General, because it was feared that an immediate release of the report would prejudice the administration of justice in relation to the intended prosecution of persons adversely mentioned in the report. The Attorney General explained that further investigations, with a view to prosecution, were going on and that the early release of the report would prejudice the intended prosecution.

When the report was finally released the Attorney General while releasing the report on behalf of the government, dismissed its findings, thus prejudicing the way it would be received by the public. By the time the Attorney General released the report, none of the promised prosecutions had been commenced. It is difficult, in the circumstances, to believe the explanation provided by the Attorney General as to the delay in the release of the report. How could the Attorney General have been considering public prosecutions based on a report that he did not believe in? It is more likely that the delay in releasing the report was because the government was uncomfortable with its contents. The delay was intended

to buy time and wish the report away. When this was not possible a decision must have been made to release the report and in the same breathe to condemn its contents.

The reports of two of the three inquiries set up by the Kibaki administration were released without delay although the decision to release one of the reports appears to have been forced by public pressure. The report of the Bosire Commission was released within two weeks of being presented to the President, as he had himself undertaken when accepting the report. However pressure preceded the release of the Ndungu report.

There were media reports that a cabinet decision had been made that the report be released and that the subsequent delay in releasing the report was the personal agenda of the responsible minister who was out to protect his friends in government mentioned adversely in the report. There were even claims that the delay was intended to provide opportunity to alter the contents of the report to make it palatable to the government. The Law Society of Kenya brought an action in the High Court to compel the immediate release of the report. The Society claimed that it was doing so to protect the public interest "in the light of the government's callous conduct and the opaque manner it conducts itself". The Society dismissed the assertion that the delay was to allow the cabinet to study the report and asserted that it was more likely that the delay was so as to allow an editing of the report to produce a form more acceptable to the government.

The release of the report of the Muthoga Commission was, however, the subject of some delay. The inquiry completed its work at the end of April 2003 and handed over its report to the President soon thereafter. However, the report was only released in January 2005. There had been a delay of almost two years. The Permanent Secretary in the Ministry of Transport, who released the report on behalf of the government, explained that the delay had been caused by the need to prepare a cabinet memorandum on appraisal of the report and that "this takes time".

Unlike the reports of the other inquiries, there does not appear to have been any pressure for the release of the Muthoga report. The explanation for the delay provided by the Permanent Secretary is scarcely believable. How could a memorandum take almost two years to prepare? It is more likely that the release of the report occupied a position of relatively low priority and that this led to the delay. If this is true, it raises the question of the necessity of the Muthoga Commission in the first place. Could a different authority have handled the work that the Commission was to set up to perform?

The foregoing examination of the evidence shows that the irregular handling of reports of inquiries, whether by delaying their release, releasing them selectively or failing altogether to release the reports is most strongly associated with the Moi administration. The Kenyatta administration, previously, and now Kibaki administration have no strong records of delay in the release of their reports.

The delay, or altogether complete failure, to release the reports of inquiries has been the source of much public disquiet in the past. The existing arrangements have been criticized for giving the government virtually unchecked control over inquiries. The government alone determines whether and when to have an inquiry, the subject matter of such inquiry and its duration. The report of an inquiry, as its only product, is also in the complete control of the government. The government has no obligation to release the report to the public or to present it to Parliament. Calls for reform have pointed out that mechanisms for popular accountability should be built into the existing arrangements.

In Australia, it is accepted that there is no obligation to make public the report of an inquiry. The reports of inquiries in Australia are, as indicated, presented to the Governor. There is no obligation to present a copy of the report of an inquiry to Parliament. In practice, however, the report is usually made to the Governor and a copy is furnished to Parliament, which orders that the report be published. There is no statutory regulation of the publication of reports of inquiries and it is the responsibility of the government to decide whether to publish a report or not. Once the report is tabled in Parliament, and once copies have been furnished to members, it becomes a public document. In England, a report once tabled, becomes a public document even before it is supplied to members.

The claim by the Attorney General of Kenya that the early release of the Akiwumi report would have prejudiced the administration of justice has already been discussed. In Australia, whereas the general practice is for reports to be laid before Parliament and for these to be made public thereafter, there are exceptions to this practice. One exception concerned a part of the report of the Scientology Inquiry (1963) which was considered to have objectionable material and which, for this reason, was never released. If a report contains information that was received in confidence, it will also not be made public as to do so would breach the confidence.

Possible prejudice to the administration of justice is also a reason for withholding or delaying the release of reports of inquiries. In its regard it is the practice not to release a report until all pending criminal cases that relate to it have been disposed of. However, this practice has been the source of much controversy in Australia. The withholding of the report of an inquiry into the affairs of the police force almost led to a police strike that demanded the release of the report.

The accepted position in Australia is that the release of a report must weigh the public interest to know and the private interests of defendants to receive a fair trial.

In England it is the practice that no criminal charges are laid following an inquiry. It is considered that the publicity that inquiries attract is so wide that it would be impossible for a fair trial to result from the matters that were the subject of inquiry. The report of the Salmon Royal Commission (1966) regarded the establishment of an inquiry as a substitute to criminal or civil proceedings. The report of the Salmon Royal Commission is regarded as providing the basis of the practice that court proceedings and inquiries are mutually exclusive.

It is argued that the fear as to the possible prejudice to the administration of justice which may result from the release of the report of an inquiry is not relevant to Kenya, where there are no trials by jury. In England and Australia, where juries are used, it is easy to see the likelihood of prejudice. In Kenya, as judges have argued, the mere publicity of matters would not necessarily lead to prejudice because, by training, judges are able to arrive at decisions based only on the evidence presented before them.

To sum up the discussion, in Kenya and Australia inquiries are not regarded as a bar to criminal or civil proceedings over the same matter. In England, as seen, this is not the case. In both England and Australia, reports of inquiries are ordinarily released to the public through Parliament. In Kenya, there is no practice of tabling reports before Parliament. As seen, such reports once tabled can be discussed by Parliament.

1.14 Reform Opportunities

A case for reform, to increase the accountability of the government in relation to the handling of the report of an inquiry, appears to have been established. The power to decide to have inquiry is vested in the President. There is no reason to change this as inquiries are set up to inform the executive government. However, inquiries are costly and it is necessary that in the exercise of this power, the question of cost is taken into consideration. Secondly, inquiries can be made to pursue the most subjective matters, like the Devil Worship Commission, and it is necessary that some objectivity be introduced into considerations of when to set up inquiries. Thirdly, inquiries can be used to deflect legitimate public pressure to proceed on a given course. For example it can be argued, in retrospect, that the only reason why the Gicheru Commission was set up was with a view to deflecting the overwhelming public pressure for an independent investigation into the death of Robert Ouko. Once the pressure could not be contained, the Commission was set up to delay decision-making. When it became clear that the Commission was moving in an uncomfortable direction, it was disbanded. Fourthly, inquiries that were established on a bona fide basis can come up with findings that the government subsequently becomes reluctant to release. Reluctance was witnessed in the release of the Akiwumi report, the Ndungu report and the Devil Worship report. Fifthly, the government can lose interest in the report of its own inquiry as happened in the Muthoga Commission.

It is suggested that the handling of the reports of inquiries, after these are handed over to the President, should be the subject of regulation by the law. The elements of that regulation would include a requirement that within such period after the establishment of an inquiry, as will be considered reasonable, the report be made to the Assembly by the President, explaining the circumstances under which it was considered necessary to appoint an inquiry; a requirement for the tabling of the report to Parliament within a specified period of time; and a requirement for the publication of the costs of an inquiry as part of the report of the inquiry and a report by the government stating whether or not the recommendations of the inquiry will be implemented.

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THE DEVIL WORSHIP INQUIRY

The devil worship inquiry was triggered by a claim by the head of the Anglican Church that educational institutions in Kenya were in danger of being taken over by devil worshippers and that parents should beware which schools they take their children to. On 21st August 1993, the Minister for Education issued a directive to expel all devil-worshipping children from public schools. The following day, in reaction to the Minister's directive, the *Daily Nation*, in editorial, said parents needed to be told more about devil worship so that they could avoid taking their children to schools where it is practiced.

On 21 March 1994, the *Standard*, citing an education official, said that devil worship was rampant in Western Kenyan schools. Two months later a similar claim was made by a different education official in respect of Taita Taveta District. On 20 July 1994, the debate reached Parliament when two MPs claimed that devil worship was threatening public schools, and called on the Minister for Education to institute a probe into the matter. The following day, the *Daily Nation* joined in and, in an editorial, claimed that "time seems to have come for a serious inquiry into the whole diabolical business, if only for peace of mind of many parents"

The editorial added, "An official inquiry would hopefully achieve... a clear indication of whether satanic practices do indeed exist in Kenya. ...or whether they are figments of overheated pubertal imagination". It urged for the inquiry to be extended beyond schools to include the church and other social places.

Two days later, the Vice President joined the debate when he decried the rise in devil worship in Kenya. The Minister for Education, responding to the increasing pressure, urged headmasters to wipe out devil worship from schools but added that the government could not end devil worship alone because "it has no definition of the practice". The head of the Anglican Church came in again, repeating his earlier claims and, the following month, was joined by the Bishop of one of his diocese.

Finally, on 20th October 2004, the President announced that a commission of inquiry would be formed to look into the matter of devil worship in Kenya. When announcing the appointment of the probe the President said in a public speech that "moral probity and common decency were the bedrock of freedom of worship and that society should not allow behavior that offends our values", The President noted the many reports on devil worship and said that "if these reports are true, then this obnoxious and ungodly practice must be checked".

The *Daily Nation* carried in its editorial, the headline, "Here is a most welcome probe", in reference to the Commission. The editorial claimed that the setting up of an official inquiry was the right thing "given the emotive nature surrounding the issue of Satanism". It added that the inquiry "is welcome as its aim is to remove the murkiness that has surrounded allegations of existence of this practice and the fear it has generated among parents, church leaders and ordinary people".

Appendix 2

COMMISSION OF INQUIRY INTO THE MTONGWE FERRY DISASTER

On 30 April 1994, the *Daily Nation* headlined with a ferry disaster which had happened the previous day in Mombasa, and in which more than 200 people were feared dead. The final death toll in the disaster came to be announced at 276. The Mtongwe ferry disaster followed another transport disaster, a train crash at Ngai Ndeithya, which had killed more than 60 people. The train crash had been the subject of an unusually high profile as the dead included a significant member of foreigners.

On the day it reported the Mtongwe Ferry Disaster, the *Daily Nation* carried an editorial in which it reviewed all the recent accidents in the transport industry and posed the question, "why did it happen?" To secure answers to its question and others, it said, a legal and investigative process must be put in place immediately. The newspaper then suggested the appointment of a crash investigator who, if a commission of inquiry were to be appointed, would give expert evidence to the commission.

On the question of cost, the editorial suggested that the appointment of a crash investigator would be highly cost effective; as he would do the entire preliminary work for the commission

On 4 May 1994 the Head of the Public Service announced the formation of a commission of inquiry into the Mtongwe Ferry Disaster".

On this the *Daily Nation* editorialized:" internal inquiries by closely involved authorities were clearly not good enough. Too many questions were raised, too much pain caused, too much fears prompted about transport safety for Kenyans to be fobbed off with the sort of minor probes announced soon after the disaster.

The editorial concluded:" Thus the nation will be gratified by the decision of President Moi yesterday to appoint a formal, independent...commission" It criticized the handling of the Ngai Ndeithya accident after which the announced commission of inquiry had to be cancelled on the grounds of costs. It noted with satisfaction that " whatever the financial cost, the authorities now seem to have agreed that we should not make that mistake again ("How can you put a price on human life anyway)" It criticized the handling of the Ngai Ndeithya accident after which the announced commission of inquiry had to be cancelled on the grounds of costs. It noted with satisfaction that "whatever the financial cost, the authorities now seem to have agreed that we should not make that mistake again ("How can you put a price on human life anyway)".